

## Territoriality, Democracy, and Borders: A Retrospective on the “Refugee Crisis”

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### Abstract

The so-called refugee crisis has triggered a broad and divisive political discussion about overrun national borders, crumbling state sovereignty, and the disintegration of democratic governance resulting from an alleged disregard for the law by the German Federal Government. Many critics have advanced arguments that are nothing more than hot-tempered polemics based on blunt legal or theoretical misconceptions. Nonetheless, it is obvious that external boundaries played—and will continue to play—a pivotal role in managing the inflow of migrants into the European Union, which is surrounded by areas of political instability, authoritarianism, poverty, civil war, and religious extremism. This Article addresses the function of territorial borders for a liberal democracy from the perspective of constitutional theory. It demonstrates that effectively controlled outer boundaries are an adequate democratic answer to an instable, fragmented, and fragile world, while avoiding the pitfalls of defining political and social membership by substantive and inescapable criteria, such as ethnicity.

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### A. Territoriality as a Modern Basis for Governance

The modern state rests on territoriality, which is not only a geographic description or a demarcation of power but also a political tool to shape a political community. Territoriality is a form of behavior that uses a bounded space, a territory, as the instrument for securing a particular outcome. By controlling access to a territory through boundary restrictions, the content of a territory can be manipulated and its character designed.<sup>1</sup>

The differentiation of public institutions administering sovereign functions accompanies the establishment of territorial jurisdiction. Territoriality, gradually, overcame ancient systems of personal loyalties, substituting these systems through legislation emanating from territorial sovereignty. Territoriality imprinted itself on the institutional design of the modern state and its jurisdiction. Territoriality enabled the states to base sovereignty on secular foundations,<sup>2</sup> modernize institutions, and establish bounded legal orders under which ideas of freedom started to thrive—no liberty without territoriality.

Admittedly, democracy's source of the legitimization of power—the people—remains a community connected by personal attribution such as nationality or citizenship. Nonetheless, democratic communities have always built effective self-government on bounded soil; members of democratic communities established the sufficient communal cohesion on neatly arranged territorial foundations. In fact, the first modern democracies inherited the concept of the territorial state from the absolutistic centralization of power of the modern period in Europe. Even in the present day, liberal democracy and the rule of law depend on institutions that effectively make rules and administer justice—institutions that work almost exclusively in territorially bounded surroundings. Territoriality enables the effective enforcement of the law and the protection of freedom rights. Democratic accountability and public control require relatively stable institutional settings, which have only been established within territorial borders. As a result, territorial boundaries are a product of modernization; they define national jurisdictions and limit the sphere of state competences. As such, a dissolution of boundaries would tend to overextend state power at the expense of fellow communities.<sup>3</sup>

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<sup>1</sup> Peter J. Taylor, *The State as Container: Territoriality in the Modern World-System*, 18 *PROGRESS IN HUM. GEOGRAPHY* 151 (1994).

<sup>2</sup> See Klaus Ferdinand Gärditz, *Säkularität und Verfassung*, in *VERFASSUNGSTHEORIE* § 5, pp. 3–4 (Otto Depenheuer & Christoph Grabenwarter eds., 2010).

<sup>3</sup> See for the originally imperialist roots of legal extraterritoriality TURAN KAYAOGU, *LEGAL IMPERIALISM: SOVEREIGNTY AND EXTRATERRITORIALITY IN JAPAN, THE OTTOMAN EMPIRE, AND CHINA* (2014); CHEN LI, *CHINESE LAW IN IMPERIAL EYES: SOVEREIGNTY, JUSTICE, AND TRANSCULTURAL POLITICS* 29–68 (2015); TEEMU RUSKOLA, *LEGAL ORIENTALISM* (2013). Another concept of aggressive hyper-territorialisation is the wider sphere of influence (*Großraumtheorie*) presented by Carl

### *I. Borders: Between Inclusion and Exclusion*

Borders are an instrument of exclusion. They exclude foreign jurisdictions and secure the state monopoly through the legitimate use of force. Specifically, borders legally enable states to control the movement of people and goods. A state can prohibit from entering its territory foreigners who lack appropriate authorization and legalize or illegalize their residency status. Nevertheless, these exclusionary mechanisms mostly blind us to another remarkable role territorial borders play within the architecture of modern democracies: Territorial borders are also an instrument of inclusion.<sup>4</sup> A liberal democracy does not define citizenship by substantial criteria—like ethnicity, blood ties, culture, or political alignment—but by the formal attribution of nationality. Although there are different principles on how to acquire citizenship—like the competing and usually blended concepts of *ius soli* and *ius sanguinis*, or divergent criteria of naturalization—any person who has acquired citizenship is a full member of the democratic body politic, regardless of his or her parentage or cultural affinity. The legal and social role of substantive criteria of personal belonging gradually disappears; an obvious propinquity to racism discredits ethnicity as a legal criterion of membership in a political community. Culture is still an important factor on which to build an organized community, but it gradually dissolves, as pluralism and individual rights warrant the choice of one's own cultural alignment. Common language, duration of residence, and obedience to the law remain the only factors of substantial importance, which are acceptable as an imperative legal requirement regulating the access to citizenship. The strict formality of citizenship as a concept of legal attribution is a central pillar on which a liberal-pluralistic legal order rests.

### *II. Territoriality as a Political and Social Anchor*

Nonetheless, every society needs some anchorage of political integration. The less important substantive criteria of belonging become, the more important concepts of territorial integration grow. An immigration country, such as Germany, can no longer complacently rely upon traditional models of common culture and ancestry. It must permanently recreate a community sentiment on a territorial basis. As a consequence of modernization, legal instruments change the focus from a personal to a territorial attribution of rights: Traditional nationality laws based on an *ius sanguinis* model are complemented by *ius soli* citizenship and facilitated naturalization.<sup>5</sup> Today, most legal

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Schmitt, *VÖLKERRECHTLICHE GROßRAUMORDNUNG MIT INTERVENTIONSVERBOT FÜR RAUMFREMDE MÄCHTE* (3d ed. 1941). In fact, this is a concept aimed at overcoming of territorial jurisdictions and establishing a hierarchy of powers.

<sup>4</sup> Klaus Ferdinand Gärditz, *Die Ordnungsfunktion der Staatsgrenze: Demokratizität, Liberalität und Territorialität im Kontext*, in *DER STAAT IN DER FLÜCHTLINGSKRISE. ZWISCHEN GUTEM WILLEN UND GELTENDEM RECHT* 105, 107–08 (Otto Depenheuer & Christoph Grabenwarter eds., 2016).

<sup>5</sup> Acquisition of nationality by *ius sanguinis* is—despite common contention—not an expression of ethnicity but of parental continuity. The German Federal Constitutional Court convincingly argued that the attribution of nationality

relations—from taxation to social welfare benefits—are based on residency instead of nationality.<sup>6</sup> Thus, territorial bonds become more important as mobility across boundaries increases. Territorial integration helps the individual escape formerly inescapable ties of parentage and ethnicity.<sup>7</sup>

Against this background, territorial borders are not just “a spatial confirmation of a pre-defined ontology of the social.”<sup>8</sup> To the contrary: They are a political tool to mold a society by open and malleable democratic rule-making. Democratic legislation’s responsiveness is adaptable to social change yet retains sufficient inertia to integrate softly and iteratively into grown social structures, thus absorbing the impact of rapid globalized change. Without territorial borders, the task to moderate social conflicts of modern societies in a pluralized and globalized world would just overburden any larger political community. Territorial borders and the effective control of those borders, then, are a central element to keep

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by birth is necessary to protect the unity of the family, which is protected by Article 6 (1) Grundgesetz, and would be seriously hampered if parents and children did not share at least one nationality. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1 BvL 22/71, 21/72, May 5, 2974, 1 BvL 22/71, 21/72, in 37 BVERFGE 217, 247; Peter Michael Huber & Kirsten Butzke, *Das neue Staatsangehörigkeitsrecht und sein verfassungsrechtliches Fundament*, 52 NEUE JURISTISCHE WOCHENSCHRIFT 2769, 2771 (1999); BURKHARDT ZIEMSKIE DIE DEUTSCHE STAATSANGEHÖRIGKEIT NACH DEM GRUNDGESETZ 289 (1995) Anyone can hand down one’s own nationality to her/his descendants irrespective of origin, culture, religion or ethnicity. E. g., if a Pakistani citizen is naturalized in Germany this week and gives birth to a child next week, under the current *ius sanguinis* (Sec. 4 German Citizenship Act) model the child would be German without any difference in right and status. It is a different discussion whether the dichotomy of social and economic inclusion and democratic-political exclusion should be overcome by disconnecting citizenship from nationality or encouraging naturalization. See RUTH RUBIO-MARIN, IMMIGRATION AS A DEMOCRATIC CHALLENGE 99–129 (2000).

<sup>6</sup> Klaus Ferdinand Gärditz, *Der Bürgerstatus im Licht von Migration und europäischer Integration*, in: *Repräsentative Demokratie in der Krise?*, in 72 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER 49, 60–89 (2013).

<sup>7</sup> Of course, there have always been attempts to abuse the concept of territoriality to redraw territorial boundaries by tracing ethnic settlement structures to exclude members of purportedly ‘alien’ ethnicity, and, thus, implicitly defining borders on racist concepts. Cf. DEBORAH A. ROSEN, BORDER LAW - THE FIRST SEMINOLE WAR AND AMERICAN NATIONHOOD 158–84 (2015). The bloody history of the secession wars on former Yugoslavian soil are the latest example of ethnic re-territorialisation. For the intricate blending of Montesquieu’s theory of the particularity of legal culture and racist concepts of supremacy, see JEDIDIAH JOSEPH KRONCKE, THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW 40–41 (2016). For the discriminating territoriality within the British Empire, see DIETER GOSEWINKEL, SCHUTZ UND FREIHEIT? STAATSBÜRGERSCHAFT IN EUROPA IM 20. UND 21. JAHRHUNDERT 83–97, 637 (2016). In contrast, modern models of “territorial pluralism” try to federalize conflicts in territorially concentrated communities. Cf. John McGarry, Brendan O’Leary & Richard Simeon, *Integration or Accommodation? The Enduring Debate in Conflict Regulation*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 41, 63–67 (2008, Sujit Choudhry, ed.).

<sup>8</sup> Paolo Novak, *Back to Borders*, in CRITICAL SOCIOLOGY (forthcoming 2016).

complexity sufficiently confined,<sup>9</sup> conflicts manageable and democratically decidable,<sup>10</sup> and a society adaptable to the gradual modification of the population by migration.

A particular national identity can also be based on political principles and institutions<sup>11</sup> as the jurisprudence of the German Federal Constitutional Court<sup>12</sup> strongly demonstrates. Territoriality enables democratic communities to form a political identity based on residency, on formal citizenship, and on common interests defined by “soil” instead of “blood.” Territorial borders secure an imminent asset of modern citizenship: Political stability and “the entitlement possessed by each individual to enjoy secure legal standing in the home community to which she belongs as an equal and in which she has title as full participant in the governance of the commonwealth.”<sup>13</sup> The formality of both territoriality and citizenship encourage political integration on a pluralist basis while satisfying the need for belonging to a community as a political and social “home.”<sup>14</sup> A realist approach to human rights asserts that the effectiveness of human rights is dependent on authority and power, which only can only be provided by a legal order based on territorial sovereignty.<sup>15</sup> Instead, a fluid and borderless community of temporal sojourn would undo democratic self-determination and, finally, bereave the individuals of their opportunity to settle on legally and socially solid ground; overstretched with internal social conflicts, it would finally fail to offer the protection desired by natives and migrants.

### *III. The EU Area of Freedom, Security, and Justice: A Macro-Territorial Scheme*

One of the central policies of the European Union is to establish an *area* of freedom, security, and justice, as stated in the fifth title of the Treaty on the Functioning of the European Union. The term *area* emphasizes a notion of space and distinct boundaries. The European Union and, in particular, the Schengen system have not dissolved the territorial boundaries as the

<sup>9</sup> Of course, oversized states need additional mechanisms to enable democratic ruling and prevent drifting off into tyranny. Federalism can be a solution, if the right sentiment is met. Yet, external boundaries remain a prerequisite of any internal order.

<sup>10</sup> Compare ALEXANDER SOMEK, *THE COSMOPOLITAN CONSTITUTION* 215 (2014). He argues that cosmopolitan complexity furthers tendencies to strengthen the executive branch, which can use superior knowledge and stave off the public by pointing to the inherent complexity of the subject matter.

<sup>11</sup> David Miller, *ON NATIONALITY* 179–80 (1995).

<sup>12</sup> In particular Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 30, 2009, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09, in 123 BVERFGE 267, 343–47, 350, 353–55, 381 (“Lissabon”).

<sup>13</sup> AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* 46 (2009).

<sup>14</sup> See, e.g., Hannelore Burger, *Passwesen und Staatsbürgerschaft*, in *GRENZE UND STAAT* 1, 91 (Waltraud Heindl & Edith Saurer eds., 2000).

<sup>15</sup> See, e.g., Nehal Bhuta, *The Frontiers of Extraterritoriality - Human Rights Law as Global Law*, in *THE FRONTIERS OF HUMAN RIGHTS* 1, 2–9 (Nehal Bhuta ed., 2016).

basic structure on which sovereign powers are exercised. Instead, the European Union pursues a macro-territorial approach, which left political demarcations of national jurisdiction untouched and relocated border control to the rim of the member states.<sup>16</sup> An outer border of the European Union emerged as the national borders became—within the Schengen system—relieved from a tight control to enable a free and unhindered movement of goods, services, and persons *within* the Union's territory. The European Union still has an outside and an inside demarcated by territorial boundaries. The outer territorialization is a vital prerequisite of the inner depletion of border control and, thus, a core element of the intra-European model of freedom. Political scientists have qualified this phenomenon as “post-sovereign territoriality”<sup>17</sup>—and not post-territorial sovereignty.

#### *IV. Territorial Boundaries and Inclusion*

Without boundaries there is neither hierarchic ruling nor effective enforcement of law, which are both supporting pillars of the modern and institutionally differentiated state.<sup>18</sup> Territoriality remains an indispensable precondition of democratic ruling, too. From this perspective, territoriality is a lubricant of modernization for bounded political communities. Thus, the value of borders is currently undiminished. The maintenance and control of territorial borders remains vital, in particular, to democratic societies of migration countries like Germany. As a result, social and political integration today means inclusion by territorialization. Without the formal criterion of bordered territoriality, political integration would switch to substantive approaches—like ancestry, culture, or economic utility—which are far less liberal and possibly inescapable with regard to ethnicity. A modern concept of “progressive inclusion,” which tries to include foreigners in a body politic iteratively by granting a legal status with certain participatory rights before bestowing formal citizenship,<sup>19</sup> strongly depends on territoriality as a firm anchor for an inclusive political community and inclusive action by state organs.

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<sup>16</sup> Lena Laube, *Postsouveräne Räume: Makroterritorien und die Exterritorialisierung der europäischen Grenzpolitik*, in *POSTSOVERÄNE TERRITORIALITÄT – DIE EUROPÄISCHE UNION UND IHR RAUM* 169, 171–81 (Ulrike Jureit & Nikola Tietze eds., 2015); STEFFEN MAU, HEIKE BRABANDT, LENA LAUBE & CHRISTOF ROOS, *LIBERAL STATES AND THE FREEDOM OF MOVEMENT: SELECTIVE BORDERS, UNEQUAL MOBILITY* 88–120 (2012).

<sup>17</sup> Ulrike Jureit & Nikola Tietze, *Postsouveräne Territorialität*, in *POSTSOVERÄNE TERRITORIALITÄT – DIE EUROPÄISCHE UNION UND IHR RAUM* 7–24 (Ulrike Jureit & Nikola Tietze eds. 2015) (providing with further references).

<sup>18</sup> H. PATRICK GLENN, *THE COSMOPOLITAN STATE* 84–85 (2013).

<sup>19</sup> Lucidly developed by ANUSCHEH FARAHAT, *PROGRESSIVE INKLUSION* 141 et seq. (2014). See also the proposals by HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 189–200 (2007).

## B. The Territorial Concept of Refugee Protection

Giorgio Agamben sees the refugee as the new subject of revolutionary upheaval, toppling the old order of nation and soil: “Inasmuch as the refugee, an apparently marginal figure, unhinges the old trinity of state-nation-territory,” she “deserves instead to be regarded as the central figure of our political history.”<sup>20</sup> It is rather doubtful whether this imaginary role correctly reflects the legal function of refugee protection.

First, in modern societies shaped by tradition and inherited culture as well as by immigration, the idea of the nation state—an apparently Eurocentric concept with rather limited charisma on a global scale<sup>21</sup>—is slowly fading out.<sup>22</sup> Traditional foundations of nationhood were substantive concepts like common ethnicity, language, and culture. Today, only a common language—and thus a more or less formal criterion—remains an indispensable presupposition for political participation and social integration. In a pluralistic society, the cultural basis on which all have to agree is the democratic legislation.<sup>23</sup> Thus, modern constitutionalism rests upon state institutions of governance and territory, but lacks a necessary nexus with ideas of substantive nationhood, which is apparently too vague for a legal utilization and might, at best, serve as a sociological description. Admittedly, culture, language, and common history as focal points of common identity can still unfold potent momentum to hold a society together. The historical developments are rather ambiguous, dialectic, and disparate.<sup>24</sup> Nevertheless, from a legal perspective, other parameters—like the joint enterprise to unite under democratic legislation and a constitutional order that guarantees individual rights gradually—albeit not completely<sup>25</sup>—supersede those traditional foundations of nation building.

Second, asylum and refugee protection are territorial concepts at their core. Asylum is not an instrument to tear down border fences. On the contrary, the refugee seeks refuge behind a border, which promises safety and protection from persecution. The crucial prohibition of expulsion or return (“refoulement”) in Article 33 of the Refugee Convention (1951) directly

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<sup>20</sup> GIORGIO AGAMBEN, *MEANS WITHOUT END: NOTES ON POLITICS* 21 (2000).

<sup>21</sup> And where the model was and is imitated, the consequences are often disturbing.

<sup>22</sup> Attempts to imitate 19th century European nationalism in Asia follow different paths and ideologies, in particular, in culturally, ethnically, and linguistically diversified countries like India and China.

<sup>23</sup> Uwe Volkmann, *Grund und Grenzen der Toleranz*, in 39 *DER STAAT* 25, 352 (2000).

<sup>24</sup> It is still too early to say whether the disturbing revival of cloudy nationalism and the political pressure of right wing populism in many European countries—in particular, as a reaction to the growing numbers of refugees—poses a countermovement that has enough impetus to influence democratic practices and legislation.

<sup>25</sup> See Sujit Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, in *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION?* 3, 30–31 (Sujit Choudhry ed., 2008); See MILLER, *supra* note 11, p. 81–195.

expresses the territorial concept of refugee protection. Pursuant to this provision, no contracting State shall expel or return a refugee “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” The Convention addresses effectively controlled boundaries not merely as an obstacle to overcome but also as an effectively guarded shelter. There is no safe harbor without strong state institutions wielding effective authority emanating from territorial sovereignty. A failed state cannot play the Hobbesian role as protector imposed on any member state by the refugee law.<sup>26</sup> Moreover, a state that opens its borders to everyone also fails to provide the promised protection by allowing entry to oppressors and victims alike. Therefore, the legal institutions of refugee protection prove to be rather traditionalistic, thoroughly relying on territorial borders and state authority. From this perspective, dark prophecies that the refugee is a harbinger of a “radical crisis” bringing the traditional principles of statehood to collapse<sup>27</sup> seem to be misguided.

### C. The Democratic Challenge of Controlling Residence and Borders

Migrants—whether they are refugees in a legal sense<sup>28</sup>—are not just provisional visitors; they have come to stay for good. It is true, however, that neither national nor international law recognizes a right to migrate or to choose one’s residence abroad. Access to national soil, in principle, remains within the political discretion of each country. “The central purpose of border control today is to distinguish between desired flows of populations and undesired.”<sup>29</sup> Even the international law of refugee protection is not concerned with immigration, but offers merely an interim protection against expulsion or return. Nonetheless, from a practical point of view, most migrants will stay and become permanent residents in Germany—or another European country—even those who are not legally entitled to asylum. A majority of migrants arriving in Europe, including those who are denied refugee status, will likely find ways to avoid deportation. For example, most migrants from African countries lack valid documents and their presumed home states usually do not cooperate in retrieving or reproducing lost documents necessary to determine personal

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<sup>26</sup> Gosewinkel, *supra* note 7, at 636–38. The traditional correlation of protection and authority is clearly expressed in Article 1 A (2) of the Refugee Convention, which defines a refugee, inter alia, as a person that “is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.” G.A. Res. 429(V) Convention Relating to the status of Refugees (Dec. 14, 1951).

<sup>27</sup> See AGAMEN, *supra* note 20, at 22.

<sup>28</sup> These categorical legal—not necessarily moral—differences are often blurred in public discourse when all foreigners are labelled “refugee.” Critical remarks by Christian Hillgruber, *Flüchtlingsschutz oder Arbeitsmigration—Über die Notwendigkeit und die Konsequenzen einer Unterscheidung*, in DER STAAT IN DER FLÜCHTLINGSKRISE. ZWISCHEN GUTEM WILLEN UND GELTENDEM RECHT 185–94 (Otto Depenheuer & Christoph Grabenwarter eds., 2016).

<sup>29</sup> MAU ET AL., *supra* note 16, at 5.



identity.<sup>30</sup> Often even the nationality of illegal migrants cannot be determined with sufficient legal certainty. Some migrants suffer from diseases that their home states cannot adequately treat; some migrants are minors unaccompanied by their parents. They all acquire interim protection from deportation.<sup>31</sup> Thus, deportation is legally difficult, morally unsolicited, or simply impracticable. The longer the migrants stay, the less probable deportation becomes, as modern legislation reasonably offers ways to legalize resident status. More and more, these “strangers” become part of a political society. It is true that the “exclusion of those who are regularly subject to the polity’s coercive power runs counter to the ideal of democratic self-governance as co-authorship of the polity’s laws by those who are subject to its rule.”<sup>32</sup> As it would be democratically intolerable to demand obedience of the law but unreasonably deny access to democratic participation, long-term residents have, at least in principle, a right to citizenship<sup>33</sup> through the process of naturalization. The access to citizenship turns into an individual legal entitlement, following the path of juridification,<sup>34</sup> which is the strongest tool to demystify and rationalize categories of belonging.

### *I. Migrants as Future Citizens: The Democratic Impact of the “Refugee Crisis”*

Perceived as the future fellow-citizen, granting a refugee entry at the border will have democratic repercussions because it raises the question of future membership in a political community. Democracy as a form of governance points to the people as its source of legitimacy. Based on personal attribution, democracy is inherently a “bounded system of membership.”<sup>35</sup> The definition of membership in a political community has always been a

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<sup>30</sup> See, e.g., Landtag Nordrhein-Westfalen, Official Journal (Drucksache) 16/12588; BMI-Fact Sheet zur Durchsetzung der Ausreisepflicht (Abschiebung), <https://www.bmi.bund.de/SharedDocs/Kurzmeldungen/DE/2016/07/factsheet-abschiebungen.html> (11.11.2016); Eckart Lohse, Ablehnen ist einfacher als abschieben, <http://www.faz.net/aktuell/politik/fluechtlingskrise/fluechtlingskrise-ablehnen-ist-einfacher-als-abschieben-13909297.html> (11.11.2016).

<sup>31</sup> Sec. 60(7), Sec. 60a Residence Act [Aufenthaltsgesetz].

<sup>32</sup> SHACHAR, *supra* note 13, at 137.

<sup>33</sup> Ulrich Becker & Jens Kersten, *Demokratie als optimistische Staatsform*, in 35 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 580, 584 (2016); Otto Depenheuer, *Zwischen staatlicher Souveränität und Menschenrecht. Grundfragen staatlicher Einwanderungspolitik*, in Festschrift für Georg Brunner 46, 57, 59 (2001); Gärditz, *supra* note 6, at 121–22; Thomas Groß, *Postnationale Demokratie—Gibt es ein Menschenrecht auf transnationale Selbstbestimmung?*, in 2 RECHTSWISSENSCHAFT 125, 139–42 (2011).

<sup>34</sup> See, e.g., GOSEWINKEL, *supra* note 7, at 631; David Miller, *Immigrants, Nations, and Citizenship*, in 16 J. POL. PHIL. 371–90 (2008).

<sup>35</sup> Phrase used by SHACHAR, *supra* note 13, at 134.

tension-filled act of balancing social openness and barriers of entrance,<sup>36</sup> the search for a middle ground between “a vision of a utopian world without borders on the one hand and a fortress paradigm of sovereign self-determination that further locks in disparities between jurisdictions on the other.”<sup>37</sup> Rules attributing membership can inherently only be set by those who are already members.<sup>38</sup> The formation of a people as the subject of democratic legitimation and, thus, legal attribution of sovereign functions, is unavoidably historically contingent.<sup>39</sup> In a democracy, the composition of the people as body politic and the preconditions of membership are politically malleable. The degree of openness or seclusion is the object of controversy, political discussion, and—finally—legislation. To determine the degree of openness of national borders and/or citizenship requires political value decisions, which have to balance conflicting legitimate interests of potential migrants and the society that has to include them.<sup>40</sup> In fact, modern immigration laws tend to accompany a transition process. Balancing inherent conflicting interests, in turn, requires broad political discretion;<sup>41</sup> which grounds for the refusal of entry are considered fair will also depend on general policy objectives of the respective state.<sup>42</sup>

## *II. Democratic Control of Migration and Interest Balancing*

Disregarding the question of whether uncontrolled immigration might undermine the democratic *ethos* of a society,<sup>43</sup> a democracy that derives sovereign powers from the people is particularly dependent upon the personal composition of the body politic. Thus, it is indispensable to decide democratically who shall have access to a community’s territory and become subject to “the polity’s coercive power.”<sup>44</sup> It would be impossible to uphold

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<sup>36</sup> See, e.g., Ayelet Shachar, *Citizenship*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1002, 1018 (Michael Rosenfeld & András Sajó eds., 2012).

<sup>37</sup> SHACHAR, *supra* note , at 46.

<sup>38</sup> See, e.g., Uwe Volkmann, *Der Flüchtling vor den Toren der Gemeinschaft*, in 49 KRITISCHE JUSTIZ 180, 190 (2016).

<sup>39</sup> This is the focus of the critique by Sofia Näsström, *The Legitimacy of the People*, 35 POLITICAL THEORY 624, 647–50 (2007).

<sup>40</sup> For an excellent overview of the European discussion, see Volkmann, *supra* note 36, at 183–90.

<sup>41</sup> DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE 226–228 (2007).

<sup>42</sup> *Id.* at 229.

<sup>43</sup> Such effects can occur when immigration meets strong resistance and nourishes an anti-egalitarian and anti-democratic sentiment (internal de-democratization) or when the immigrants import anti-democratic sentiments from their societies. Both effect, which apparently occur, are not easily attributable: The refugee is neither responsible for xenophobic response nor for political misconceptions of numerous fellow-refugees. Nonetheless, a political order can take these effects seriously and try to restrict asylum or immigration rights to avoid political tensions a democratic society is probably unable to bear.

<sup>44</sup> SHACHAR, *supra* note 13, at 137.

democratic self-determination with regard to membership if anyone was free to choose his or her place of residence and force oneself on a pre-existing democratic community. Precisely because liberal democracies treat migrants as bearers of rights and grant them access to social security benefit and, under certain legal requirements, to a legal status as resident, which—finally—opens a path into regular citizenship, it is vital to maintain an effective regime of border control.<sup>45</sup>

To achieve this, democracy needs a realist perspective on sentiment and power. Undoubtedly, a democratic society can benefit from opening its borders for immigration and bestowing membership on new citizens. Nonetheless, democratic institutions have to face the real risks, potential disadvantages, and political consequences of immigration soberly. For example, from a moral point of view, one might qualify distribution of wealth within a welfare state also as a question of universal justice.<sup>46</sup> According to this approach, permeability to migration appears as a compensation for an unjust distribution of wealth and opportunities on a global scale. Such splendid visions are not very helpful for democratically accountable decision making, which has to deal with current and manageable problems in an adversarial and crisis-ridden world. From the perspective of a constitutional theory for liberal democracies, optimizing social benefits for residents, citizens and foreigners alike, or opening the borders for predominantly needy migrants denotes just a tangible conflict of interests<sup>47</sup> which requires a political decision on how limited financial resources shall be distributed. This decision demands democratic accountability and may have to overcome political obstacles like resistance by the voters if nothing else.

Realistically, national security implications emerge from a massive inflow of migrants,<sup>48</sup> in particular, considering the threats looming around the Mediterranean—in Northern Africa and the Levant—Iraq, and the Caucasus—Europe's broader neighborhood, for example. The more that internal conflicts arise, the less liberal a political community tends to be. A society laden with social conflicts will be less stable and, thus, requires tougher security legislation. Additionally, as liberal democracies cannot impose political beliefs on their citizens, they

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<sup>45</sup> Becker & Kersten, *supra* note 33, at 582.

<sup>46</sup> JOSEPH H. CARENS, *THE ETHICS OF IMMIGRATION* 283 (2013).

<sup>47</sup> Volkmann, *supra* note 36, at 182. See also MARTIN RUHS, *THE PRICE OF RIGHTS: REGULATING INTERNATIONAL LABOR Migration* 187–200 (2015). He demonstrates that states that bestow migrants with strong and effective rights tend to restrict entry, while those countries that prefer relatively open borders, in particular, for cheap workers tend to be reluctant to grant social entitlements. Even if exploitation of workers shall not be a political option for a liberal democracy, the conflict of interests is fairly illustrated. And even immigration countries can follow disparate strategies how to reconcile border control and immigrant rights. Regarding Canada, see CHRISTOPHER G. ANDERSON, *CANADIAN LIBERALISM AND THE POLITICS OF BORDER CONTROL* (2013).

<sup>48</sup> Naive denial by CARENS, *supra* note 46, at 276.

deeply depend on a common democratic sentiment<sup>49</sup> of the willingness to accept formal democratic rules and corresponding individual freedom rights. Thus, a democratic society has to address the general risks if a minor but still significant part of migrants refuses to accept the mechanics of a pluralist society, which grounds on individual self-determination.<sup>50</sup> Finally, if the integrative capacities of a society are practically limited, sheltering refugees and allowing regular immigration are practically conflicting political goals; as more accommodation of refugees is allowed, the higher the political pressure may grow to restrict other forms of immigration—even if this might be unreasonable. Democratic legislation will have to set priorities, notwithstanding the minimum standards of refugee protection.

### *III. Democratic Legislation Between Dilemma, Challenge, and Optimism*

External territorial borders, then, can help reduce internal personal boundaries as a political community can concentrate on the political and social inclusion of those who are already on national soil. From the perspective of political ethics, such conflicts of interest may be described as a moral dilemma.<sup>51</sup> From the perspective of constitutional theory, which is not about morality but about legal-institutional competences, deciding such conflicts is a matter of democratic procedures, interest balancing, legislation, and accountability. Value judgments are a permanent task of democratic legislation, which leaves enough space for moral constraints.<sup>52</sup> Even if the basic composition of a people is historically contingent and perpetuated by birthright citizenship, democratic systems are always open to the future. If the reference to the historic events constituting a people means making a claim for the present, which can be challenged,<sup>53</sup> democracy offers adequate mechanisms to correct the presuppositions and decisions of the past by changing the laws of membership and considering moral claims of those excluded in a pragmatic way.<sup>54</sup> Migration provokes a “reflexive instability,” which permanently forces a democratic society to reconsider and adapt pre-existing concepts of social and political membership.<sup>55</sup> As imperfect as this may seem, we have no better institutional settings at hand. Because democracy is not about homogeneity but about organizing the inhomogeneity of a society by imposing formal rules

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<sup>49</sup> Volkmann, *supra* note 36, at 188.

<sup>50</sup> *Id.* at 188.

<sup>51</sup> Dana Schmalz, *Rezension*, 49 KRITISCHE JUSTIZ 260, 262 (2016); Volkmann, *supra* note 36, at 191–92.

<sup>52</sup> Notwithstanding a popular misconception, moral constraints conceptually cannot threaten legal sovereignty of states. CARENS, *supra* note 46, at 273.

<sup>53</sup> Näsström, *supra* note 39, at 650.

<sup>54</sup> For a pragmatic and optimistic concept, see SEYLA BENHABIB, *THE RIGHTS OF OTHERS. ALIENS, CITIZENS AND RESIDENTS* (2004).

<sup>55</sup> Seyla Benhabib, *Democracy, Demography, and Sovereignty*, 2 LAW & ETHICS OF HUMAN RIGHTS 1, 4 (2008).

based on equal freedom of all members, there is enough reason to hope that European democracies will cope with the challenges of integrating a vast number of foreigners as citizens into existing body politics. Democratic procedures of legitimation, however, will always require boundaries.

#### **D. The “Refugee Crisis”: State of Emergency Rhetoric versus the Effectiveness of the Bureaucracy**

Undoubtedly, the “refugee crisis” has caused a major political upheaval within Europe. In many European countries—Germany included—right wing movements rapidly gained support and sometimes even a foothold in parliaments. Some Eastern European countries ostentatiously revoked their solidarity and accused Germany that the refugee policy would split up the European Union. The close decision by referendum of the British people to leave the European Union, “Brexit,” was supposedly influenced by a broad dissatisfaction with the European states to overcome the “refugee crisis” and reestablish an effective regime of border control. While a questionable deal with Turkey partially blocked the Balkan route, the suffering in refugee camps at the outer border of the European Union continues, and people tragically drown attempting to cross the Mediterranean.

The general political atmosphere evoked connotations of a constitutional crisis. There were repeated allegations that the federal government of Germany acted in a permanent breach of the law when opening the border for refugees stuck in Hungary.<sup>56</sup> Soon, rhetorical hysteria invoked emergency scenarios. An ominous Schmittian yearning to rouse an opaque dormant power to throw off the constitutional shackles and declare the state of emergency regrettably exerts some intellectual fascination even today and inspires crisis rhetoric, which expectedly looms up in every uncommon situation and relishes in the idea of a nearing apocalypse.

To take a sober view: Is the so-called “refugee crisis” really unsettling the territorial and personal foundations of the constitutional order? Are the political institutions acting in an undeclared state of emergency? The democratic rule of law does not allow for unwritten and non-promulgated emergency exceptions *preater legem*.<sup>57</sup> Whether opening the borders by letting migrants pass freely into German territory infringed binding German and/or European refugee law involves complicated legal questions not discussed in this Article. Nonetheless, it seems obvious that the detailed legal discussion triggered by the events since summer 2015 fairly illustrates that the question of the legality is not easily answered. The federal government acted under time-pressure when hundreds of thousands of migrants

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<sup>56</sup> Critically commented by Günter Frankenberg, *Flüchtlingsabwehr oder Flüchtlingsschutz?*, 49 KRITISCHE JUSTIZ 145, 147–48 (2016).

<sup>57</sup> Udo Di Fabio, *Sicherheit in Freiheit*, 61 NEUE JURISTISCHE WOCHENSCHRIFT 421 (2008); CHRISTOPH MÖLLERS, DEMOKRATIE – ZUMUTUNGEN UND VERSPRECHEN 81 (2008).

were displaced in Hungary, suffering under miserable and humiliating conditions without access to a fair hearing to make their case for refugee status. The federal government took the legal position that granting access to asylum procedures on German soil and offering at least interim shelter was within the law, in particular, in conformity with Article 17 of the Dublin-III-Regulation.<sup>58</sup> Future legal proceedings may determine whether this position will withstand judicial scrutiny. In the confusing situation in 2015, it was, at least, legally tenable.<sup>59</sup> In any event, what else should the federal government have done in the face of inhumane suffering?

Both democracy and the rule of law proved to be adaptable and sufficiently flexible to deal with critical situations. A crisis ignites hot political debate, but after a period of cooling down the process of legislation starts to work, and, finally, turns frenetic rhetoric and virtual activity into a problem solved by a bureaucratic administration which develops routine in applying new legislation in a more or less efficient way. This is exactly what happened during the “refugee crisis.” Despite alarmist rhetoric, the political system is far removed from a state of emergency. After the first shock in the face of the sheer numbers of refugees entering German soil—in 2015 approximately 1.1 million migrants were registered as applicants for refugee status and another 300.000 still unregistered<sup>60</sup>—the federal, state, and local administrations started to build up capacities to process asylum requests, provided interim shelter, gave permissions to reconstruct empty facilities (such as army barracks) as make-shift accommodation for refugees, and provided funding for local reception centers. The states established additional posts for judges to cope with the rising number of lawsuits concerning refugee claims. Finally, federal legislation<sup>61</sup> amended the Asylum Act to accelerate the administrative proceedings, which is also in the best interest of the applicants for asylum status. The Federal Office for Migration and Refugees is currently adapting to the new standards and developing administrative routines to work off the vast backlog in settled applications.

Long live bureaucracy! It is what makes democracy and rule of law work in times of stress. As long as bureaucracy prevails, democratic legislation is transformed into executive action

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<sup>58</sup> Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, 2013 O.J. (L 180) at 31.

<sup>59</sup> Compare Gerrit Hellmuth Stumpf, *Der Ruf nach der „Rückkehr zum Recht“ bei der Bewältigung der Flüchtlingskrise*, 69 DIE ÖFFENTLICHE VERWALTUNG 357–68 (2016).

<sup>60</sup> See *Flüchtlingskrise in Deutschland ab 2015*, WIKIPEDIA, [de.wikipedia.org/wiki/Fl%C3%BChtlingskrise\\_in\\_Deutschland\\_ab\\_2015#Zahlen\\_f.C3.BCr\\_das\\_Jahr\\_2015](https://de.wikipedia.org/wiki/Fl%C3%BChtlingskrise_in_Deutschland_ab_2015#Zahlen_f.C3.BCr_das_Jahr_2015).

<sup>61</sup> Asylverfahrensbeschleunigungsgesetz [Asylum Procedure Acceleration Act] of October 20, 2015, BUNDESGESETZBLATT I at 1722.

and the administration of law remains democratically accountable.<sup>62</sup> Finally, to bureaucratize boundaries also provides the best help for migrants.

### E. Perspectives

Democracy rests on the variability of law, the changing of an always temporary and fluid social order by legislation based on self-determination. Thus, a democratic procedures' perspective is the future; democratic and pluralist societies are adaptable. As such, democracy is an optimistic form of ruling.<sup>63</sup> While democracy depends on the rule of law, this should not make us blind for the need for a modicum of political flexibility. It ranks among the strong beliefs of German European policy that strict legal rules are necessary to bind the political institutions. In contrast, the legalistic approach towards European law has suffered serious setbacks during the last decade. The "financial market crisis" and the "refugee crisis" are possibly the strongest evidence that the trust in binding legal texts might have been exaggerated. It would be worth discussing a more political and less legalistic approach to define the foundations and boundaries of society.

A world without borders<sup>64</sup> is a world without refuge, without safe havens. Undeniably, there remain severe injustices within a world legal order based on borders and states competent to open or close the access to their territories pursuant to national rule making: The unequal distribution of wealth and opportunities, the "birthright lottery,"<sup>65</sup> and the hazards underprivileged persons endure to circumvent border control and reach one of the promised lands, which are—in hindsight—often less promising after closer examination. Solving these macroscopic problems on a global scale is way beyond the limited capabilities of states and democratic institutions. Democracy is a pragmatic form of government; it does not strive for an ideal of self-determination and equal justice for everyone because such utopian aims would overburden any political system and thwart self-determination.<sup>66</sup> Democratic legislation is an instrument of self-determination for limited purposes of a defined body politic, not a mission for idealistic redistribution or for the achievement of a higher justice. Democratic justice is always "bounded justice," and critics<sup>67</sup> tacitly abolish procedural democratic ruling to replace it with their substantive ethical concepts of justice. Self-

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<sup>62</sup> See, e.g., MÖLLERS, *supra* note 57, at 68–69 (noting that democratic systems tend to be bureaucratic).

<sup>63</sup> Becker & Kersten, *supra* note 33, at 584.

<sup>64</sup> Energetically advocated by CARENS, *supra* note 46, at 225–54. Instead, SOMEK, *supra* note 10, at 209–16, illustrates the ambivalence of open borders which socially privileges some and puts others at a disadvantage.

<sup>65</sup> SHACHAR, *supra* note 13.

<sup>66</sup> For the inherent value of pragmatic realism in refugee affairs, see Jack Snyder, *Realism, Refugees and Strategic Humanitarianism*, in *REFUGEES IN INTERNATIONAL RELATIONS* (Alexander Betts & Gil Loescher eds., 2011).

<sup>67</sup> In particular CARENS, *supra* note 46, at 256–60.

determination is only practical within manageable limitations of a bounded sovereignty; it is not a grand scheme for a new world order without borders. It is an instrument to mitigate the small injustices in every-day life. A democratic polity can ameliorate opportunity inequalities within its territory by legally providing progressive inclusion of residents<sup>68</sup> or access to citizenship and political participation.<sup>69</sup> The only legitimate means to define the politically contingent borders of membership and territorial access is democratic legislation, which inevitably privileges members over non-member. Even the abstract ideal to grant every long-turn resident political membership in the democratic body politic would leave it to the residents to define the requirements of territorial access, and, thus, decide the fate of those left outside.<sup>70</sup> Democratic personal and territorial institutions of political integration have always been conflicting principles,<sup>71</sup> both engendering their own concepts of modernity.<sup>72</sup> A democratic society simply has to endure the inherent tension between the claim for participation in democratic rule making of all subjects of sovereign power on the one hand, and the imperative to define membership in a political community based on self-determination on the other.<sup>73</sup> Disregarding this temporary setback in political participation of non-members, those migrants who finally become citizens shape the future territorial and membership borders via democratic self-determination, too. Is that not an inspiring promise?

All in all, we should avoid the fruitless semantics of political romanticism, which is mostly nothing more than hidebound nationalism, as well as visionary aspirations of new steps of European integration, while the European Union is in a deplorable state. More than ever, what we need is democratic pragmatism. Alas, the nation that was always shining symbol of political pragmatism has just decided to leave the European Union.

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<sup>68</sup> FARAHAT, *supra* note 19.

<sup>69</sup> SHACHAR, *supra* note 13, at 164–90.

<sup>70</sup> *See id.* at 138. She argues that “citizenship laws, which mark the literal delineation between insider and outsider, member and nonmember, have coercive effects.” Thus, those feeling coercive authority should participate in the process of rulemaking. This idealistic position has its flaws, too. As long as democratic self-determination prevails, there is always membership and non-membership, rules practically affecting those who are not part of a body politic. Even if the border shifts from nationality-based citizenship to (permanent or more than temporary) residency, there will be borders. Her proposed *ius nexi* (p. 164 et seq.) also needs a body politic (with members) who allow a nexus to be established and to define what kind or degree of nexus shall be sufficient.

<sup>71</sup> GOSEWINKEL, *supra* note 7, at 648–50.

<sup>72</sup> *See* Gärditz, *supra* note 6, at 51–88.

<sup>73</sup> Michael Walzer, SPHERES OF JUSTICE — A DEFENSE OF PLURALISM AND EQUALITY 52, 62 (1983).