

## EUROPEAN SOCIETIES, MIGRATION, AND THE LAW

Not a day passes without political discussion of immigration. Reception of immigrants, their treatment, strategies seeing to their inclusion, management of migration flows, limitation of their numbers, the selection of immigrants; all are ongoing dialogues. *European Societies, Migration, and the Law* shows that immigrants, regardless of their individual status, their different backgrounds, or their different histories and motivations to move across borders, are often seen as ‘the other’ to the imaginary society of nationals making up the receiving (nation-)states. This book provides insights into this issue of ‘othering’ in the field of immigration and asylum law and policy in Europe. It provides an introduction to the mechanisms of ‘othering’ and reveals strategies and philosophies which lead to the ‘othering’ of immigrants. It exposes the tools applied in the implementation and application of legislation that separate, deliberately or not, immigrants from the receiving society.

MORITZ JESSE is Associate Professor of European Union Law at Leiden Law School, the Netherlands. His teaching and research focuses on the EU’s internal market, the free movement of persons, European Citizenship, as well as EU migration law. His recent publications include *The Civic Citizens of Europe* (2016).

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EUROPEAN SOCIETIES,  
MIGRATION, AND THE LAW

The 'Others' amongst 'Us'

Edited by  
MORITZ JESSE  
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To Caspar, Róisín, and Timna,  
born while this book was written.

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## PREFACE

**The Summer of 2018, the Summer of ‘Othering’**

The summer of 2018 was a great moment to reflect on what ‘othering’ is, how it functions and which groups are affected by it. It was three years after the peak of the so-called refugee (policy) crisis in Europe, which unfolded late in the summer of 2015; the discussions about how refugees from the middle-east and Africa should be treated had not faded away, but seemed to reach yet another climax. The aftermath of the crisis almost led to the fall of the German government, which was divided over the question of whether asylum seekers could be pushed-back at the German Austrian border in cases of secondary movement, and how and how far border controls should ensure such push-backs. Additionally, a new Italian government, which by the time this book was in its final production had fallen, started to aggressively demand far-reaching reforms of the European asylum system. To show strength, the government, represented by the new minister of the interior, Matteo Salvini, from the right-wing party Lega Nord, prohibited ships which had rescued refugees during their (failed) passage over the Mediterranean from entering Italian ports. These escalations in the year 2018 were remarkable. The numbers of refugees who were reaching European shores were decreasing and were nowhere near the amounts seen in 2015 and before. The policies put in place were effective in so far as they achieved a drastic lowering of the numbers of arrivals,<sup>1</sup> albeit, some argued, at the expense of the protection of human rights.<sup>2</sup> In short, when looking at the facts on the ground, things seem to have calmed down and an immediate threat

<sup>1</sup> See D. Thym, *Der Rechtsbruch-Mythos und wie man ihn widerlegt* (Verfassungsblog, 2 May 2018), <https://verfassungsblog.de/der-rechtsbruch-mythos-und-wie-man-ihn-widerlegt/>, last accessed 21 July 2018.

<sup>2</sup> See, for example, V. Moreno-Lax, ‘The EU Humanitarian Border and the Securitization of Human Rights: The “Rescue-through-Interdiction/Rescue-without-Protection” Paradigm’ (2018) 56(1) *Journal of Common Market Studies*, 119–140.

of a repetition of the scenes which occurred in the summer of 2015 was unlikely. Yet, heated political discussions would not stop.

At the same time, the football world-cup organised by FIFA took place in Russia. Headlines in newspapers unsurprisingly often read ‘we won’ or ‘we lost’, referring to the national team of the country where that newspaper was published.<sup>3</sup> The players on the football pitch represented ‘their’ state or nation and those feeling a bond with that national team expressed their belonging by referring to the team as ‘we’. On a more abstract level, one could witness for example a German ‘we’ or, for much longer in this world cup, an English, French, Belgian or Croatian ‘we’ in which all supporters of the respective team found their place. This, of course, is normal during all sport events involving national teams and not in itself remarkable.<sup>4</sup> However, during the weeks of the world cup an interesting mingling of issues occurred. Headlines in proximity to those referring to successes or failures of ‘our’ national teams pointed to the arrival of ‘them’, as well as the problems and risks ‘they’ would pose, usually referring to migrants and asylum seekers. During the collective celebrations of national togetherness during the football world cup, the differentiation between ‘us’, the members of the nation, and ‘them’, the aliens, the new-arrivals, the immigrants and asylum seekers from outside of the nation, was very tangible for those who wanted to see it.

The contention in discussions was that ‘they’ would come to live ‘amongst us’. This was depicted as a grave disruption of normality. Normality needed to be restored, immigration needed to be curbed. These sentiments are not new. In fact, emigration, immigration and integration of those settling into a new environment seldom occurs without at least some friction with the residing population. Yet, observers claim to witness a hardening of stances in Europe and the whole western world over recent years. Opinions that receiving nations must protect themselves from too much immigration and that nations have a right to do so in order to preserve their culture and liberal characteristics have moved from the right spectra of the political debate and into the mainstream.<sup>5</sup> Political discussions about immigration are now a daily

<sup>3</sup> B. Anderson calls the sports pages and editorials a ‘world of homelands’ in which ‘the national “us” is placed’, B. Anderson, *Us & Them – The Dangerous Politics of Immigration Control* (Oxford: Oxford University Press, 2013), p. 178.

<sup>4</sup> Ibid.

<sup>5</sup> D. Miller, *Strangers in Our Midst – the Political Philosophy of Immigration* (Cambridge, MA: Harvard University Press, 2016).

occurrence and have become more divisive. As a direct result, political compromises are almost impossible to reach. Immigrants are separated from the receiving societies and pictured as disruptive elements. As Catherine Dauvergne mentioned in her book about the end of settler societies, ‘a new worldwide “us” and “them” divide, existential fear, and an unprecedented place on the central political stage of all Western liberal democracies’ led to new politics of migration with levels of hostility towards migrants and ‘a strident objection to asylum’ at levels ‘higher than ever before’.<sup>6</sup>

The lines between members of a nation and those considered ‘other’ are blurred. Again, the football world cup provided some stark illustrations of this point. For example, members of the Swiss national team of Kosovan origin celebrated their goals by depicting the Albanian national symbol, the Double-Headed Eagle, with their hands. They did so in a game against Serbia, provoked by racist chants from the stands of the stadium in front of Serbian spectators. Immediately, discussions about whether this behaviour was appropriate for players of the Swiss national team and whether they should be allowed to make an Albanian gesture while representing Switzerland erupted.<sup>7</sup> Almost identical discussions involving players with foreign backgrounds took place in Germany. A couple of German players of Turkish origin posed on a picture with the president of the Turkish Republic Erdogan. The picture was taken during a meeting with all players of Turkish origin playing in the English Premier League during a visit of Erdogan to the United Kingdom. The players claimed it was taken as a matter of courtesy and without any political message.<sup>8</sup> The president of Turkey claims to be a big football fan. Yet, discussions immediately arose about whether players representing Germany should be allowed to pose with such a divisive foreign leader. During a friendly game of the national team, said players were booed by the German audience even though some of them were amongst the players who secured Germany’s victory at the 2014 FIFA world cup. Even after the world-cup and the early elimination of the German team, the focus remained on these few players and discussions circled around the

<sup>6</sup> C. Dauvergne, *The New Politics of Immigration and the End of Settler Societies* (Cambridge: Cambridge University Press, 2016), pp. 8, 129.

<sup>7</sup> *Nota bene*, even though these players scored decisive goals for Switzerland.

<sup>8</sup> Even though one of the players involved, Mesut Özil, who was in the centre of the ‘affair’ and resigned from the national team, later chose Erdogan as his best man when he married.

question of whether *their* behaviour had contributed to the early elimination of the national team. The impression arose that ‘foreign’ elements in the national team would be made a scapegoat and remarks by officials from the Germany Football Association and those in charge of the national team further put fuel on this fire. This was criticised heavily. Yet, an invisible line was drawn within *the* institution representing a nation, i.e. the national football team, and players of the team who had a foreign background and did not hide it were ‘othered’.

Yet another example of ‘othering’ in the summer of 2018 came from a country that was not involved in the FIFA world cup at all. In addition to closing Italy’s shores for asylum seekers, the Minister of Interior of Italy, Salvini, also announced action to ‘deal’ with the Roma people residing in Italy. He floated the idea of conducting a census of all Roma living in Italy to register them. Primarily, this should be done to expel all Roma with foreign nationality staying illegally in Italy. This was not surprising in itself. Anti-Roma sentiment is a tradition amongst many right-wing politicians in Europe. However, Salvini added that those Roma in possession of Italian citizenship would ‘unfortunately’ have to be kept in Italy.<sup>9</sup> Apparently, in the eyes of (part of) the Italian government in charge in the summer of 2018, there are Italian citizens whose existence and rights to stay in Italy is ‘unfortunate’. Naturally, the words and plans of Minister Salvini were criticised heavily.

These three examples depict forms of ‘othering’. Perceived differences in lifestyle, culture, skin colour, religion, sex or gender, sexual preference, wealth and even food<sup>10</sup> play a role in the process to identify individuals or whole groups of people as different. In the same vein, literature has defined ‘othering’ as the ‘devaluation of certain individuals, communities, and even nations, while privileging those who are members of the dominant group, class, or country’.<sup>11</sup>

The summer of 2018 is long gone. The world-cup has been won by France and Matteo Salvini manoeuvred his party out of government. However, until today no day passes without political discussions of immigration, integration, reception of immigrants, their treatment,

<sup>9</sup> See, *The Guardian*, ‘Far-right Italy Minister Vows “Action” to Expel Thousands of Roma’, *The Guardian*, 19 June 2018, available at [www.theguardian.com/world/2018/jun/19/italy-coalition-rift-roma-register-matteo-salvini](http://www.theguardian.com/world/2018/jun/19/italy-coalition-rift-roma-register-matteo-salvini), last accessed 9 December 2019.

<sup>10</sup> See D. M. Feidenreich, *Foreigners and their Food: Constructing Otherness in Jewish, Christian, and Islamic Law* (Berkeley: University of California Press, 2011).

<sup>11</sup> J. Todres, ‘Law, Otherness, and Human Rights’ (2009) 49(3) *Santa Clara Law Review*, 609.

strategies seeing to their inclusion into the host societies, management of migration flows, limiting of numbers or the selection of immigrants and the like. As will be shown in this book, immigrants, regardless of their individual status, the different backgrounds they come from or their different histories and motivations to move across borders, are often seen as ‘the other’ to the imaginary society of nationals making up the receiving (nation-) state. Deliberately or not, immigrants become ‘the other’. This book will provide insights into the issue of ‘othering’ in the field of immigration and law in Europe. It will provide an introduction to the mechanisms of ‘othering’ and reveal strategies and philosophies leading to the ‘othering’ of immigrants. It will expose the tools applied in the implementation and application of legislation which separate, deliberately or not, immigrants from the receiving society.

The book will address questions such as who is the ‘other’?, who are ‘we’?, and what it means that ‘we’ express ‘otherness’ the way ‘we’ do in the context of the current political landscape and heated discussions about immigration. In doing so, the book will look at political and legal action and discussions and seek to contribute to these discussions. It will also suggest a set of ideas and principles on how to minimise the negative effects of ‘othering’. The analysis will cover policies to regulate immigration in the most pertinent areas, such as border controls, economic migration, EU citizenship and, naturally, the treatment of refugees and asylum seekers.

In short, this book is a scholarly contribution to the discussion circling around immigration, asylum, politics and the treatment of immigrants. It contains ideas, approaches, and developments on the topic ‘European Societies, “Otherness”, and the Law’ in times of increasing nationalism, xenophobia, and skepticism to international cooperation.

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## ABBREVIATIONS

AA	Ankara Agreement (EEC–Turkey Association Agreement)
AFMP	Agreement on Free Movement of Persons between the EU and Switzerland
AG	Advocate General
AMIF	Asylum, Migration, and Integration Fund (EU)
AP	Additional Protocol to the Ankara Agreement
CAS	Emergency Reception Centres for asylum seekers (Italy)
CEAS	Common European Asylum System
CEE	Central and Eastern Europe
CFR	Charter of Fundamental Rights, EU
CJEU	Court of Justice for the European Union
CRvB	Centrale Raad van Beroep (highest Dutch court on social security matters)
DNPC	Dutch National Point of Contact
EC	European Communities
EEA	European Economic Area
EEC	European Economic Community
EUCFR	Charter of Fundamental Rights, EU
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union [European Court of Justice]
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EFTA	European Free Trade Area
EMN	European Migration Network
EU	European Union
EU27	European Union of 27 (after Brexit)
EU28	European Union of 28 (before Brexit)
FIFA	Fédération Internationale de Football Association [International Federation of Association Football]
FRD	Family Reunification Directive (Directive 2003/86/EC)
GC	Grand Chamber of the European Court of Human Rights
GDP	Gross Domestic Product

HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	Intra-Corporate Transferee
ILO	International Labour Organisation
IND	Immigratie en Naturalisatiedienst [Netherlands Immigration and Naturalisation Service]
IOM	International Organisation of Migration
LA	Local Authorities
LGBTQI	Lesbian, gay, bisexual, trans, queer, intersex
LTR-Directive	Long-Term Residents Directive (Directive 2003/109/EC)
MVV	Machtiging voorlopig verblijf [Netherlands Authorisation of Temporary Stay/Entry Visa]
NGO	Non-Governmental Organisation
OHCHR	Office of the United Nations High Commissioner for Human Rights
OJ	Official Journal
ORRM	Obligatory Relocation and Resettlement Mechanism of asylum seekers
QNI	Quality of Nationality Index
RIES	Refugee Integration and Employment Service (UK)
SBC	Schengen Border Code
SGTD	Second Generation Turkish Immigrants in the Netherlands
SIS	Schengen Information System (Regulation (EU) 2018/1861)
SPD	Svoboda a přímá demokracie Party [Freedom and Direct Democracy Party, Czech Republic]
SPRAR	Protection System for Asylum Seekers and Refugees
TCN	Third-Country National
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSO	Third Sector Organisations
UNHCR	United National High Commissioner for Refugees
Vb 2000	Vreemdelingenbesluit 2000 [Netherlands Aliens Decree 2000]
VPRS	Syrian Vulnerable Persons Resettlement Scheme (UK)
Vv 2000	Vreemdelingenverordeningen 2000 [Netherlands Aliens Regulations 2000]
VVR	Verblijfsvergunning [Netherlands Regular Residence Permit]
Vw 2000	Vreemdelingenwet 2000 [Netherlands Aliens Act 2000]