

Populism, Immigration and Liberal Democracies

Inherent Instability or Tipping of the Balance?

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1.1 INTRODUCTION

This chapter investigates how challenging questions and tensions caused by migrants and their universalist claims for inclusion have been approached and resolved in liberal democracies. By regarding the development of populism as a real and dangerous political phenomenon that has significant traction, the chapter asks whether populism adds something new to how migrants' claims are approached in liberal democracies. More specifically, does populism add some distinctiveness that we should be more sensitive to?

To address these questions, I first describe some inherent instabilities in liberal democracies and accept that populism responds to these instabilities (Section 1.2). I then argue that the rights of migrants have been a site for contestation and tension, thereby exposing the instabilities in liberal democracies (Section 1.3). In particular, the question how inclusive or exclusive the bounded national community should be has always been contested. By zooming in on the case law of the European Court of Human Rights (ECtHR), the chapter examines three areas where migrants' universalist claims for inclusion have been addressed in human rights law (Section 1.4). With reference to the requirement that states have to provide justifications for measures that affect individuals, I analyze how the tensions between exclusion versus inclusion and particularism versus cosmopolitanism have been adjusted. The conclusion of Section 1.4 is that the adjustment has been tipped in favour of exclusion and particularism. The concern that arises in the current circumstances is that populism might further shape this adjustment to the point where the balance is completely tilted in favour of exclusion and statism.

Having set out the main descriptive argument, the chapter draws on Dora Kostakopoulou's work to explain that the question how inclusive or exclusive

the bounded national community should be concerns more than the demarcation of the external boundaries of the community (Section 1.5). The internal and the external are intertwined, which implies that exclusionary policies ultimately infect the ‘inside’ of the national community. As a consequence, anybody or any group can be framed as an ‘outsider’. The rise of populism has exposed this intertwining. This means that the tipping of the balance in favour of exclusion and statism as to how migrants are treated raises general concerns about the nature of the community and its organizing liberal values. These concerns relate to how the community responds to diversity and plurality more generally and, relatedly, how it draws lines between different social groups that might have ideas and values different from those that dominate. As a consequence, when migrants invoke universalist claims, the response necessary affects not only them (e.g. being kept in immigration detention or impossibility to enjoy family life) but also the political community that is the addressee of these claims.

1.2 INHERENT TENSIONS IN LIBERAL DEMOCRACIES

The growth of populist political actors has presented various challenges to liberal democracies, to constitutionalism and to the rule of law.¹ Political scientists have addressed populism and its manifestations.² As it emerges from their scholarship, while populism can be difficult to define,³ two broad approaches can be identified in the efforts to explain it. The first one implies recognizing a series of characteristics running through different examples of populist governments and versions of populism.⁴ The second approach, the one adopted for the purposes of this chapter, is more narrow and understands populism as ‘a thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, “the pure people” versus “the corrupt elite”, and which argues that politics should be an expression of the general will of the people.’⁵ It follows from this definition that

¹ Susanne Baer, ‘The Rule of – and not by – Law: On Constitutionalism’ 71(1) *Current Legal Problems* (2018) 335.

² For a useful overview, see Nicole Lacey, ‘Populism and the Rule of Law’ 15 *Annual Review of Law and Social Science* (2019) 79.

³ Paul Taggart, *Populism* (Oxford University Press 2000) 2.

⁴ For the identification of these two approaches, see Alison Young, ‘Populism and the UK Constitution’ 71(1) *Current Legal Problems* (2018) 17.

⁵ Cas Mudde, ‘Are Populists Friends or Foes of Constitutionalism?’ (2013) *The Foundations of Law, Justice and Society Policy Brief* 3; Cas Mudde and Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017) 6. When discussing populism in this chapter, I largely draw on the definition proposed by Jan-Werner Müller: populism is as ‘a particular

populism is an ideology that homogenizes the will of ‘the people’ and promotes it against the will of the elites.⁶ It operationalizes emotion over reason and promotes a binary choice between accepting and rejecting a particular position, which undermines the ability of deliberation to reach a solution that might protect a range of diverse interests.⁷ Populism moves political debates away from rational discussion; it invokes emotional outbursts, oversimplifies complex issues, challenges expertise, and prevents democratic deliberation⁸ and the possibility for compromising among different interests in society.⁹

Having clarified the definitional features of populism, it is important to note that constitutional scholars have warned against perceiving populism as completely foreign to liberal democracies. Constitutional scholars have rather maintained that populism responds to some inherent and ingrained instabilities and tensions in the structures of liberal democracies. This chapter aligns with this understanding: ‘populism’ is an ‘expression of deep-seated problems within existing democratic regimes’.¹⁰ It is ‘a signifier of structural deficiencies and tensions within modern democracy, including in its constitutional design’.¹¹ According to Walker, populism is not ‘wholly anomalous within our political tradition’;¹² it is rather ‘a product of and response to a series of stress factors that are intrinsic to the modern constitutional condition’.¹³

With some risk of oversimplifying, these stress factors are reflected in three interrelated dichotomies that are a cause of inherent tension and instability in liberal constitutionalism: the collective versus the individual, the universal versus the particular, and, finally, plurality versus unity.¹⁴ As to the first one, liberal democracies search for a balance between the interests of the collective

moralistic imagination of politics, a way of perceiving the political world that set a morally pure and unified – but . . . ultimately fictional – people against elites who are deemed corrupt or in some other way morally inferior.’ Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press 2016) 20.

⁶ Young (n 4) 43.

⁷ Young (n 4) 36.

⁸ Young (n 4) 43.

⁹ Nicole Lacey, ‘Populism and the Rule of Law’ 15 *Annual Review of Law and Social Science* (2019) 79.

¹⁰ Paul Blokker, ‘Response to “Public Law and Populism”’ 20 *German Law Journal* (2019) 284, 285.

¹¹ Blokker (n 10) 285.

¹² Neil Walker, ‘Populism and Constitutional Tension’ (2019) 17(2) *International Journal of Constitutional Law* 515, 519.

¹³ Walker (n 12) 519.

¹⁴ Walker (n 12) 529–30; see also Zoran Oklopcic, ‘Imagined Ideologies: Populist Figures, Liberalist Projections, and the Horizons of Constitutionalism’ 20 *German Law Journal* (2019) 201, 215.

as a whole, on the one hand, and individual interests as protected by human rights law, on the other.¹⁵ Human rights presuppose protection against excessive and disproportionate limitations in the name of collective interests. The questions how to find the right balance between competing interests (the collective versus the individual interests) and at which point individual rights are disproportionately burdened are not prone to easy answers.

As to the second dichotomy (i.e. the universal versus the particular), a balance is sought between aspirations in favour of some universal values that have global reach, on the one hand, and considerations of the specific conditions and distinctiveness of the particular political community, on the other. Universal values give a basis for human rights as enshrined in international instruments. At the same time, particularism and closure in defence of the interest of the particular political community might not be easily squared with universalist aspirations.¹⁶

The third dichotomy (i.e. plurality versus unity) implies a tension between the plurality of identities that individuals within a state might have (in terms of, for example, ethnicity, culture, language, religion, gender, etc.), on the one hand, and the need for social cohesion and integrity of the whole so that 'the people' constituting the nation state can be formed. As Dora Kostakopoulou has observed, arguments in favour of 'legitimate closure in order to preserve collective identity are [...] underpinned by a static conception of identity'.¹⁷ These arguments tend to 'locate identity in some existing, inherent attributes of an entity, thereby overlooking the fact that identities (both personal and collective) are complex entities in process'.¹⁸ Identities are complex since they 'evolve, develop, become negotiated and re-negotiated within a context and in response to that context'.¹⁹ At the same time, some form of social cohesion is necessary:²⁰ 'To function well a constitutional democracy must also be underpinned by

¹⁵ This can be also represented as a tension between the protection of human rights and the protection of democracy. This tension emerges when human rights law is allowed to override legislation adopted by the democratically elected parliament. Young (n 4) 29.

¹⁶ Kim Lane Scheppele, 'The Party's Over' in M Graver, S Levinson and M Tushnet (eds) *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 495, 496, where the social division between cosmopolitans/globalists and nationalists/localists, is also identified. See also Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publisher 2001)

¹⁷ Dora Kostakopoulou, *Citizenship, Identity and Immigration in the European Union. Between Past and Future* (Manchester University Press 2001).

¹⁸ Kostakopoulou (n 17).

¹⁹ Dora Kostakopoulou, 'Is There an Alternative to "Schengenland"' (1998) *XLVI Political Studies* 886, 900.

²⁰ '[...] the success of popular or national sovereignty as an organizing principle of modern states owes much to presumptions about their organic unity: they have been portrayed as unitary, undifferentiated and integrated bodies lending an identity to their citizens and compelling

certain social conditions' that might imply 'relatively homogeneous societies'.²¹ Achieving some level of homogeneity and unity while at the same time respecting the plurality of identities might not be an easy task.

As Walker explains, liberal democracies are in a constant search for answers on how to approach these dichotomies and the tensions that they produce. There are no easy answers to any of them.²² The division between inside and outside, a division that implies a degree of national closure and boundedness, can ensure some form of stability in finding a balance. Transnationalism, on the other hand, can challenge the stability.²³ Transnationalism finds expression, for example, in the creation of transnational regulatory institutions (e.g. the EU),²⁴ which might undermine the capacity of states to regulate their own economies.²⁵ Transnationalism is also expressed in the work of international courts that make binding pronouncements as to whether, for example, the balance struck at national level between individual interests and community interests is compatible with human rights law.²⁶

Another example of transnationalism that can strain the search for the delicate balance is migration: the movement of people who make claims to be included in another political community.²⁷ It is not surprising therefore that migrants and their rights have been one of the major targets of populists.²⁸ Rejecting migrants' claims for inclusion and limiting migrants' rights have been one of the flagship proposals of populism.

their unqualified allegiance.' Dora Kostakopoulou, 'Floating Sovereignty: A Pathology or a Necessary Means of State Evolution' (2002) 22(1) *Oxford Journal of Legal Studies* 149.

²¹ Martin Loughlin, 'The Contemporary Crisis of Constitutional Democracy' (2019) 39(2) *Oxford Journal of Legal Studies* 435, 439.

²² Walker (n 12) 519.

²³ Zoran Oklopcic, 'Imagined Ideologies: Populist Figures, Liberalist Projections, and the Horizons of Constitutionalism' 20(2) *German Law Journal* (2019) 201, 216.

²⁴ Mark Dawson, 'How Can EU Law Respond to Populism' (2020) 40(1) *Oxford Journal of Legal Studies* 183.

²⁵ Martin Loughlin, 'The Contemporary Crisis of Constitutional Democracy' 39(2) *Oxford Journal of Legal Studies* (2019) 435, 442.

²⁶ Barbara Oomen, 'A Serious Case of Strasbourg-Bashing? An Evaluation of the Debates on the Legitimacy of the European Court of Human Rights in the Netherlands' (2016) 20(3) *International Journal of Human Rights* 407; Jan Petrov, 'The Populist Challenge to the European Court of Human Rights' (2020) 18(2) *International Journal of Constitutional Law* 476.

²⁷ For a useful outline of the philosophical discussions on how to address the tensions between statism and cosmopolitanism, see Alex Levitov, 'Human Rights, Membership, and Moral Responsibility in an Unjust World' in Adam Etinson (ed) *Human Rights: Moral or Political?* (Oxford University Press 2018) 470.

²⁸ Speech by the CoE Secretary General, Understanding Populism and Defending Europe's Democracies, 27 January 2017.

1.3 THE TENSION BETWEEN INCLUSION AND EXCLUSION

As Section 1.2 suggests, with or without populism the rights of migrants are a source of tension in liberal democracies. Liberal constitutional democracies have been struggling with the question of how to accommodate migrants, who are not formally members of the host community (i.e. the nation state),²⁹ without forsaking liberal values.³⁰ Constitutional democracies are bounded communities of citizens with equal rights, and, on this account, the claims of migrants, as non-citizens, pose a challenge that destabilizes the construction of these communities. This construction presupposes some degree of closure and exclusion.³¹ Migrants, on the other hand, by invoking universal values, make claims in favour of inclusion,³² which would broaden the political community and affect its homogeneity. These claims feed the three tensions mentioned in Section 1.2.

Both the inclusion and the exclusion claims raised by migrants can find a basis in the applicable legal standards.³³ Appeals for strict anti-immigration policies are 'based on premises, and made with arguments, compatible with existing constitutional understandings and arrangements'.³⁴ Such appeals 'are made in the name of principles that are thought to undergird the idea of a constitutional democracy: security of territory, a self-governing demos, a rule

²⁹ Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000) 489. Noll explains that '[t]he effectiveness of the state as a guarantor of rights and freedoms presupposes the idea of a bounded community. Thus, immigration control is a means to secure not only the interests, but also the human rights of citizens and denizens'. At the same time, however, imposition of immigration control and restrictions upon the rights of migrants can lead to severe human suffering (e.g. separating children from parents).

³⁰ Jürgen Bast and Liav Orgad, 'Constitutional Identity in the Age of Global Migration' (2017) 19(7) *German Law Journal* 1587, 1587, where the authors ask '[h]ow can liberal states, or a supranational Union formed by such states, welcome immigrants and treat refugees as future denizens without fundamentally changing their constitutional identity, forsaking their liberal tradition, or slipping into populist nationalism?'

³¹ On this account, exclusion is perceived as 'necessary for the creation and continuation of a political order (because it is constitutive).' See Bas Schotel, *On the Right to Exclusion: Law, Ethics and Immigration Policy* (Routledge 2012) 54.

³² These claims can have a different legal and moral basis, some more powerful than others.

³³ It suffices here to recall the pronouncement of the ECtHR that 'as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.' *Abdulaziz, Cabales and Balkandali v. United Kingdom* App no 9214/80 (ECHR, 28 May 1985) para 67.

³⁴ A Alexander Aleinikoff, 'Inherent Instability. Immigration and Constitutional Democracies' M Graber, S Levinson and M Tushnet (eds) *Constitutional Democracy in Crisis* (Oxford University Press 2018) 477, 485.

of law'.³⁵ Although democracy and human rights have been in general regarded as a 'mutually reinforcing couple',³⁶ migrants who have no political membership and no political equality cannot benefit from this potential 'mutual relationship between human rights and democracy'.³⁷ They are not part of the demos and do not formally participate in the taking of decisions that might affect them.³⁸ This relates to Koskeniemi's observation that human rights do not exist outside the structures of political deliberation.³⁹ Similarly, Noll has explained how human rights are derived 'from the will representation of a particular political community organized in a nation-state with delimited territory'⁴⁰ and they are 'a by-product of the particular kind of society'.⁴¹

At the same time, international human rights law has a 'community-transcending validity',⁴² and its application as a matter of principle is not contingent on membership in a particular political community. Accordingly,

³⁵ Aleinkoff (n 34) 491; Schotel (n 31) 32.

³⁶ Samantha Besson, 'Human Rights and Democracy in a Global Context: Decoupling and Recoupling' (2011) 4(1) *Ethics and Global Politics* 19.

³⁷ Samantha Besson, 'Human Rights and Constitutional Law. Patterns of Mutual Validation and Legitimation' in R Cruft, S Liao and M Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 279; Besson (n 36) 23. Besson wrongly assumes that a 'right to membership' includes a right to asylum and a right to *non-refoulement*. There is no right to asylum in human rights law. The right to *non-refoulement* is also very limited in its scope; it simply requires states not to send back individuals to ill-treatment. The latter might not imply access to territory, let alone 'a right to membership'.

³⁸ The structure of human rights and, in particular the proportionality analysis that they imply, presupposes decision-making within the specific political community, where there is a crucial element of sharing, commonality and interdependence of stakes. See Kai Möller 'Proportionality: Challenging the Critics' (2012) 10(3) *International Journal of Constitutional Law* 709, 716. The proportionality framework rests on the existence of a democratic community. See Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2010) 417–18; Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification' (2010) *Law and Ethics of Human Rights* 140, 143; Robert Alexy 'The Construction of Constitutional Rights' (2010) 4(1) *Law and Ethics of Human Rights* 20, 28; Aharon Barak 'Proportionality and Principled Balancing' (2010) 4 *Law and Ethics of Human Rights* 1, 3.

³⁹ Marti Koskeniemi, 'Human Rights, Politics and Love' (2001) 4 *Mennesker og Rettigheter* 33, 38.

⁴⁰ Gregor Noll, 'The Exclusionary Construction of Human Rights in International law and Political Theory' IIS Discussion Paper 2003 10.

⁴¹ Chris Brown 'Universal Human Rights: A Critique' (1997) 1 *The International Journal of Human Rights* 41, 58–9. For an account that explains how human rights are political and at the same time justified by a natural-law approach based on dignity, see Laura Valentini, 'In What Sense are Human Rights Political?' (2012) 60 *Political Studies* 180.

⁴² Seyla Benhabib *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 134.

commitment to human rights may require constraining the community's competence on immigration.⁴³

Benhabib argues that this contradiction between particularism versus universalism should be openly acknowledged. Once we have done this, we should think how to negotiate and renegotiate the tension between inclusion and exclusion.⁴⁴ Benhabib thus maintains that this 'constitutive dilemma at the heart of liberal democracies'⁴⁵ can be calibrated, adjusted and reconstructed. She further recognizes that this contradiction cannot be easily resolved; however, she is optimistic that it can be mitigated through 'democratic iteration', including 'jurisgenerative politics'.⁴⁶ These imply 'deliberative processes in which universalist rights claims are contested and contextualized'.⁴⁷ In light of the tendency to view courts, especially courts with a mandate to adjudicate human rights law related issues, as important actors in these 'deliberative processes',⁴⁸ it is relevant to scrutinize the ECtHR's approach to this contestation. The concrete question to be examined is how the claim in favour of inclusion as opposed to exclusion has been adjusted in the case law of the Court. This claim complicates the three tensions identified in Section 1.2 as inherent in liberal democracies. An individual migrant, the applicant to the Court, formulates his/her claim with reference to the specific harm that he/she sustains, and an assessment needs to be made whether this harm is justifiable given any collective interests, which feeds the collective versus the individual tension. The applicant appeals to universal values, which feeds the universal versus the particular tension. Finally, the plurality versus unity tension is also complicated since inclusion

⁴³ Dora Kostakopoulou, 'Is there an Alternative to "Schengenland"?' *XVLI Political Studies* (1998) 886, 896; Evan Fox-Decent, 'Constitutional Legitimacy Unbound' in D Dyzenhaus and Malcolm Thorburn (eds) *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) 119, 120: the assertion that the state has the unilateral right to determine the conditions of entrance and memberships 'subverts the legitimacy of the state's constitutional order.' Fox-Decent argues that '[t]he state is entitled to restrict entrance and membership only if it offers a compelling and independently reviewable justification.'

⁴⁴ Benhabib (n 42) 134.

⁴⁵ Benhabib (n 42) 2.

⁴⁶ Benhabib (n 42) 176–81; Seyla Benhabib, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty' 103(4) *American Political Science Review* (2009) 691.

⁴⁷ Benhabib (n 42) 179.

⁴⁸ In the context of migration, see Gregor Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers 2000) and Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016).

might imply enhanced plurality, thus affecting the homogeneity of the particular community that is the addressee of the migrant's claim.

By accepting that the above-described instabilities and tensions are not only ideological in their nature, but also pervade the applicable legal standards, this chapter attempts to respond to the question how the claim in favour of inclusion as opposed to exclusion has been adjusted by the ECtHR, by looking into three concrete circumstances (i.e. admission to territory, immigration detention and migrants' right to family life).⁴⁹ I approach these circumstances by asking the question whether human rights law requires the state to provide some form of justification for the restrictive measures taken in relation to migrants. Why this focus on justification? As moral beings, we at least have 'a fundamental right to justification'.⁵⁰ When public authority interacts with an individual, if he or she is considered as a person, he or she is owed reasons and justifications. There is thus a strong connection between personhood and justification.⁵¹ It follows that although there is an instability in how inclusive or exclusive a bounded community should be and to what extent the state that represents this community should follow a universalist or particularist approach, recognizing the personhood of migrants is the very minimum that can be required. Providing some form of justification for measures affecting them is therefore the very minimum that can be demanded.

Providing justifications also creates a space where the different interests can be identified and arguments underpinning possible decisions exchanged. It also implies identification and evaluation of the empirical consideration behind the interests and the possible solutions.⁵² Abstract invocation of sovereign entitlement does not suffice. Justification also requires taking into account the migrants' interests and balancing them against the national

⁴⁹ These circumstances reflect the main ways in which migrants' rights have been adjudicated under the ECHR. Admittedly, the right to *non-refoulement* under Article 3 raises issues other than admission to territory (e.g. non-removal, quality of the national procedure for assessing migrants' protection needs, the types and levels of harms that migrants might face upon removal and whether these are worthy of protection under Article 3). I have chosen to focus on admission to territory since it relates to circumstances where migrants' claims for inclusion are perceived to be the weakest due to the absence of physical contact with the authorities of the countries of destination.

⁵⁰ Benhabib (n 42) 133.

⁵¹ '[a]uthority without reason is dehumanizing' Jerry Mashaw, 'Reasoned Administration: the European Union, the United States, and the Project of Democratic Governance' (2007) *Yale Faculty Scholarship Series* 99, 101.

⁵² Schotel (n 31) 25: Justification required 'not only the statement of reasons, but also their substantiation by data and analysis.'

interests. Therefore, Benhabib's proposal for negotiation and renegotiation of the tension between inclusion and exclusion can be realized in the context of such a framework of justification.

1.4 SITES OF CONTESTATION

1.4.1 *Admission to Territory*

The first context in which migrants' claims are examined concerns admission to territory. The concrete question here is whether states are required to provide some justifications for rejecting claims for admission. It is crucial to concretize the circumstances under which such claims are made. Here I have in mind asylum seekers who intend to apply for international protection. To formulate their international protection claims, they need to get in contact with the authorities of countries of asylum.

With *Hirsi Jamaa and Others v. Italy* it became clear that once asylum seekers get in physical contact with the authorities of the destination state the latter's obligations under human rights law, including the obligation not to *refoule*, are triggered.⁵³ The applicants in this case belonged to a group of individuals who left Libya in 2009 aboard vessels intended to reach Italy. They were intercepted, transferred to Italian military ships and returned back to Libya without examination of their international protection needs. The applicants argued that their transfer to the Libyan authorities was in violation of the prohibition on *refoulement* as implied under Article 3 ECHR. The ECtHR agreed and found Italy in violation of the ECHR.

In this case, Italy was under human rights obligations because the migrants were within Italy's jurisdiction in the sense of Article 1 of the ECHR. This provision stipulates that the State Parties 'shall secure to everyone within their jurisdiction the rights and freedom defined' in the ECHR. Jurisdiction in human rights law is an initial threshold that determines whether there is a relationship between the state and certain individuals so that the state can own these individuals' obligations under the ECHR.⁵⁴ In *Hirsi Jamaa and Others v. Italy*, this relationship was established since, as mentioned above, the asylum-

⁵³ *Hirsi and Others v. Italy* [GC] App no 27765/09 (ECHR, 23 February 2012) paras 123–6 and 131.

⁵⁴ Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in L Malcom (ed) *Global Justice, State Duties* (Cambridge University Press 2013) 153, 154; Samantha Besson 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' 25 (2012) *Leiden Journal of International Law* 857.

seekers could depart from Libya and get in physical contact with the Italian authorities.

Most asylum-seekers, however, are not able to depart and reach European states. The possibilities for movement and flight have been increasingly suppressed in their inception in and by countries of origin and transit.⁵⁵ This suppression of mobility is based on cooperation between countries of destination, on the one hand, and countries of origin and transit, on the other.⁵⁶ In particular, European states have enlisted the latter group of countries to apply exit and departure controls.⁵⁷ This has been part of the external dimension of the EU migration policy,⁵⁸ which has taken various forms: assisting countries of origin and transit to apply stricter border controls,⁵⁹ including pull-backs of migrants;⁶⁰ supporting and training, for example, the Libyan coast guards and navy;⁶¹ providing border control equipment and intelligence to countries of origin and transit.⁶² The demand to contain movement comes normally as part of a larger package of financial forms of assistance and other incentives, including development aid.⁶³

When these measures are applied, there is no direct physical contact between the affected individuals, on the one hand, and the authorities and the agents of European states of intended destination, on the other. The

⁵⁵ James Hathaway, 'The Emerging Politics of *Non-Entrée*' 91 *Refugees* (1992) 40; Thomas Gammeltoft-Hansen and James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235; Mariagiulia Giuffrè and Violeta Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

⁵⁶ Paula Garcia Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' (2018) 55 *Common Market Law Review* 157, 158.

⁵⁷ Establishing a New Partnership Framework with Third Countries COM(2016) 385 final, 7 June 2016. See also Thomas Spijkerboer, 'Coloniality and Recent European Migration Case Law' in this volume.

⁵⁸ Malta Declaration 3 February 2017, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route – Consilium (europa.eu)*.

⁵⁹ Progress Report on the Partnership Framework with Third Countries COM(2017) 471, 6.

⁶⁰ The term 'pull-back' means prevention of departure. See Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27(3) *European Journal of International Law* 591.

⁶¹ Progress Report on the European Agenda on Migration COM(2017) 669 8; Communication on Establishing a New Partnership Framework with Third Countries COM(2016) 385, 15.

⁶² Article 1, Italy–Libya Memorandum Agreement, [MEMORANDUM_translation_finalversion.doc.pdf \(eumigrationlawblog.eu\)](#).

⁶³ Nora El Qadim, 'The Funding Instruments of the EU's Negotiation on External Migration Policy. Incentives for Cooperation' in S Carrera et al, *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill 2019) 341.

jurisdictional threshold under Article 1 ECHR cannot be triggered and, accordingly, the European states do not own any human rights law obligations to the affected individuals. The ultimate result is that European states exercise powers that severely affect migrants (by preventing departures, movement and containing asylum-seeker in countries with notorious human rights abuses), without any possibility for scrutiny against human rights law standards.

The above situation prompts the question as to the role of jurisdiction in human rights law. In light of the jurisdictional threshold, asylum-seekers cannot invoke their rights against countries of destination whose interests dictate the measures of containment. The link between these countries' conduct and harm sustained by individuals is broken.⁶⁴ The jurisdiction threshold conditions the existence of human rights law obligations on some form of personal control that is practically not even relevant to the substance of the harm. In sum, the jurisdictional threshold in human rights law guarantees that the two competing interests never meet each other. The interests of the individuals as protected by human rights law cannot be opposed to the interests of the states that actually exercise powers in ways that seriously harm these individuals.⁶⁵

In this way, questions of material justice are avoided.⁶⁶ States are not required to offer any forms of justification.⁶⁷ The universal does not even meet the particular. The claim for inclusion cannot even be formulated. In addition, countries of destination maintain that, in fact, the measures of containment are in the interest of the migrants since the latter are prevented from embarking on dangerous sea journeys and from becoming victims of unscrupulous human smugglers and human traffickers.⁶⁸

The extraterritorial cooperation-based migration control measures reveal a situation where migrants are met with 'purely de facto acts of border

⁶⁴ The same breakage has been sanctioned by the ECtHR in the context humanitarian visas. See Vladislava Stoyanova, 'M.N. and Others v Belgium: no ECHR Protection from *Refoulement* by Issuing Visas' (EJIL:Talk!, 2020).

⁶⁵ Vladislava Stoyanova, 'The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law' (2021) 32(3) *International Journal of Refugee Law* 403.

⁶⁶ 'Jurisdictional questions are termed as "preliminary", and considered quite literally *before* passing across the boundary of material justice.' Gregor Noll, 'Theorizing Jurisdiction' in A Orford and F Hoffmann (eds) *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 600, 601.

⁶⁷ There will be a justification, if the authorities of the destination state take into account the interests of the excluded migrants, provide reasons for the exclusion and balance the migrants' interests against the interests of the receiving state. Schotol (n 31) 17.

⁶⁸ Vladislava Stoyanova, 'The Right to Life under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) 21(3) *German Law Journal* 436.

control'.⁶⁹ Any possibility for placing these acts in a human rights law framework that implies justifications is removed and replaced with pure efficiency. Migrants are made objects of European states migration control measures to keep them out of the legal order.⁷⁰

1.4.2 Detention

How is the tension between the universal and particular addressed when asylum-seekers are fully within the destination state's physical powers? In particular, when the possibility is open for immigration detention, are justifications for this intrusive measure required?

Article 5(1)(f) of the ECHR allows for two forms of immigration detention: for preventing an unauthorized entry into the country or for taking actions with a view of deportation or extradition.⁷¹ My objective here is not to survey all applicable standards, but to outline the major principles underpinning the legal reasoning in this area.⁷² Two judgments in particular are pertinent: *Chahal v. United Kingdom* and *Saadi v. United Kingdom*. Despite the important nuances introduced after these two cases, their reasoning has not been overruled.

Saadi v. United Kingdom is a leading case on detention for preventing unauthorized entry.⁷³ The applicant was from Iraq; once arriving at Heathrow airport, he claimed asylum. He was allowed to leave the airport, but was asked to return to the airport immigration authorities, which he did on three occasions. After that, he was detained and transferred to a detention centre. As the facts revealed, the actual reason for his detention was facilitation of fast track processing of asylum claims. The ECtHR reasoned that the detention of Saadi served the purpose 'to prevent his effecting an unauthorized entry into the country'.⁷⁴ His status as an asylum-seeker was considered irrelevant in this

⁶⁹ Hans Lindahl, 'Jus includendi et excludendi: Europe and the Borders of Freedom, Security and Justice' (2005) 16(1) *King's College Law Journal* 234–47, 243.

⁷⁰ Referring to Agamben, Bas Schotel argues that in this way migrants create a state of exception. Schotel (n 31) 73. See Chapter 4 in this volume.

⁷¹ I am not focusing here on the conditions of detention, on the legality requirement and the procedure that needs to be followed so that immigration detention is in accordance with human rights law. See Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016) 285.

⁷² EU law standards are not included in the analysis. Admittedly, EU law has enhanced the standards in this area.

⁷³ *Saadi v. United Kingdom* [GC] App No 13229/03 (ECHR, 29 January 2008).

⁷⁴ *Ibid.*, para 65.

context. The Court's reasoning is based on the fallacy that he is outside the national boundaries, when in fact he had already entered and was a participant in an administrative process, that is, refugee status determination.

The Court added that detention of 'unauthorized entrants' was the 'necessary adjunct' to states' 'undeniable right to control entry of aliens'.⁷⁵ The state is not required to show that the detention of this particular individual was necessary to achieve any specific aim; rather the general and abstract aim of immigration control suffices: 'once the migrant is classed as an "unauthorised entrant", she is detainable'.⁷⁶ Not only this, but the detention was framed as being in his interest, that is, it facilitated faster processing of the asylum claim. The dissenting judges in *Saadi v. United Kingdom* strongly objected against this stance: '[...] to contend in the present case that detention is in the interests not merely of the asylum seekers themselves "but of those increasingly in the queue" is equally unacceptable. In no circumstances can the end justify the means; no person, no human being may be used as a means towards an end.'

Chahal v. United Kingdom is the leading case on pre-deportation detention.⁷⁷ The ECtHR established that Article 5(1)(f) ECHR 'does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing ...'.⁷⁸ The test of necessity was thus rejected.⁷⁹ This means that the purpose that the detention served does not have to be anything more specific than invocation of the state's general immigration control powers.

If immigration detention were to have a proper justification, it would have to serve a more concrete purpose. For example, if there is a risk that the person might abscond, the immigration detention would serve the purpose of effectuating the deportation. In this sense, there would be a link between the detention of the specific person, on the one hand, and a concrete purpose (i.e. the deportation). Instead, when immigration detention is made a 'necessary adjunct' of states' immigration control powers, the underlying justification does not have to go beyond invocation of these powers.

⁷⁵ *Ibid.*, para 64.

⁷⁶ Cathryn Costello, 'Immigration Detention: The Ground Beneath Our Feet' (2015) 68 *Current Legal Problems* 143, 151.

⁷⁷ *Chahal v. United Kingdom* [GC] App no 22414/93 (ECHR, 15 November 1996).

⁷⁸ *Ibid.*, para 112.

⁷⁹ The Court has raised other important safeguards in its case law under Article 5(1)(f) ECHR (legality, deportation proceedings pursued with 'due diligence' etc.).

1.4.3 *Family Life*

The right to family life has also provided a site of contestation between universalism versus particularism, inclusion versus exclusion. This right is protected by Article 8 of the ECHR. As the second paragraph of this provision suggests, the tension between the individual's interest to family life and state interests ought to be resolved through the application of the proportionality test.⁸⁰ This test demands an inquiry as to the aim pursued by the state with the deportation of the family member and the suitability and necessity of the measure. Already at this stage, it is clear that migrants are placed in a better position to support their claim for inclusion, in comparison with the circumstances discussed in the previous two subsections.

As to the actual performance of this inquiry, however, the following distinguishing features emerge. First, the state is not required to articulate the aim of the deportation measure beyond the general and abstract invocation of immigration control prerogatives. General deterrence against breaches of immigration legislation has been accepted in the ECtHR's reasoning as a legitimate aim.⁸¹ When such an abstract aim is accepted, it becomes difficult to meaningfully scrutinize whether and how the concrete measure of deporting the migrant (that will lead to disruption of his or her family life) is suitable and necessary. The aim of immigration control pursued by the state is not subjected to any rational or factual scrutiny. No links are sought between the measure (i.e. the deportation of the particular migrant who might be, in fact, economically active and supporting his or her family) and any more concretely formulated objectives. Immigration control is accepted as the objective in itself.

In addition, the Court has framed the preservation of migrants' interests as an exception by applying the 'most exceptional circumstances' test. This implies that if there is a possibility for the family to move to another country, it is likely that no violation of Article 8 will be found. Disturbingly, the alternative of moving to another country needs to be only possible in theory,

⁸⁰ Article 8 has produced a rich body of cases in the area of migration and it is beyond the scope of this paper to investigate all the nuances. I will focus only on cases involving migrants (not accused of any criminal offences), who try to prevent their removal when they are already in the territory of the host state where they have a family.

⁸¹ *Nunez v. Norway* App no 55597/09 (ECHR, 29 August 2011) para 71; *Antwi and Others v. Norway* App no 26940/10 (ECtHR, 14 February 2012) para 90; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (2008) 46 EHRR 23, para 79.

and is not closely scrutinized as to its practical difficulties.⁸² The assessment of the alternative by the Court is thus often ‘reality-disconnected’.⁸³ The option of moving to another country might imply severe costs for the individual; however, since ‘Article 8 does not guarantee a right to choose the most suitable place to develop family life’,⁸⁴ an alternative that is less protective for the individual is accepted in the Court’s reasoning.

In sum, the Court invokes the proportionality test when it adjudicates the rights of migrants to family life. This implies that migrants are offered justifications for measures that affect them. However, the space for these justifications is very narrow and the argumentative framework is biased in favour of exclusion.

1.4.4 *From Renegotiation to Takeover*

The three sites of contestation examined above show a continuum from a complete absence of a requirement to offer a justification to a weakened requirement for a justification for measures affecting migrants. These sites expose degrees of exceptionalism when dealing with migrants: from total exclusion from the legal protection offered by human rights law (in the context of admission), to inclusion that is subordinated to the objectives of effective migration control (in the context of detention) and, finally, to inclusion but only in exceptional circumstances (in the context of family life). As Benhabib suggests,⁸⁵ there might be some scope for challenging this exclusion and renegotiating the balance. However, the balance is tipped in favour of statism and exclusion. How does the rise of populism impact on this (im)balance? In light of the populist trends, the concern emerges that the problem will no longer be framed as one of balancing at all, since the exclusion side might completely take over.

The examples described above to a certain degree also reflect the ‘hard on the outside – soft on the inside’ approach.⁸⁶ In particular, issues of admission

⁸² Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: ‘Living Instrument’ or Extinguished Sovereignty?* (Hart Publishing 2016).

⁸³ Dissent by Judge Kovler in *Omoregie v. Norway* App no 265/07 (ECtHR, 31 July 2008). See also *Useinov v. the Netherlands* App no 61292/00 (ECtHR, 11 April 2006), where the Court invoked the standard of ‘virtually impossible’. In this way, the Court has alluded that any contacts between the applicant and his children after his deportation will have to be ‘virtually impossible’ so that the deportation could be averted.

⁸⁴ *Ahmut v. the Netherlands* App no 21702/93 (ECHR, 28 November 1993) para 71.

⁸⁵ See Section 1.3.

⁸⁶ Linda Bosniak, *The Citizen and the Alien. Dilemmas of Contemporary Membership* (Princeton University Press 2008). It is questionable to what extent the ECtHR’s reasoning under Article

are within the sovereign sphere of destination states and excluded from scrutiny, while the treatment of migrants once on the inside in terms of migrants' detainability and family life, can be to a certain extent scrutinized. A version of the 'hard on the outside – soft on the inside' approach has also been proposed as a solution to populism: by strictly securing the external borders, it might be easier to gain popular support for more liberal policies in relation to migrants that are already on the territory of the state.⁸⁷ However, as Bosniak acknowledges, the inside and the outside are intertwined since 'national concerns with protecting the boundaries of territory and membership' might 'structure the status of noncitizens currently residing in the national territory and participating in national life'.⁸⁸ This type of intertwinement is evident in how the ECtHR adjudicates migrants' right to liberty and family life: states' immigration powers to control the outside boundaries have a serious impact on the rights of migrants who are already inside.

Crucially, however, the intertwinement between the inside and the outside can be looked at from a different perspective. The inside then will refer not only to the status of migrants, but to the status of all diverse groups within the national community. Concerns with protecting the boundaries of membership can then structure and affect the position of everybody. The rise of populism has exposed this additional dimension of the intertwinement, to which we now turn.

1.5 'THEY' DEFINES 'US'

Dora Kostakopoulou's work is the starting point for explaining this intertwinement. She has argued that restrictive immigration policies have an impact on the 'political community's scale of values'.⁸⁹ The way we treat migrants has a profound effect upon the principles on which European polities 'profess to be based, and upon the identity of their citizens. After all, admission and belonging are issues relating to "what kind of polity we wish to have" and

8 in migration-related cases, can be described as 'soft' given that the protection afforded is limited.

⁸⁷ 'all legal residence of a country be treated the same irrespective of their color and creed' but that 'secure border can help win popular support for more generous immigration policies.' Yascha Mounk, *The People versus Democracy. Why our Freedom Is in Danger and How to Save It?* (Harvard University Press 2018) 214.

⁸⁸ Bosniak (n 86) 38.

⁸⁹ Dora Kostakopoulou, 'Is There an Alternative to "Schengenland"?' (1998) *XVLI Political Studies* 886, 898. She also adds 'Critical exchanges and collisions enhance the possibility for reflective self-awareness by showing the limits and relativity of one's political culture'.

“who we choose to become” – not simple correlatives of the state’s power to exclude.⁹⁰ The way in which immigration control powers are exercised, including whether and what kind of justifications are offered for substantiating these powers, can compromise the internal process of democracy: ‘[i]mmigration is inextricably linked with how political communities respond to diversity itself.’⁹¹

Migrants are perceived as a danger to the order, welfare, culture and identity of the host community ‘only in relation to certain ideological conceptions as to what constitutes a member.’⁹² Anybody who does not fit within this fixed conception of the identity that a member should have, is at risk of being silenced by a community that does not anymore value diversity. It follows that ‘the way we relate to Other becomes part of our identity.’⁹³ If this way is characterized by pure effectiveness, objectification and exceptionalism (as suggested in Section 1.4), ‘this cannot but affect citizens’ identity negatively.’⁹⁴ Accordingly, the pursuit of illiberal admission policies, fosters ‘an ugly identity’ and places ‘democratic achievements in jeopardy.’⁹⁵ It follows that decisions about external membership (i.e. migrants) and internal membership (various groups within the host society that might have different religious or ethnic backgrounds, different sexual orientation, etc.) are interrelated.⁹⁶

Internal membership decisions that imply drawing distinctions between different groups within the society, are an object of constraints. Such constraints are reflected in the right to non-discrimination that demands *inter alia* that any distinctions are proportionate and justifiable. If not, they might constitute prohibited forms of discrimination. If there are no similar constraints in how migrants are treated, this ‘cannot but compromise the democratic culture of communities and the principles upon which they are founded.’⁹⁷

⁹⁰ Kostakopoulou (n 89) 887. See also Hans Lindahl, ‘Dialectic and Revolution: Confronting Kelsen and Gadamer on Legal Interpretation’ (2003) 24 *Cardozo Law Review* 785: ‘[...] no legal community can call itself a “we” other than in relation to a “they”’.

⁹¹ Kostakopoulou (n 89) 897–8.

⁹² Kostakopoulou (n 89) 897–8.

⁹³ Kostakopoulou (n 89) 900.

⁹⁴ Kostakopoulou (n 89) 900.

⁹⁵ Kostakopoulou (n 89) 900.

⁹⁶ Dora Kostakopoulou, ‘The Area of Freedom, Security and Justice and the Political Morality of Migration and Integration’ in Hans Lindahl (ed) *A Right to Inclusion and Exclusion?: Normative Fault Lines of the EU’s Area of Freedom, Security and Justice* (Hart Publishing 2009) 158, 200.

⁹⁷ Kostakopoulou (n 96) 201.

Populists who perceive membership as static and the polity as culturally homogeneous, not only tip the balance as to how migrants are treated, but also compromise more generally ‘democratic ideals by perpetuating fictions of internal homogeneity and promoting nativist narratives of belonging.’⁹⁸ The constructions of ‘the other’ and the treatment of non-members are ‘closely linked to internal definitions of membership, the quality of community relationships and the recognition accorded to diversity.’⁹⁹ In other words, the binary opposition between ‘us’ and ‘them’ infects and spreads to the inside of the community leading to the establishment of other binaries.

This compromises the values of the community because ‘identitarian assumptions’¹⁰⁰ about who belongs to the ‘the pure people’ quickly lead to the targeting of other groups who do not fit within these assumptions. When the boundaries of the community are aligned along ethnic, nationalist and nativists homogeneous lines, minority groups, women, LGBT people, people of colour, people with disabilities, and other groups that do not fit or have different opinions, find themselves in a precarious state. Pluralism is undermined and the multiple identifications and identities of individuals are ignored.¹⁰¹ Any difference can become a target.¹⁰² A useful illustration here concerns the rights of women that have also been an object of attack by populist government based on nativist and identitarian arguments.¹⁰³ As a consequence, anti-immigration policies serve wider regressive agendas.

⁹⁸ Kostakopoulou (n 96)202.

⁹⁹ Kostakopoulou (n 96) 202.

¹⁰⁰ Seyla Benhabib, ‘The Slippery Slope of Statist Cosmopolitanism’ in A Etinson (ed) *Human Rights: Moral or Political?* (Oxford University Press 2018) 490, 492.

¹⁰¹ On the multiple identification and identities of citizens, see Dora Kastakopoulou, ‘Towards a Theory of Constructive Citizenship in Europe’ (1996) 4(4) *Journal of Political Philosophy* 337, 343. She explains that a citizen can be a black citizen, or a gay citizen, or an old age pensioner citizen and there are multiple and overlapping communities that a citizen can belong to at various levels and in relation to his or her different identities.

¹⁰² See, for example, Christoffer Kølvraa and Bernhard Forchtner, ‘Cultural Imaginaries of the Extreme Right’ (2019) 53(3) *Patterns of Prejudice* 227, where the ways through which populist parties present ‘an “ideal extreme-right subject” with whom comrades and potential followers might identify’, are examined.

¹⁰³ Katarzyna Sękowska-Kozłowska, ‘The Istanbul Convention in Poland: Between the “War on Gender” and Legal Reform’, in J Niemi, L Peroni and V Stoyanova (eds) *International Law and Violence Against Women: Europe and the Istanbul Convention* (Routledge, 2020); see also D Francesca Haynes, ‘Sacrificing Women and Immigrants on the Altar of Regressive Politics’ (2019) 41(4) *Human Rights Quarterly* 777, 795: ‘[...] nativism is both blatantly racist, and, though perhaps more subtly, gender oppressive. [...] nativists of all shades share a penchant for limiting the freedoms of women, perhaps because women whose freedoms are limited can be controlled. If women are controlled, then ultimately so is reproduction.’ In this way, Haynes illustrates the links between restrictive immigration policies and restrictions upon the rights of

1.6 CONCLUSION

Migration law scholars have for a long time discussed the tendency towards more restrictive and more oppressive measures against migrants. In their reaction to populism two aspects can be identified. First, migration law scholars have in detail demonstrated that the rights of migrants have been shaped by statism and exclusion. In this sense, the standards applied to detention of migrants or to their right to family life, seriously diverge from the standards applied more generally to situations where migration is not an issue. As a consequence, migration law scholars have maintained that any populist attacks against human rights law or institutions mandated to apply it, like the ECtHR, have little basis since human rights law accommodates states' migration control interests.¹⁰⁴

At the same time, migration law scholars perceive the danger of populism since often there is a delicate balance to be made and under the influence of populism, states might want to demonstrate strong control over migration to the public, which can lead to expansion of repressive measures.¹⁰⁵ While migration law and the rights of migrants have always been in the realm of the exceptional in liberal democracies, populism can lead to further expansion of this space of exceptionality. As a consequence, the risk arises that migration control interests will not simply be accommodated in a balanced way, but rather the balance will be tipped, and exclusion will reign.

Constitutional law scholars have started to understand and explain populism and its dangers since relatively recently. Restrictions upon the rights of migrants are mentioned in this growing body of scholarship. However, the main focus of concern has been elsewhere (attacks on courts, rule of law, tactics of decision-making, etc.). As a consequence, there has not been much sustained dialogue between the fields of migration law and constitutional law. Treatment of migrants has received comparatively little attention apart from immigration and asylum specialists, the reason being the acceptance that liberal democracies are in principle entitled to impose restrictions and this in itself does not affect their constitutional nature.

women. See also Nials Spierings, Andrej Zaslove, Liza M Mügge and Sarah L de Lange, 'Gender and Populist Radical-Right Politics' (2015) 49(1–2) *Patterns of Prejudice* 3.

¹⁰⁴ Marie-Benedicte Dembour, *When Humans Become Migrants* (Oxford University Press 2015); Vladislava Stoyanova, 'Populism, Exceptionality, and the Right to Family Life of Migrants under the European Convention on Human Rights' (2018) 10(2) *European Journal of Legal Studies* 83.

¹⁰⁵ See for example, Cathryn Costello, 'Immigration Detention: The Grounds Beneath our Feet' (2015) 68(1) *Current Legal Problems* 143, 148.

This chapter aims to demonstrate that a conversation between the two fields is useful for better understanding the challenges posed by populism. This conversation exposes the intertwinement between the internal and the external, the inside and the outside, between the question how inclusive or exclusive the national community should be to outsiders and the question about equality more generally among different groups within the community. By furthering the conversation, the general dangers of subordination, undermining of equality and decline of diversity emerge. In other words, by examining how the tension between inclusion and exclusion of migrants is addressed, we can also understand subordination more generally. The chapters in this volume continue this conversation by providing concrete examples of how the restrictions upon migrants' rights have wider repercussions for states' constitutional orders and values.