

'Transnational civil dis/obedience' in the Danish family unification dispute

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This article develops a concept of transnational civil dis/obedience. It provides a framework for interpreting and evaluating practices of cross-border movement by citizens and migrants, who mobilize international or supranational law to sidestep and challenge domestic rules deemed illegitimate. Such acts are made possible by, but also enact, complex, overlapping and competing legal orders in Europe and elsewhere. In contrast to analyses stressing the private and market-based nature of these actions, the conceptual lens introduced here draws out their potentially civic and political character. To construct and illustrate my argument, I engage with an in-depth case study of EU citizenship and cross-border movement in the area of marriage migration, where individual liberty and political membership are fiercely contested. The paper draws on narrative interviews with Danish-international couples who in response to Denmark's restrictive family unification rules have used EU-law to protest against what they see as unjust interference in their private lives.

Keywords: citizenship; EU; migration; civil disobedience; family unification

Introduction

This article introduces and defends a concept of transnational civil dis/obedience. It offers an interpretive frame for capturing and assessing practices of cross-border movement undertaken by citizens and migrants who mobilize international or supranational law to evade and contest national rules considered unjust. The presence of complex and sometimes conflicting juridico-political orders enables persons to sidestep, or openly challenge, the legality and legitimacy of one set of rules by appealing to regulation by another regime (Kostakopoulou, 2007: 645). This is especially, but by no means exclusively, the case within the European Union. To develop and illustrate my argument I use an in-depth analysis of a case of EU citizenship and cross-border movement in the area of marriage migration dominated by intense political dispute over personal freedom and political membership.

Family unification has long been a major migration channel to Europe. In recent years, access has been tightened in several countries including Denmark, the Netherlands, Austria, the United Kingdom, Norway, and Germany (Rytter, 2010b: 301–302; Huddleston *et al.*, 2011: 14–15; Ruffer, 2011: 937; Staver, 2012). For many citizens it has thus become difficult to settle in their home state with partners

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from outside Europe. Therefore, some are activating their EU citizenship. The European Union promotes free movement across internal borders. Citizens who live for a while in another member state obtain a number of rights including the freedom to bring their close relatives. EU law also allows couples to return again to their own country regardless of more restrictive national legislation (Directive 2004/38, 2004; Staver, 2013). I focus on Denmark, a front-runner in tightening family unification rules. In response to restrictive legislation ‘an estimated 2000–3000 Danes have moved to Sweden ... to obtain family unification.’ (Rytter, 2010a: 126)¹ Similar border-crossing is found between for example Belgium and the Netherlands and the United Kingdom and Ireland (Bonjour and de Hart, 2013: 66; Staver, 2013).

For more than a decade Denmark has had one of the strictest regulations of marriage migration in Europe. In particular, a 24-year-rule means that both spouses must be at least 24 years old to obtain family unification. No other EU country has such a high age requirement, reflecting the Danish opt-out from cooperation in the area of justice and home affairs.² Still, Denmark must respect the free movement of persons, which is a fundamental principle in the Union. This means accepting, however reluctantly,³ the rights of mobile citizens and their families (Manners *et al.*, 2008: 297–300). For a study exploring complex legal orders and the opportunities for opposition, these give rise to the Danish family unification dispute thus merits attention. Even where the conditions for exercising national sovereignty would seem favourable, supranational integration sets boundaries. The fact that we find widespread and ingenious resistance strategies, enabled by EU’s multilevel governance, in this unlikely case shows how profoundly Europe’s juridico-political space is being transformed. Consequently, the meaning of citizenship within and across borders is changing and needs to be reappraised.

The paper draws on 30 narrative and semi-structured interviews with Danish citizens and/or their foreign spouses, most of whom have used the EU-route. I focus on one ‘exemplary’ (Ferrara, 2008) story that is particularly well suited to bring out the central tenets of what I term transnational civil dis/obedience. My informant Martha’s principled and politicized account of cross-border movement challenges state-centric, republican accounts. These perspectives tend to view international migration and EU mobility with scepticism as a threat to the participation and shared cultural or political identification of citizens (Schuck, 1989; Jacobson, 1996; Bellamy, 2008, 2009). EU-citizenship is presented as market-based, instrumental and overly individualistic, while free movement is seen as an undesirable invitation to ‘forum shopping’. Against such views I argue that the strategies of Martha and other interviewees have a striking ‘family resemblance’ (Wittgenstein, 1953) with

¹ Note that this estimate is a few years old. In 2010–2011 a new restrictive reform was introduced, which again intensified movement to Sweden.

² Denmark is not bound by the Family Unification Directive, which sets an upper limit of 21 years for resident immigrants and their families (Manners *et al.*, 2008: 297).

³ On the reluctance of the Danish immigration authorities, see footnote 18.

forms of civil disobedience or conscientious objection (Rawls, 1971: 363–393; Arendt, 1972; Cabrera, 2010: 131–153). Yet these couples do not so much break the law as avail themselves of alternative regulations and are thus not 'disobedient' as usually understood. I therefore conceptualize their actions as dis/obedient. I argue that in the context of complex legal pluralism it is possible for public actions to be at the same time dutiful and transgressive, legal and non-compliant. While such 'schizophrenic' practices certainly go against conventional understandings of citizenship and political community, they also offer new ways of contesting, avoiding and perhaps transforming state power when basic freedoms are at stake.

Transnational citizenship – from shopping to dis/obedience

Since the end of the Second World War we have witnessed a gradual development and expansion of transnational law and institutions. Nowhere is this more pronounced than in the EU where national, international and supranational legal norms coexist in a complex relation of supplementation and competition (Walker, 2008). This has opened up a range of strategies for citizens, social movements and commercial agents. Kostakopoulou (2007: 645), for example, points out that:

...individuals, in both their personal and corporate identities, can shift subject positions and activate their link with a normative system (i.e. the human rights regime or the EU) when their link with another normative system either is blocked or fails to yield a desirable outcome. Individuals are thus no longer locked within a single, unified and finite network commanding unqualified allegiance.

Kostakopoulou's argument implies that we should, on balance, welcome the '*disorder of normative orders*' (Walker, 2008: 376, original emphasis), which constitutes the legal terrain of contemporary Europe. The ability to move – physically, legally and symbolically – between different and overlapping political communities helps guard against overwhelming state power. But this is not merely a negative freedom of leaving each alone. By appealing to human rights or mobilizing EU citizenship, we often also engage in processes that transform the nation-state and push for greater inclusion and 'porous borders' (Soysal, 1994; cf. Benhabib, 2004; Kostakopoulou, 2007: 642–646).

This is an interesting contention but one that needs careful examination. A proper appreciation and assessment of the transnational juridico-political field and the practices it gives rise to calls for further conceptual development and critical analysis. What constitutes a 'desirable outcome'? To whom is it desirable – individual citizens, companies, democratic majorities – and how to weigh their respective concerns? The lack of 'a single unified network commanding unqualified allegiance', which is here presented as emancipatory, is precisely what worries state-centric republicans or national-communitarian critics. When citizens move between different legal and normative regimes what happens to political solidarity? (Bellamy, 2008, 2009). Owing to such concerns, EU citizenship has from its early days been the

object of considerable criticism. Indeed, to many it is a ‘misnomer’ (Armstrong, 1996: 586; Besson and Utzinger, 2007: 575). For critics, the emphasis on free movement reflects a market-based citizenship, which treats individual members not as political subjects with rights and responsibilities, but as workers, employers and consumers pursuing their private interests. Free movement, it is feared, will encourage citizens to shop around between different states to get the best deal for themselves. ‘Jumping the waiting list’ in health care, for example, by moving to another country shows a lack of solidarity and could lead to a negative spiral undermining European welfare states (Bellamy, 2008, 2009: 20; Scharpf, 2009). In legal studies, the phenomenon described by Kostakopoulou is thus often referred to as ‘forum shopping’. Individuals opt in and out of different juridical systems and litigation forums according to what best serves their private concerns (Juenger, 1988–89; Clermont and Eisenberg, 1994–95).

To understand this critique and how to address it let us therefore look closer at the concept of forum shopping. It is often used as a derogatory term. This does not mean that scholars are uniformly critical of the phenomenon. Juenger (1988–89: 570–571), for example, points out how such inventive strategies may serve a range of different, more or less admirable causes. Some scholars advocate certain forms of forum shopping as a way to advance international human rights (Helfer, 1999). Still, the term is generally pejorative and acknowledged to be so (Juenger, 1988–89: 553). Forum shopping portrays individuals as consumers of law rather than subjects and authors of law. It presents us with an image of privatized agents in the marketplace instead of members of a political community. Implicitly or explicitly individuals are assumed to act instrumentally to promote their own interest at the expense of justice (see, e.g. Clermont and Eisenberg, 1994–95).

This presupposition is no doubt often justified, yet as a general assumption it is problematic. If the concept of forum shopping is employed broadly as a metaphor describing the movement of persons between different legal and political systems, then a range of other considerations enter the picture. In Israel, for example, marriage falls under the jurisdiction of the religious authorities. Many citizens who wish to get a civil marriage therefore go to Cyprus where they can get a secular process at the registrar’s office. But though they are evading their own state’s regulation it is not evident that they do so for narrowly self-interested reasons. Nor does it make much sense to suggest that the couples simply prefer the goods on sale in another marriage market. That would fail to capture any possible ethico-political significance of their action. Yet it is quite plausible that some spouses are engaged in principled action akin to conscientious objection. They refuse to abide by and condone a system that does not permit secular unions.⁴

The concept of forum shopping, whether applied as an explicit analytical lens or an implied logic, does not provide us with adequate criteria for distinguishing

⁴ Thanks to Nimrod Kovner and Yonathan Reshef for this example.

between different kinds of practices. Why, for example, should we accept, as this terminology indicates, that the strategies of an international oil company that seeks to avoid paying damages for the pollution it has created is comparable in any normatively relevant sense to the actions of the Israeli 'marriage tourist'? Or that such corporate evasion of responsibility is somehow analogous to so-called 'asylum shopping' (Thielemann, 2012: 30) where refugees travel to Sweden rather than Greece in order to enhance their chances of protection? We need an analytical framework that does not merely assume identity between such cases, but instead enables us to differentiate between forms of action and to critically discuss similarities and differences. This presupposes concepts that do not settle the debate in advance by employing an all-embracing market-logic, which blinds us to the *political* and *civic* character of some modes of border crossing.

To explore such practices of border crossing we might find inspiration in the social movement literature on transnational activism. This is a field analyzing the diverse 'repertoires' of contention domestically and across borders (Della Porta and Tarrow, 2005; Tarrow, 2005).⁵ The mobilization of EU law by marriage migrants could for example be seen as acts of what Tarrow (2005) calls 'externalization' where international rules are invoked as part of a national struggle. The justification of this strategy by the actors themselves could likewise be described from this perspective as a form of 'framing'.⁶ However, when discussing activists' turn to European Union law, Tarrow still uses the troubling phrase 'shopping' (2005: 151) indicating an insufficient break with a market-based understanding. The term externalization, moreover, suggests that EU rules and international norms are external to the dispute, only to become part of it when drawn on by the actors involved. But this can be misleading. In the area of family unification, for example, juridico-political disputes are at least partly *constituted* by complex and overlapping legal norms.⁷ The construction of domestic rules thus reflects a respect for the right to family and private life codified in international conventions, just as the legal distinction between foreign spouses from inside and outside the EU is predicated on a state's membership of the European Union. More importantly, the political sociology of social movements is concerned with identifying causal mechanisms (McAdam *et al.*, 2001) rather than evaluating the ethico-political character of such actions. Since strategic cross-border movements include practices as diverse as family migration, asylum litigation and corporate tax evasion, a perspective is needed that helps us make relevant analytical and normative distinctions.

I therefore suggest that we instead turn to the political theory literature on civil disobedience and conscientious objection. Within this field of study, the character and justifiability of specific forms of contentious politics has been given careful

⁵ I am grateful to an anonymous reviewer of EPSR for pointing this out.

⁶ For analyses of transnational activism and social movements in the area of migration, see, for example, Guiraudon (2001), Sokefeld (2006), Piper (2010).

⁷ For a friendly critique of the inside/outside binary in this literature, see Olesen (2009: 416–420).

attention (Rawls, 1971; Arendt, 1972; Dworkin, 1985). In the following I argue that a re-appropriation of this framework that pushes it in a transnational direction offers insightful new analytical tools. It enables us to capture the political potential of forms of border crossing within and beyond the EU, while providing a grammar for normative assessment and debate. I thus propose a concept of transnational civil dis/obedience developed and illustrated through a case study of EU-citizenship, cross-border movement and family unification.

Stories of border crossing, EU citizenship and marriage migration

Family unification has long been a highly salient political issue in Denmark (Schmidt, 2011: 258). In 2002, the newly elected centre-right government, with the support of the anti-immigration Danish People's Party, adopted a comprehensive reform of the Aliens Act (Aliens Act, 2002; Rytter, 2007). This included significant restrictions on spousal migration. The 24-year-rule was introduced and combined with an attachment requirement stipulating that the couple's joint affiliation with Denmark must exceed their ties to any other country. Several economic conditions were also launched. The objectives of the law were to reduce the number of immigrants, promote self-sufficiency, and prevent forced marriages (Ministry for Integration, 2002: 14, 36–39). Young migrants and ethnic minority citizens were presented as under severe pressure from family members to marry across borders.

The law was amended several times in the following decade. In 2011 a comprehensive reform was carried out. It adopted, among other things, a point-system (Aliens Act, 2011). Family migrants would earn points according to their educational qualifications, work experience, and linguistic skills. For extraordinarily high skilled migrants, family unification would be possible even though they were not yet 24 years old. For most others it became more difficult. The attachment requirement and economic conditions were also tightened. The official objective was to ensure that only 'those foreigners who can and will contribute to growth and wealth in Denmark' would be admitted (Ministry of Integration, 2011: 5, my translation). The point-system has subsequently been abolished following a change of government (Aliens Act, 2012).

Shortly after the 2002 reform took effect, many Danish citizens and their foreign partners began moving to Sweden to use their European Union citizenship and the right to family unification following from that (Rytter, 2007; Schmidt *et al.*, 2009). This is not an option open to all. Only citizens and not resident immigrants can move freely across borders and bring their partners, and then only if they can provide for the spouse (Directive 2004/38/EC, 2004).⁸ Still, EU rules are considerably more liberal than Denmark's national regulation. Some of the Danish exiles are settling permanently in Sweden with their families. Others are returning or plan to do so (Rytter, 2007; author interviews).

⁸ Usually, applying for family unification under EU rules requires crossing an internal border, but there are examples to the contrary in existing case-law. For a discussion, see Kochenov (2011) and Staver (2013).

During 2011–2012 I carried out 30 narrative and semi-structured interviews (Kvale, 2007; Riessman, 2008) with Danish-international couples, most of whom had moved to southern Sweden. The majority of informants were found through self-selection as interviewees responded to my advertisements posted online and at various public institutions in the Swedish town of Malmö. Others I approached or found through snowballing. Self-selection tends to bias towards well-articulated, self-confident persons whose accounts do not deviate too radically from widespread social scripts and norms. Yet the sample, though not representative, contains extensive breadth of experiences and socio-cultural positioning. There are early and late movers, divorcees, permanent settlers and returnees, and a few who were unable to use EU regulation. The foreign spouses come from all regions of the world and from poor and well-off families. The Danish citizens vary in age, gender, ethnicity, and social class but most are middle class ethnic majority Danes in their twenties. I also interviewed citizens with refugee or migrant backgrounds but in general this group was more difficult to establish contact with. To supplement the material, I draw on the few existing anthropological studies of family migration and the Swedish model among ethnic minorities (Schmidt *et al.*, 2009; Rytter, 2010a).⁹

In our conversations my informants narrated their lived experiences of marriage migration. The stories that emerged are shaped by individual biographies and dispositions as well as public law, policy and discourse (cf. Maynes *et al.*, 2008; Riessman, 2008: 8–10). They give meaning to practices of cross-border movement and everyday routines wherein politics and private lives, individual subjectivity and civic engagement are often deeply intertwined. Moving to Sweden is described by my informants as a way of coping with their personal situation when faced with restrictive Danish family unification law. For a few, this appears to be their sole concern. Many interviewees, however, narrate how their experience of involuntary exile prompted them to articulate their critique publicly or engage in different forms of organized action to create political change or support others. Finally, some informants present their cross-border movement as an act of protest or dissent. This group includes six interviewees, female and male, young and middle-aged, Danish citizens and one migrant spouse. Some emphasize that they are devout Christians or Muslims while others express no particular religious conviction. One stresses her previous childhood experiences of seeking asylum. Others point out that they have lived safely in Denmark all their lives. It is one such 'protest' story I analyse in detail in the remainder of the paper.

⁹ It is important not to overstate ethnicity as a marker of difference in this dispute. Though restrictive regulation like the 24-year-rule and the attachment requirement explicitly targeted young minority citizens, it also affected majority citizens. Among both groups there has been considerable movement to Sweden, just as we find similar articulations of anger, shock and discontent (author interviews; Schmidt *et al.*, 2009; Rytter, 2010a). Still, marriage practices and socio-cultural positioning differs in ways that are likely to shape cross-border experiences and storytelling.

Martha¹⁰ is a young Danish woman who with her Guatemalan husband Guillermo has used EU law to bypass Danish family unification rules. Her story¹¹ is chosen for further analysis because it with admirable clarity illustrates and helps to elucidate a novel and conceptually interesting form of action. It provides us with an account of exit-entry, which differs markedly from dominant private and apolitical understandings. This makes it well suited for theoretical development. The point is not that all or even most transnational couples engage in this form of action. Rather, as Ferrara (2008: 3, original emphasis) argues, some unusual acts are exemplars, which both ‘disclose new vistas on what exists *and* new dimensions of normativity’. Since this is a heuristic case study with the aim of conceptual innovation it is helpful to focus on just one such exemplary story. This allows me to conduct an in-depth analysis of how cross-border movement is practiced, interpreted, and justified by the protagonist and to discuss it critically in light of the literature on civil disobedience.

The interview is analysed drawing on narrative analysis. The key assumption in this methodology is that meaning is created in narration. ‘When biographical disruptions occur that rupture expectations for continuity, individuals make sense of events through storytelling’ (Riessman, 2008: 10). To understand the significance assigned by informants like Martha to their experiences of exile and contentious border crossing, it is therefore important to explore the accounts constructed in the interviews. I mainly use a ‘thematic narrative analysis’ focusing on the content of the storyline (Riessman, 2008: 53). I thus begin the presentation by tracing and reconstructing the sequence of actions that are tied together. How did the couple meet; their struggle with family unification; their use of EU law. This is followed by a careful textual analysis of how these acts and events are interpreted, contested, and justified. Here I also pay attention to the rhetorical tactics used, exploring how discourses are mobilized to make claims and persuade the audience. This part is organized around key criteria from the political theory of civil disobedience to support the conceptual development I pursue. Having set out the methodological approach, let us now turn to this theoretical literature and how it can be re-appropriated for a transnational context.

Transnational civil dis/obedience

The twin concepts of civil disobedience and conscientious objections have been the subject of considerable debate in political theory (Rawls, 1971: 363–393; Arendt, 1972; Dworkin, 1985: 104–117; Brownlee, 2004; Smith, 2004; Thomassen, 2007). Though views differ with regard to their precise interpretation, they describe and

¹⁰ To ensure anonymity names and certain features of the story have been changed, albeit in ways that do not affect the overall narrative.

¹¹ Martha and Guillermo both participate in the interview. I focus on Martha’s account of their joint experiences as it is mainly she who articulates and discusses the relationship between family migration, Danish and EU citizenship.

give meaning to acts within a political system, which are conscientious but non-compliant. Thoreau ([1849] 1991), who is usually credited with the emergence of the term civil disobedience, refused to pay taxes to a government that tolerated slave-ownership and waged a war of conquest against Mexico. In the 1960s, US civil rights activists disobeyed laws of racial segregation they found unjust. Today's Greenpeace activists often violate private property to protest against corporate environmental hazards, which in their view are indefensible.

In a recent study, Cabrera (2010: 131–153) has applied the concept of civil disobedience to irregular migration and cross-border movement. He argues, drawing on in-depth ethnographic research, that migrants who cross the US-Mexican frontier illegally in search of a better life can be seen as performing acts of civil disobedience or 'conscientious evasion' (cf. Rawls, 1971). They refuse to submit to an unjust global order where place of birth greatly affects (in)access to the most basic goods and freedoms (see also Mezzadra, 2004). Cabrera suggests that their practice appeals to an 'emerging global normative structure' of human rights. Irregular migrants 'are acting in some ways as though there were in place the sort of fully integrated global institutional structure' of citizenship, which cosmopolitans often hope to promote (Cabrera, 2010: 146).

For my purposes, what makes this argument particularly interesting is how Cabrera critically reinterprets and extends a concept of civil disobedience that is otherwise typically used within the state (see also Smith, 2004 and Isiksel, 2010). His argument helps us to see that if we accept the view that injustice transcends political boundaries or is even built into the current international system, unwarranted crossing of borders may be legitimate as a protest or remedial act. An objection to this use of the concept might be that civil disobedience, as a *civil* and *political* act, must address a political community of fellow citizens (cf. Rawls, 1971; Arendt, 1972) and in that conversation foreigners are per definition outsiders. This view, however, fails to properly grasp the character of this kind of activism. Civil disobedience has often been employed to question and reinterpret the boundaries of membership – by, for example, the suffragettes and the US Civil Rights Movement (see King, 1991; McAdam, 1982).

While Cabrera's argument denationalizes conceptions of civil disobedience by alerting us to the spread of cosmopolitan moral norms, it does not fully take account of the 'disorder' of legal pluralism especially in the EU.¹² The development of complex transnational regimes like the European Union changes the relationship between obedience and disobedience. New modes of action emerge, which are neither simply one nor the other. It is to capture such practices that I propose the term civil dis/obedience. This re-appropriation (Butler, 1995) changes the meaning

¹² Though Cabrera's civil disobedience argument focuses on the US-Mexican context, he does offer a comparison with the EU, which includes insightful accounts of migration *into* and *within* Europe. But his analysis overlooks the significant interplay between internal and international mobility enabled by EU's legal pluralism (Cabrera, 2010: 181–201).

of the concept and the action it designates. Acts of civil disobedience are ‘suspended between legality and legitimacy’ as Habermas (quoted in Thomassen, 2007: 203) puts it. A law is broken when and because it is considered unjustified. By contrast, acts of dis/obedience are suspended between different *orders* of legality and legitimacy. This makes it possible for an action to be non-compliant without being illegal. The lawfulness and morality of supranational legislation can be employed by citizens and some categories of migrants to challenge national law and the power of the state. To see how let us turn to the story of Martha and Guillermo.

In the interview Martha explains how she went to Guatemala to work as a volunteer in an orphanage after high school. This is where she met Guillermo, a young local co-worker. The two started dating just as Martha was about to leave. She went home briefly and then returned to Guatemala. The relationship became serious and they decided that Guillermo should come to Denmark. When he was first visiting her they applied for a student permit but were unsuccessful. Martha knew that since she was under 24 they would not be able to get family unification via Danish law. Still, she hoped they might find a way. But then parliament began debating the new skill-based point-system for family unification. For couples, where one of the parties was under 24, the number of points required was very high. Guillermo had little formal education and thus poor chances of qualifying. Martha therefore decided that they should go to Sweden, stay there for a short while and then use EU law to return to Denmark. She found a job in Copenhagen to provide for them and they moved across the border. At the time of the interview they had lived three months in Sweden and were planning to apply soon for a residence permit in Denmark via EU rules.¹³

As Martha points out in our conversation, she and Guillermo are not breaking any laws by their action. On the contrary, she is simply using her right as a citizen of the European Union. Freedom of movement is a key feature of EU citizenship (Directive 2004/38/EC, 2004). It is central to the EU’s internal market and peaceful interaction among Europeans. By availing themselves of these rights, Martha and Guillermo indirectly help bring to life the supranational legal order on which Union citizenship is based. From the perspective of the EU they are thus ideal citizens and their act of exit and re-entry could be described as civil ‘obedience’.

But with regard to Denmark their action looks rather different. A central aim of the 2002 reform was to reduce immigration. By returning Martha and Guillermo would activate EU regulation to counter this objective. It might be argued that Danish law never really aimed to keep out couples such as Martha and Guillermo. The official remarks to the law focus on resident immigrants and descendants. It is their transnational marriages that are constructed as problematic. Ethnic majority citizens like Martha, though affected by the law, are not referred to at all (Ministry of Integration, 2002). Moreover, Guillermo is a Christian from a region, Central

¹³ Shortly after the interview they did return to Denmark where Guillermo was granted a residence permit as the spouse of an EU citizen.

America, which is seldom mentioned let alone vilified in Danish popular debates over immigration. Even if we grant this, the 2011 reform and its emphasis on economic utility alter the picture markedly. According to the law's extensive scoring system Guillermo, with his limited formal education, is an unwanted immigrant (Ministry of Integration, 2011: 30–36). By entering Denmark, he and Martha are thus acting against the explicit intention of Denmark's family unification rules. Hence, from the perspective of Danish national legislation this is an instance of non-compliance even though it is not unlawful. A contra-factual perspective can illustrate the argument:¹⁴ If it was not for the presence of EU law, which Denmark qua its union membership is obliged to respect, then Martha and Guillermo's return would indeed have been illegal.¹⁵

Through their conjoined practice of exit and re-entry Martha and Guillermo therefore act simultaneously as obedient and disobedient citizens. Their performance is transgressive with regard to Danish law but affirmative with respect to EU regulation. Theirs is an act of dis/obedience. But is it also civil? Analyzing Martha's story further I hope to show how it follows the wider grammar of civil disobedience. Through a close textual analysis I draw out the conscientiousness, necessity and public character of their performance.¹⁶ In doing so I argue that a civil dis/obedience concept enables us to address key statist objections to EU citizenship and free movement and distinguish civic from non-civic practices of border crossing.

Conscientiousness

In the classical tradition of civil disobedience it is stressed that non-compliant acts must also be conscientious. To separate them from ordinary crime a civic ethos is required (Rawls, 1971: 363–365; King, 1991). Rawls (1971: 365) for example argues that such acts must be 'guided by and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions generally'. He contends that especially violations of fundamental liberties can justify non-compliance (pp. 371–373). Others take a broader view and see civil disobedience as, for example, a way of protesting against legislative processes that greatly privileges powerful lobbyists at the expense of vulnerable groups and a free

¹⁴ Thanks to Christian List for pointing this out.

¹⁵ That this cross-border strategy is indeed undesired by Danish officials is illustrated by the tactics employed by the administration to prevent its use. For several years, the Danish Immigration Service adopted a very narrow interpretation of the rules. Hardly any information about the EU route was made available by the ministry, and liberalizing case law from the European Court of Justice was only slowly and reluctantly implemented (The Danish Parliamentary Ombudsman, 2008). While public critique had changed this to some extent at the time when Martha and Guillermo moved to Sweden, the EU option continued to be controversial.

¹⁶ A further criterion often discussed is that disobedient citizens 'must be willing to face arrest' (Cabrera, 2010: 136) to draw public attention to their cause and demonstrate 'fidelity to the law' (Rawls, 1971: 366; Habermas, 1985; King, 1991; Cabrera, 2010: 136). Yet legal punishment, while perhaps strategically valuable at times, is not intrinsic to civil disobedience. Publicity and fidelity can be established by other means (Dworkin, 1985: 114–116; Greenawalt, 1991: 185–188; Smart, 1991: 207).

and open debate (Smith, 2004). Cabrera (2010: 143–146), in his argument about irregular migration, presents drastic socio-economic inequality or the absence of a basic standard of living as a defensible motivation for acts of civil disobedience. Notwithstanding these differences there is an emphasis on severe wrongs. Persons who engage in civil disobedience must seek to persuade their interlocutors that they are not acting for trivial or narrowly self-interested reasons (Rawls 1971: 365; Brownlee, 2004). This helps us to see why for example a polluting company that uses cross-border strategies to avoid costs will find it difficult to make a strong case for civil dis/obedience. It is hard to see that the firm is wronged by a request to clean up the mess it has made, a mess moreover which may greatly harm innocent members of local communities. Unlike the forum shopping framework, a civil dis/obedience analysis thus has the potential for helping us to distinguish normatively and conceptually between different kinds of cross-border action.

How then does Martha justify her and Guillermo's cross-border dis/obedience? The couple, as we have already seen, moved to Sweden primarily because of the Danish point-system for family unification. Martha explains that she was very upset when this new set of rules was debated in parliament and the public:¹⁷

M: ...I was *angry* because they created an atmosphere in Denmark ... of 'we can only use those whom we can get something out of' and 'they just take all our money'. Well, I have *lived* in a developing country. I know that we actually have quite a lot of money, and they don't take that much money after all. I just got so angry because they had to interfere so much in my private life. Well, those rules they after all started out as and had to go against forced marriages, but isn't it also wrong to make, what can you say, forced-non-marriages? That is, to *force* people not to be together – isn't that wrong too? ... I felt it was like in the old days when the parents had to decide who should get married. Now it was just *the politicians* who should decide who we should marry (Interview with Martha and Guillermo).¹⁸

Martha is challenging the point-system's utility focus where spouses are admitted or not according to their skills. In developing this critique she refers back to one of the government's main objectives when the first restrictive family unification rules were introduced – hindering forced marriages. It is a justification which has continued to play a key role in public debate and is emphasized in the new legislation as well (Ministry of Integration, 2011: 5). Martha accepts this rationale but

¹⁷ The interview was carried out in Danish and Spanish with Martha as translator. All quotes in English are my translation. Italics are used when the interviewees emphasize particular words. In the first and longest part of the conversation Martha and Guillermo took turns narrating their experiences in response to my initial and follow up questions. In the second part, I made more proactive interventions returning to central themes arising in their story prompting them to reflect in greater depth on issues of border crossing, family unification law, and public debate.

¹⁸ Martha makes this statement towards the end of the interview telling about her anger over the point-system, which made her contact the press (see section on Publicity). I prompt her to say more about this frustration ('R: What was it you were angry about? Could you be a bit more specific?').

re-appropriates it ingeniously to criticize the law. Coining the term 'forced non-marriages' she points out that the regulation in its current form does precisely what it originally aimed to prevent. It forces young adults to act against their own free will in a matter essential to their personal freedom. The parental analogy conjures up an image of the state as a feudal patriarch who wants to use his daughter to obtain beneficial alliances and therefore prevents her from following her heart. This contrast between individualistic romantic love and marriages arranged by guardians without concern for the young adults' wishes is central to the law's delineation of legitimate and illegitimate unions. Martha does not question this conception of 'a proper marriage' (Bonjour and de Hart, 2013). But by playing around with it creatively she draws out the ironies (see Jensen and Fernandez, 2013) of a law that acts in the same interfering manner as the parents whose rein it seeks to check.

Martha's critique of utility-driven migration control is thus closely bound up with her commitment to romantic love. Where a few other informants criticize the presence of migration and border control *per se* and advance cosmopolitan ideals of universal free movement Martha's claims are more constricted. In the interview she thus stresses that she appreciates the need to regulate the intake of unqualified labour immigrants. Not only on account of the receiving society but also because they often end up in vulnerable positions and poorly paid jobs. But she contends that 'when it is our spouses then it is just something different' (Interview with Martha and Guillermo). In clarifying her objection Martha notes that she 'certainly [does not] think that love can *in any way* be about how long an education one has or how fast one is at learning Danish'. She thus objects not to the principle of skill-based selection as such but to its application in the domain of marriage migration. The invasion of market logics into the 'life world' (Habermas, 1992: 112) of spousal relations results in an unequal treatment of citizens on the basis of whom they choose to marry.¹⁹ Martha's story therefore clearly illustrates how border crossing can be defended on conscientious and political grounds. This does not mean that all will be persuaded. Civil disobedience is always an appeal to an audience that may or may not be convinced (cf. Brownlee, 2004). The point is that reasonable arguments are and can be made.

Publicity

Still, more is required for an act to be civil. Cabrera (2010: 134), following Rawls (1971: 364), notes that it requires publicity. The political potential of secret acts is negligible since few will know the law is actually being challenged. The hoped for transformations in regulation and public opinion cannot then come about (Rawls, 1971; King, 1991). The publicity criterion, however, is not quite as straight forward as it might appear. Take the example of those who secretly helped Jews flee from Nazi Germany. They could hardly have drawn attention to their activities without endangering themselves and the refugees (Greenawalt, 1991: 185–186). Also in

¹⁹ Consequently, not only the freedom but also the equality of citizens is affected, Martha points out.

today's Europe individuals and groups who hide rejected asylum seekers must be careful to avoid disclosing the identity and whereabouts of the persons they help (p. 186). Even so we do intuitively associate such secret actions with civil disobedience. Dworkin (1985: 107–108) refers to this type of non-compliance as 'integrity based civil disobedience'. In his view, it is not about making a political statement and affecting general change but about refusing to perform an action, which would run counter to one's most profound, constitutive beliefs. It follows then that public attention is not required. Rawls (1971: 368–369) agrees but categorizes these acts as conscientious refusals or conscientious evasions, which he separates from civil disobedience proper.

Returning to Cabrera's analysis, he points out that clandestine Mexican immigrants cross the US border in secret. Yet large demonstrations by migrants have ensured publicity (Cabrera, 2010: 135). Much the same can be said about Danish-international couples moving between Denmark and Sweden. The actual act of moving is usually done in private by individual families. At the same time, many couples have drawn attention to the effects of the rules and the plights of marriage migrants by taking part in public debate, talking to reporters or academic researchers, participating in demonstrations, or petitioning politicians (author interviews; Schmidt *et al.*, 2009; Rytter, 2010a). During our conversation I ask Martha and Guillermo if they too have considered contacting the press with their story. Martha explains that they were interviewed by a Danish newspaper before leaving for Sweden:

M: [I]t was at the time when they changed the rule[s] ... there was this big debate this autumn about the point-system and all that. And I simply got so *angry* and so it's difficult ... you get so angry and it's so difficult. One has to get it out somehow and then I actually think it's a good opportunity if you get the press to do it. If you just sit and are angry in your own little room then you don't change anything. (Interview with Martha and Guillermo).²⁰

For Martha, as for many of my informants, voice whether in the media or as research participants is about expressing their distress and contributing to political change. Telling their story to outsiders is a way of handling frustration that otherwise threatens to overwhelm and depress as well as a strategy for bringing public focus on experienced inequities in need of redress. In the newspaper interviews, Martha and Guillermo also underline that they intend to use EU rules because the restrictive and in their view unduly interfering Danish rules do not allow them to live together in Denmark.²¹ Attention is thus drawn not just to problems of the law but also to the couple's border crossing counter-strategy. That in turn might inspire others to use the opportunities for legally sidestepping and contesting

²⁰ This quote is from the same section as the previous one responding to the following question: 'R: There are some, some couples in your situation who have gone to the *press*, to the media to tell their stories. [M: Yes]. R: Is that something you have considered?'

²¹ The newspaper interviews are publically available but are not referenced here to ensure the couple's anonymity.

national regulation. This illustrates what several studies have shown, namely that 'exit' need not undermine but can sometimes generate 'voice' within and across borders (Hirschman, 1993; Gammage, 2004; Hoffman, 2010).²² This challenges the statist and nationalist worry that public democratic participation is threatened by strategies of cross-border movement. All in all, Martha and Guillermo's actions thus fully meet the publicity condition.²³

Necessity

Finally, justifying non-compliance typically involves an argument about the necessity of the action: The law had to be transgressed in order to prevent a serious wrong and no other adequate remedy was available (Rawls, 1971: 371–373; cf. Habermas, 1996: 382–384; Cabrera, 2010: 143). Again it is important to emphasize the contestability of such claims and not interpret them too restrictively (Rawls, 1971: 373; Thomassen, 2007: 16). In the early 60s, many criticized Martin Luther King and his fellow activists for impatience and for not pursuing their cause through the legal system (King, 1991; Cabrera, 2010: 144). It is only in hindsight that the righteousness and urgency of the Civil Rights Movement appears to us so entirely beyond dispute. This is worth bearing in mind when assessing contemporary cases (Singer, 1991: 128).

So let us examine if and how Martha narrates the necessity of their cross-border dis/obedience. Below, she defends their chosen strategy explaining why they plan to use EU law to return to Denmark rather than moving to Guatemala or settling more permanently in Sweden:

M: I see it a bit like a *duty* in a way. Sometimes I want to stay in Sweden because it's too much trouble and that sort of thing, but then after all I think that we have to. I think it's really *unjust* the way the rules are in Denmark and we have to *fight* for it. We can't just sit still and let it harm us. We have to fight for us. So I see it as a duty to fight for it. And I think that if all the couples like us disappear to Sweden or [Guatemala] then there is never anyone who sees us and then there is never anyone who discovers that we exist and then we can just continue to have these rules. So I think we need to make ourselves noticed, and we need to get into Denmark again to get to know people and to change their ways of thinking and their minds. (Interview with Martha and Guillermo).²⁴

This is a necessity argument. It describes the Danish rules as unjust and therefore representing a serious harm. Alternative actions, such as moving elsewhere, are

²² For an excellent reinterpretation of exit in democratic theory, see Warren (2011).

²³ There might be couples who had chosen the EU route on principled grounds but who did not have the resources for speaking out in public. Their action would qualify as Dworkin's (1985) integrity based civil disobedience or Rawls' (1971) conscientious evasion.

²⁴ This quote is taken from Martha's answer to the following question asked in the second part of the interview: 'R: ... There are some who say that couples like you who use the EU rules in this way [M: Yes] that they take part in *circumventing* the Danish rules. [M: Yes] Is that something you have thought about? [M: Well, to circumvent?] Well, yes you can say that Denmark has sort of one set of rules and then you find a shortcut to bypass it or something?'

dismissed as ineffectual because they help to uphold rather than change the unacceptable status quo. In unfolding this statement, we can note interesting similarities and differences compared with Cabrera's (2010: 143–146) analysis. He argues that many irregular migrants from Central America are justified in violating the immigration laws of the United States of America as this is often their best if not only way to avoid poverty and hopelessness. The stakes for Danish-international couples are rather different. Their livelihood is typically not in danger but their ability to live together in Europe is. Safeguarding their family life is central to all my informants. But in addition, a few like Martha also express a strong commitment to wider change when defending their border crossing. It is to alter perceptions and policy by making themselves seen and heard that Martha insists on their returning. This is an argument about preventing harm to all citizens, present and future, who are unable to live with the partner they love in Denmark. Such agendas for political transformation are typical of iconic exemplars of civil disobedience like the civil rights movement. Indeed, some commentators insist that only this kind of action falls within the remit of the concept (Rawls, 1971: 363–371; but see Dworkin, 1985: 106–107; Habermas, 1985: 102–106). That in turn underlines how closely Martha and Guillermo's action follows the grammar of civil disobedience in this respect. It suggests that statist and nationalist sceptics are too hasty in their account of cross-border movement as a threat to civic solidarity.

Conclusion

In this paper I have developed and defended a concept of 'transnational civil disobedience'. It designates conscientious acts of border crossing undertaken in order to circumvent and contest domestic rules by mobilizing international or supranational law. These acts are legal yet non-compliant, disobedient yet obedient, civic and contestatory. In the analysis, I re-appropriated the concept of civil disobedience adapting it to a context of complex jurisdictions with overlapping, competing, and supplementary regulation. Here acts of dis/obedience become possible, which are suspended less between legality and legitimacy than between different orders of legality and legitimacy.

I constructed the argument through an in-depth case study of family migration, EU citizenship and border crossing. The empirical basis was a collection of narrative interviews with transnational couples, focusing on the exemplary story of Danish Martha and her Guatemalan husband Guillermo. I argued that, though legal under EU rules, Martha and Guillermo's strategies of exit and re-entry challenged Danish family unification law. Their undertaking was non-compliant making them disobedient national citizens. At the same time their actions indirectly brought to life a European area of free movement in accordance with the objectives of EU-integration. Hence from the perspective of the EU they were ideal, obedient citizens. The analysis showed, moreover, how Martha presented their actions as conscientious and political. Moving to Sweden and back again she and Guillermo

contested rules that, in her view, violated civil rights to privacy and family life. Border crossing was articulated as necessary both in order to re-claim these freedoms for themselves and to help change policy and perceptions in Denmark. In addition, the couple had helped to draw public attention to the effects of Danish family unification rules. In this way their actions met the criteria of conscientiousness, necessity, and publicity of civil disobedience.

The concept of transnational civil dis/obedience helps us critically appreciate practices of territorial border crossing that are made possible by but also enact complex and overlapping constitutional orders. It enables us to address key criticisms from statist or nationalist perspectives, which see tactical cross-border movement, particularly in the EU, as private, market-based and instrumental. Against this view, the analytics defended here draw attention to the ethico-political character of some forms of mobility. It stresses that strategic border crossing is called for and legitimate when basic rights are at stake and other remedies are not available or effective. Publicity is usually required if such practices are to hold a wider transformative potential though secret acts still may qualify as conscientious objection.

The concept has a broader relevance within and beyond the EU, particularly in the area of family life and reproductive rights. As discussed with regard to Israel, mutual recognition of marriage in international law enables couples to sidestep mandatory religious ceremonies and in that way perform a kind of conscientious objection across territorial boundaries. Transnational civil dis/obedience also holds potential for analyzing the well-established journeys from Ireland, where abortion is illegal, to the United Kingdom where it is not. It likewise suggests possible insights into current struggles within the United States where gay couples attempt to evade and contest hetero-normative marriage regulation by moving between conservative and liberal states. To what extent we actually find politicized protest in various contexts like these is an open question. As a heuristic case study of a single interview, the aim of this analysis is not empirical generalizability. Future research could find evidence of extensive civic action or only a little – civil disobedience is after all an exceptional strategy undertaken when other avenues are blocked. What the article contributes is a conceptual lens for analyzing cross-border movement. It presents criteria for identifying civic and non-civic action and paves the way for a discussion of complex interplays and gray areas.

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