
European Societies, Migration, and the Law

Instead of an Introduction

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1.1 Introduction and Objective

The category of the Other is as primordial as consciousness itself. In the most primitive societies, in the most ancient mythologies, one finds the expression of a duality – that of the Self and the Other. This duality was not originally attached to the division of the sexes; it was not dependent upon any empirical facts. It is revealed in such works as that of Granet on Chinese thought and those of Dumézil on the East Indies and Rome. The feminine element was at first no more involved in such pairs as Varuna-Mitra, Uranus-Zeus, Sun-Moon, and Day-Night than it was in the contrasts between Good and Evil, lucky and unlucky auspices, right and left, God and Lucifer. Otherness is a fundamental category of human thought.¹

It seems that the urge to divide people into categories of ‘us’ and ‘them’ is a basic human instinct. In times of crisis, these divides become particularly visible, and notably affect minorities. Looking at the area of immigration, this book examines how law construes, amplifies, or orders social divides between immigrants and the receiving society. It also shows how law, if used wisely, can contribute to social cohesion. Underlying this is the fact that minorities at large and immigrants tend to be conceived of as ‘others’, which raises the question of the construction and effect of ‘otherness’ in law in our ‘Western’ and European societies.

Managing increasing diversity in effective ways whilst preserving legitimate interests of all members of society is a real challenge in the current (political) environment and not merely an academic or judicial question. This book will focus on immigration and asylum legislation, its

¹ S. de Beauvoir, *The Second Sex* (1949, translated version, H. M. Parshley, New York: Vintage Books, 1974).

implementation, and its application within the EU and its Member States. It will provide a panorama of differentiations made in legislation on EU and Member State level. Some groups of immigrants, such as immigrants from Islamic countries, are (still) considered ‘the other’ and measures are taken to prevent their immigration,² while different groups of immigrants, for example immigrants from western States or wealthy individuals, are not considered ‘other’ and are even invited to come.³ The common objective of all chapters is to decipher how the dichotomy of ‘us’ and the ‘other’ is reflected in legislation in various areas, situations, and for different groups of immigrants, at different stages of their migration trajectory in Europe.⁴

In this volume the underlying assumption is that regulation governing migration and the daily lives of immigrants within the EU and its Member States is to a significant degree not fit for purpose. It will not cater for the needs of today’s diverse societies and is not capable of functioning under the migration pressure Europe is facing. The legal and permanent presence of big groups of non-nationals is not catered for. It is simply not considered ‘normal’ that such elements are present within the receiving societies. The presence of immigrants is therefore still largely depicted as *abnormal*, which results in rules and regulations that reflect an inaccurate, ancient picture of society wherein the immigrant is often made the ‘other’. The underlying policies are often informed by an outdated dichotomy of the citizen and the foreigner wherein the citizen of a nation state *has* rights and the foreigner *gets* rights. Laws are stuck in the old reality as a matter of path dependence wherein the dominant group of home-state nationals/citizens had the

² R. Penninx, ‘Integration of Migrants: Economic, Social, Cultural and Political Dimensions’, in A. L. MacDonald (ed.), *The New Demographic Regime – Population Challenges and Policy Responses* (New York: United Nations, 2005), pp. 137–151; S. Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004); D. Kostakopoulou, *Citizenship, Identity, and Immigration in the European Union: Between Past and Future* (Manchester: Manchester University Press, 2001); D. Acosta Arcarazo and J. Martire, ‘Trapped in the Lobby: Europe’s Revolving Doors and the Other as Xenos’ (2014) 39(3) *European Law Review*, 378.

³ A. Farahat, ‘“We Want You! But . . .” Recruiting Migrants and Encouraging Transnational Migration Through Progressive Inclusion’ (2009) 15(6) *European Law Journal*, 700–718; C. Lucie, ‘Understanding the Diversity of EU Migration Policy in Practice: The Implementation of the Blue Card Initiative’ (2013) 34(2) *Policy Studies*, 180–200.

⁴ J. H. H. Weiler, ‘Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique’ (1992) 3(1) *European Journal of International Law*, 65–91.

monopoly to determine the realities of life for all foreign elements within society through national legislative procedures.⁵ Foreigners, i.e. non-citizens, are per definition the ‘legal other’. This mindset, in which the presence of foreign immigrants is still depicted as a troublesome disruption of normality, is leading to all sorts of misunderstandings in today’s European Union.⁶ This must change. The law must reflect and cater for reality better and to stop the ‘othering’, deliberately or not, of immigrants with all its problematic consequences.

1.2 Background and Context

As has been shown in the Preface, a brief glance at the newspapers and political discussions these days explains why ‘othering of migrants’ and the legal issues circling around it are such interesting things to study. Most Member States of the EU have turned from states of emigration to states of immigration. ‘Immigration pressure’ on European States is and will remain high.⁷ In other words, the European Union and its Member States will remain a place where individuals from poorer, politically less stable areas of the world will want to migrate to, at least as long as grave discrepancies in wealth and political and economic stability exist. Numbers may fluctuate from year to year; however, migration movements into Europe will inevitably continue. The effects of climate change will increase the likelihood of such movements.

Over the last decades the diversity of societies in all European States has increased tremendously.⁸ Some scholars speak of the emergence of super-diverse societies.⁹ The notion that European societies are

⁵ A. Favell, ‘Integrating Nations: The Nation State and Research on Immigrants in Western Europe’ (2003), in G. Brochmann (ed.), *Multicultural Challenge* (Comparative Social Research, Vol. 22) (Bingley: Emerald Group Publishing Limited, 2003), pp. 13–42; see also E. Guild, *The Legal Elements of European Identity - EU Citizenship and Migration* (The Hague: Kluwer Law International, 2003).

⁶ M. Jesse, “‘Disrupting and Annoying’ - EU Citizenship and EU Migration Law Destroying Old Habits of National Migration Policy Making”, in M. de Visser and A. P. van der Mei (eds.), *The Treaty on European Union 1993–2013: Reflections from Maastricht* (Antwerp: Intersentia, 2013), pp. 407–428.

⁷ See A. Szczepanikova and T. Van Crieking, *The Future of Migration in the European Union - Future Scenarios and Tools to Stimulate Forward-Looking Discussions*, EUR 29060 EN (Luxembourg: Publications Office of the European Union, 2018).

⁸ W. Kymlicka, ‘The Rise and Fall of Multiculturalism? New Debates on Inclusion and Accommodation in Diverse Societies’ (2010) 61 *International Social Science Journal*, 101.

⁹ S. Vertovec, *The Emergence of Super-Diversity in Britain*. Working Paper No. 25 (Oxford: Centre on Migration, Policy, and Society, Oxford University, 2006).

homogeneous and consist of one dominant (white) majority group is less and less an accurate reflection of reality.¹⁰ This is especially so in bigger cities such as Amsterdam, Brussels, or London, and triggers skepticism, fears, and at times outright hostility towards newcomers.¹¹ On the other hand, immigration is needed to balance out the negative effect of demographic changes in European societies. The economic benefits of immigration are well-researched and well-understood, and yet most societies of the Member States of the EU remain skeptical about immigration.¹²

Minorities and groups of immigrants residing permanently within formerly more homogeneous societies increasingly claim equal rights and respect: in short, recognition.¹³ They often do so against rather outspoken resistance of some members of the previously dominant group of nationals.¹⁴ These clashes lead to intense conflicts between emancipating immigrants, as well as their second- and third-generation descendants on the one hand, and members of society who claim to uphold national traditions and defend the latter against these 'attacks' on 'their' identity.¹⁵ The fierce argument unfolding in the Netherlands about 'zwarte Piet' [black Pete], the helper of Sinterklaas, is a good example for these kinds of conflict.¹⁶ Legitimate interests and calls for recognition made by minorities and immigrant groups are often questioned and pushed aside in such struggles for recognition.

Racism, and its accompanying discrimination and segregation, is still an issue in the 21st century in Europe. However, it is not clear what

¹⁰ This does not mean that 'white' people will no longer form the majority, however, this group in itself is far from homogeneous, see G. Lübke-Wolff, 'Homogenes Volk – Über Homogenitätspostulate und Integration' (2007) 27(4) *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 121–127; C. Offe, 'Homogeneity and Constitutional Democracy' (1998) 6(2) *The Journal of Political Philosophy*, 113–141.

¹¹ M. Crul, 'Super-Diversity vs. Assimilation: How Complex Diversity in Majority–Minority Cities Challenges the Assumptions of Assimilation' (2016) 42(1) *Journal of Ethnic and Migration Studies*, 54–68.

¹² See Z. Bauman, *Strangers at Our Door* (Cambridge: Polity Press, 2016).

¹³ Charles Taylor, 'The Politics of Recognition' (de politiek van erkenning), in A. Gutmann (ed.), *Multiculturalisme* (Amsterdam: Boom, 1994), pp. 25–73.

¹⁴ For example, P. J. Margry and H. Roodenburg, *Reframing Dutch Culture – Between Otherness and Authenticity* (Aldershot: Ashgate, 2007).

¹⁵ J. Habermas, *Die postnationale Konstellation* (Frankfurt am Main: Suhrkamp, 1998), p. 112; J. Cohen, 'Changing Paradigms of Citizenship and the Exclusiveness of the Demos' (1999) 14(3) *International Sociology*, 245–268.

¹⁶ The Guardian, 'Black Pete Exposes the Netherlands' Problem with Race', *The Guardian*, 5 December 2012, available at www.theguardian.com/world/2012/dec/05/black-pete-race-netherlands, last accessed 6 January 2014.

exactly the discrimination ground ‘race and ethnic origin’, which can be found in EU legislation, entails.¹⁷ In the EU there seems to be a grave hesitation to call a ground for discrimination ‘race’ because of Europe’s particular history. Hence race has become a term covering in practice ethnic origin, but also cultural and religious discrimination.¹⁸ Also ‘nationality’ seems to be covered, in the specific situation that it is used as proxy for racial differentiations.¹⁹ At the same time, discrimination on the basis of race and ethnic origin is often ‘buried under layers of citizenship, residence, or religion’ as official grounds of differentiation in order to render it justifiable.²⁰ This often leaves administrators, legislators, and victims of potential discrimination in limbo. On the one hand, their differential treatment is looking like (indirect) racial discrimination, while, on the other hand, it might be seen as a perfectly legal differentiation on the grounds of nationality or legal immigration status.²¹ What is clear, however, is that there is discrimination and that immigrants are the victim of it. This has the effect of ‘othering’ these groups further from the mainstream of society. Discrimination always points to social hierarchies in society and destroys opportunity structures, created by law, for immigrants. It further leads to re-ethnicisation, denial of recognition, and is a threat to self-esteem of whole portions of society who are shown that their worth is not appreciated.²²

Such conflicts circling around the treatment of immigrants keep emerging despite efforts to accommodate immigrants. One should not overlook the developments and legislative changes made over the last

¹⁷ See Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 No. L180/22.

¹⁸ Anti-semitism covered under RED for example, not only in FED; M. Möschel, *Law, Lawyers and Race – Critical Race Theory from the United States to Europe* (New York: Routledge, 2014), p. 92.

¹⁹ Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* ECLI:EU:C:2008:397; or Case C-83/14, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia* ECLI:EU:C:2015:480, both interpreting Directive 2000/43.

²⁰ Möschel, *Law, Lawyers and Race*, p. 187.

²¹ M. Jesse, ‘Missing in Action: Effective Protection for Third-Country Nationals from Discrimination under Community law’, in E. Guild, S. Carrera and K. Groenendijk (eds.), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU Discrimination under Community Law* (Farnham: Ashgate, 2009), pp. 187–205.

²² F. Heckmann, *Integration von Migranten – Einwanderung und neue Nationenbildung* (Wiesbaden: Springer, 2015), p. 235.

decades. Efforts to accommodate, integrate, and normalise the presence and permanent residence of immigrants have been made by almost all European societies. This should be acknowledged. For example, permanent residence permits and access to nationality through naturalisation are universally available as a matter of conditional right in the EU.²³ Equality of treatment with the host population once immigrants have obtained any legal migration status is the norm.²⁴ Additionally, policies protecting individuals from discrimination based on a variety of grounds, such as race, ethnic origin, religion, or nationality have been installed.²⁵ At the same time and increasingly so, however, western societies witness rising nationalist populism which seeks to turn back these developments.²⁶ Right wing populist groups are today part of several governments in the EU and some of them openly pursue the objective to erect ‘illiberal democracies’.²⁷ Policies, intended to limit immigration and diversity, are propagated as an effort to protect national identity and welfare.²⁸ Mostly, immigrants and asylum seekers from Islamic countries are targeted. Eventually, tighter regulation is making the acquisition of secure residence statuses and rights equal to those of nationals more difficult again.²⁹ Mandatory integration trajectories flourish and are (ab-)used

²³ R. Bauböck, *Citizenship Policies in the New Europe* (Amsterdam: Amsterdam University Press, 2009), see also Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 No. L16/44, 23 January 2004.

²⁴ M. Jesse, *The Civic Citizens of Europe: The Legal Potential for Immigrant Integration in the EU, Belgium, and the United Kingdom* (Leiden: Brill, 2017).

²⁵ D. Schiek, and L. Waddington, *Cases, Materials and Text on National, Supranational and International Non-discrimination Law* (Oxford: Hart Publishing, 2007).

²⁶ G. Lucassen and M. Lubbers, ‘Who Fears What? Explaining Far-Right-Wing Preference in Europe by Distinguishing Perceived Cultural and Economic Ethnic Threats’ (2012) 45 (5) *Comparative Political Studies*, 547–574; F. Yilmaz, ‘Right-Wing Hegemony and Immigration: How the Populist Far-Right Achieved Hegemony through the Immigration Debate in Europe’ (2012) 60(3) *Current Sociology*, 368–381.

²⁷ See the analysis of the Czech situation in Section 3.2 as an example.

²⁸ W. Kymlicka, ‘The Rise and Fall of Multiculturalism? New Debates on Inclusion and Accommodation in Diverse Societies’ (2010) 61(199) *International Social Science Journal*, 102; M. Bommers, ‘Die Planung der Migration’ (2009) 38(11) *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 376–381.

²⁹ D. Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship: An Analysis of Directive 2003/109* (Leiden: Martinus Nijhoff Publishers, 2011).

to limit immigration, particularly family migration³⁰ Moreover, the prevention of immigration through the erection of insurmountable outer borders at sea, as well on land, seems to be the prime objective of the EU today.³¹

This friction between accommodating and limiting immigration and diversity has turned immigration and integration into a minefield for politicians in Europe and beyond. Governments, which appear to be stable, suddenly find themselves in trouble as fights about how to treat asylum seekers and how to accommodate or prevent new-arrivals erupt.³² The results are political piecemeal approaches addressing only symptoms, and short-sighted legislative changes driven by public sentiments and prejudice, without significant practical effect beyond the stigmatisation they cause.³³ Interestingly, the left and the right of the political spectrum appear to agree on this assessment of the measures taken, albeit for different reasons.³⁴ Meanwhile the challenges posed by segregation and ghettoisation of immigrant communities, or complaints about the existence of parallel societies, are real. The management of increasing diversity in a formerly (allegedly) homogeneous society will be one of the fundamental challenges for European societies in the future. Diversity will increase. Identifying legislative processes, legislation, and administrative or judicial interpretations which have led to practices which, deliberately or not, drive immigrants and receiving society further apart, while offering some indications how such processes of ‘othering’ can be overcome in the above-mentioned context, is the main objective of this book.

³⁰ Y. Pascouau and T. Strik, *Which Integration Policies for Migrants? Interaction between the EU and Its Member States* (Nijmegen: Wolf Legal Publishers, 2012); M. Jesse, ‘Inburgering in het buitenland: Vraagtekens bij rechtmatigheid vanuit Europees perspectief’, (2012) 4(4) *Asiel & Migrantenrecht*, 202–206; K. Groenendijk, ‘Pre-departure Integration Strategies in the European Union: Integration or Immigration Policy?’ (2011) 13(1) *European Journal of Migration and Law*, 1–30; S. Wallace Goodman, ‘Controlling Immigrants through Language and Country Knowledge Requirements’ (2011) 34(2) *West European Politics*, 235; R. van Oers, E. Erbsoll, and D. Kostakopoulou, *A Redefinition of Belonging? Language and Integration Tests in Europe* (Leiden: Martinus Nijhoff, 2010); M. Kau, ‘Sanktionsmöglichkeiten zur Durchsetzung von Integrationsanforderungen’ (2007) 27(5–6) *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 186; K. Groenendijk, ‘Legal Concepts of Integration in EU Migration Law’ (2004) 6(2) *European Journal of Migration and Law*, 111–126.

³¹ See V. Moreno-Lax, *Accessing Asylum in Europe – Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford: Oxford University Press, 2017).

³² As happened in Germany in June/July 2018.

³³ C. Murphy, *Immigration, Integration and the Law – The Intersection of Domestic, EU and International Legal Regimes* (London: Routledge, 2013), p. 291ff.

³⁴ Kymlicka, ‘The Rise and Fall of Multiculturalism?’, 97–98.

1.3 Structure

The book is divided into five thematic parts. Part I, consisting of Chapters 2–5, will focus on how ‘otherness’ is constructed from the perspective of the law. The objective of this part is to show how ‘otherness’ flows from immigration and asylum legislation that is, on first sight, neutral. Questions answered are how societies are construed, what the nation state’s role is in structuring and defining societies, and who, legally spoken, is ‘the other’ in a nation state. Part I will also try to shed some light on processes of the devaluation and dehumanisation of immigrants as (legal) ‘others’.

Part II, comprising Chapters 6–10, will explain how the dichotomy of citizen versus foreigner, which marks the latter as the automatic legal ‘other’ to the citizen in nation states, functions in practice in the European Union. It addresses the question of, *inter alia*, whether all foreigners (non-nationals) or only those foreigners without legal status are considered ‘other’. Above all, questions like which immigrants are considered ‘the other’ and which groups of immigrants are considered part of ‘us’, and how is this visible in the law, will be answered. Specifically, the part will answer questions about what rights, residence permits, and procedures are available for which groups of immigrants and their families, and in how far they are equal to the rights of nationals.

Part III, which includes Chapters 11–13, then introduces the legal situation after the so-called refugee (policy) crisis of 2015. Refugees and asylum seekers are different from other immigrants. Their legal situation is defined not only by laws of nation states or the EU, but also by norms of international law. It is interesting how states react to the inflow of asylum seekers with their discretion vastly limited, while, at the same time, asylum seekers and refugees are considered ‘the other’, maybe even more than any other group of migrants in public discourse. Part III will seek to display what the underlying causes, public discussions and narratives for awarding certain groups of asylum seekers a status rather quickly while others are denied such opportunity. In other words, what are the mechanisms with which the law amplifies or fights the ‘othering’ of migrants in the context of asylum.

Part IV, made of Chapters 14–16, addresses the ‘othering’ of immigrants and EU citizens exercising their free movement rights in the EU. Of course, no such analysis would be complete without considering Brexit. In three chapters, this part of the book looks at how EU law itself leads to the ‘othering’ of Citizens of the Union, a group which has

traditionally a strong claim to equal treatment deriving from EU law itself. The differentiation of EU nationals, as will be shown, is based on economic activity and wealth.

All parts and the chapters therein focus on how law ‘others’ immigrants, or how differentiations within migration law creates different legal realities for different groups of immigrants. There will be interesting parallels and overlaps in the mechanisms of ‘othering’. These will be picked up in the concluding chapters contained in Part V (Chapters 17 and 18) of the book.

1.3.1 Part I: Making the ‘Other’ – The Construction of ‘Otherness’

In four chapters, Part I will try to decipher the meaning of ‘othering’ and ‘the other’ in the context of immigration and law. In Chapter 2, Moritz Jesse will unpack the phenomenon of ‘othering’ as such, and through the law in a nation state, wherein foreigners are automatically the legal ‘other’. Jesse will then focus on the disruption of the nation state paradigm by EU integration, in particular EU free movement rights and EU migration law, which has profound consequences on how legal ‘othering’ works in the EU. This analysis will serve as groundwork for the parts and chapters that follow.

In Chapter 3, Helena Hofmannová and Karel Řepa will explain how the rise of anti-liberal politics in Europe triggered changes to human rights discourse and views on human dignity. This has pushed the development of a new and anti-liberal delimitation between ‘us’ and ‘them’ in European democracies, wherein immigrants are construed as an illiberal threat who need to be guarded against, rather than granted rights. Hofmannová and Řepa will show how shifting political ideologies can lead to the quick de-liberalisation of constitutional principles.

In Chapter 4, Maartje van der Woude will turn to legal practices at the border and look at the link between ‘bordering’ and ‘othering’. The border is *the* place where differential treatment of nationals and foreigners is most tangible. Van der Woude will conclude that in the EU’s borderless ‘Schengen Area’ the objective to keep the ‘crimmigrant other’ out leads to a situation wherein borders and border-controls are now no longer confined to the outer EU border but happen virtually everywhere. This also means that the tangible differentiation between insiders and outsiders, which usually occurs at the border, can now occur everywhere in the EU.

In Chapter 5, Natalie Welfens and Asya Pisarevskaya look what happens when nation states can select refugees before they present themselves at the border. They will provide a panorama and analysis of selection criteria for humanitarian admission and resettlement in Europe to show which categories of refugees are considered eligible for resettlement and who is considered unfit for such programmes. Welfens and Pisarevskaya will show that all 21 programmes for refugee resettlement in 14 EU Member States analysed in their work officially prioritise vulnerable cases as the main criterion of selection. In practice, however, the selection of refugees for resettlement depends on welfare, security, and cultural concerns of the State along with of humanitarian grounds.

With these four chapters, Part I shows how ‘otherness’ is construed and how it is finding its way in the application of seemingly neutral regulation. The theme connecting all chapters is that States create a narrative of protection from foreign risks in the form of immigrants and draft laws that are meant to curtail this risk. The foreigner is made a ‘risk’ ‘other’ rather than a future member of society.

1.3.2 *Part II: The Operation of Legal ‘Othering’ and the National–Foreigner Dichotomy in the EU*

In Part II, five authors will deal with the operation of ‘othering’ in daily legal and administrative practice. Clíodhna Murphy, in Chapter 6, shows how an equality-based approach led to increasing rights for foreigners under national constitutional law. Traditionally constitutions can be seen as defining some sort of formal and legalistic national identity. Looking at the example of Ireland, she shows that this will not do away with the classic differentiation of foreigners and citizens, however, that immigrants are ‘less’ ‘other’ now under national law than they were before *within* the legal system created by sovereign nation states. The example of Ireland is particularly interesting in this regard as the constitution was conceived of as a relatively nationalistic and catholic constitution, of which the interpretation changed against the background of a changing society that had become more diverse, which led to some form of cosmopolitan constitutionalism.

In Chapter 7, Narin Idriz turns to EU legislation and how it creates hierarchies of privilege and ‘otherness’. She explains how some groups of foreigners are closer to equal treatment than others, and how this influences their standing in the receiving society. Some groups, such as those who are economically strong, have clear advantages, while others, such as