Analysing status diversity
Immigration, asylum, and stratified rights

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The post-national debate

The presence on national territory of those outside of national membership has long prompted interest in both the extent and the foundation of migrants’ rights, with deliberation often focussed on the balance between universal claims and national particularism. Writing of the stateless persons generated in the aftermath of the First World War, Arendt (1979) remarked on the ‘hopeless idealism’ and ‘feeble minded hypocrisy’ of human rights talk (ibid.: 269) when in practice the loss of citizenship meant an absence of all rights. This juxtaposition may be termed ‘Arendt’s paradox’, and turned on the fact that any attempt to lay claim to universal human rights broke down when states were confronted with ‘the abstract nakedness of being human’ (ibid.: 299). Her fear was that the promise of human rights amounted to little more than ‘a right of exception . . . for those who had nothing better to fall back on’ (ibid.: 293). Though the situation today is somewhat changed and there now exists a wide range of treaties and conventions which can be called upon to support the position of trans-national migrants and asylum seekers, Arendt’s argument has continuing contemporary relevance. This is captured by Benhabib’s (2004) reflections on a dilemma at the heart of liberal democracy: ‘There is not only a tension but often an outright contradiction, between human rights declarations and states’ sovereign claims to control their borders as well as to monitor the quality and quantity of admittees’ (ibid.: 2).

Habermas (1998) makes a similar point in speaking of the Janus-faced nature of the nation state, manifest in: ‘The tension between the universalism of an egalitarian legal community and the particularism of a community united by historical destiny . . .’ (ibid.: 115).

Nevertheless, a somewhat different sentiment has emerged in a body of literature which now sees a radical reconfiguration of the nation state and the emergence of a post-national society, as characterised by: ‘A new and more universal concept of citizenship . . . whose organising and legitimating principles are based on universal personhood rather than national belonging’ (Soysal 1994: 1).

In effect, Arendt’s paradox is thus reversed to render a different problematic: the presumption of national membership alongside the long-term presence of trans-national migrants without citizenship in their country of stay, but who nevertheless possess a significant array of rights. Sassen (1998) has made a related argument in noting the ‘de facto trans-nationalisation of
immigration issues’ (ibid.: 6), citing in support the expansion of international treaties and conventions which deal with migrant rights, collaboration between member states within the European Union, and the power of human rights as a means to contest the authority of the state. Meyer et al. (1997) have addressed a similar set of issues, albeit at the level of normative ideals, identifying an emergent world culture that can shape and constrain the actions of nation states, which in effect become enactors of ‘conventionalised scripts’ rather than autonomous agents of their own history. Freeman (1995) saw the force of universal human rights claims as the key driver behind an expansionary bias in the immigration policies of liberal democracies, though he also recognised a contrary dynamic in the tightening of entry controls and deterrent treatment of asylum seekers.

For attempts at a concrete assessment of the post-national argument, much rests on the amount of sovereign control a state retains over the granting of entry and stay for trans-national migrants, and the delineation of their attendant rights. Certainly, the post-war dynamic has not been all in one direction, and there has been variation between national immigration regimes, even within the member states of the European Union (Morris 2002). Indeed, national immigration regimes are not only driven by universal obligations, but also strongly influenced by national interests framed in the context of particular circumstances. So, for example, while Germany’s guestworkers gradually acquired a permanent presence, this was initially driven by employer demand at the national level (Jacobson 1997). Human rights were later brought to bear in securing the entry and stay of family members through family reunification, but this has operated with tight requirements of housing and maintenance on the part of the principal migrant, though no such conditions apply to German citizens.

Conversely, in Britain many early post-war migrants arrived with a full right of abode, derived from the status of British subject, which attached to being either a Citizen of the UK and Colonies or a Commonwealth citizen. However, in an attempt to restrict immigration this right was notoriously removed from those who did not have ties with Britain through naturalisation or descent (termed partiality) by the 1971 Immigration Act, a change that was then consolidated by the definition of British citizenship in the 1981 British Nationality Act (see JCWI 1997: 319). However, the continuing presence of trans-national migrants holding citizenship in the UK has meant that (unlike Germany) family (re)unification rules are conditional for citizens and non-citizens alike. There are other common rights limitations for non-citizen residents; even once permanent residence is secured, non-citizens are commonly denied the right to vote in national elections, while absolute security from deportation still rests with citizenship status. Thus, Joppke (2010) argues ‘There are intrinsic vulnerabilities to non-citizen status that Soysal glosses over too easily’ (ibid.: 22), such that: ‘aliens never quite reach the position of comfort allotted to them by post-nationalists’ (ibid.: 84).

The European Union is a frequent reference point for those espousing the post-national position (Sassen 1998; Soysal 1994) as it uniquely establishes a multi-national citizenship, allows freedom of movement between member states, and secures a raft of rights attendant on this mobility – albeit rights which privilege EU citizens over third country nationals. However, it is also commonly acknowledged that these developments are underpinned by enhanced control over external borders, and this has been reflected in the requirements for EU membership. Other trans-national conventions have a potentially wider purchase, but can be limited in a variety of ways – by granting protection only to citizens of countries which are party to the convention, by addressing the needs of particular groups (e.g. women, children, workers), by limiting rights to those who are lawfully present, etc. Even universal human rights contain their own legitimate hierarchy of qualified, limited and absolute rights, the former permitting conditions in support of an array of national concerns, and the latter raising difficult questions of interpretation and
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The result is that rights are often negotiated on a contested terrain which brings universal rights claims into confrontation with national interests, in an ever shifting struggle over both their content and boundaries.

Normative versus empirical claims

Bosniak (2000) points to a certain ambiguity in relation to concepts such as post-national, trans-national or global citizenship, such that, while these terms ostensibly describe a process of change in the structure and operations of the nation state, they also carry a normative message, which is not always made explicit. She therefore sees post-national citizenship as a trope: ‘to invert the burden of justification, so that normative nationalism may itself be interrogated’ (ibid.: 453), but as having only limited empirical resonance. In particular, it is held to neglect those aspects of alien status which fall under national control – terms of entry and stay, access to the labour market, social rights for family members, etc., rather than international human rights obligations, the power of which is sometimes overstated. An interesting link can be made here to a body of work on the concept of cosmopolitanism; work that challenges the very conception of a bounded national society, but is more explicitly normative in character, actively embracing those forces which seem to be undermining national closure.

Beck (2006), for example, speaks of the ‘mythic’ status of the nation state and identifies a network of social forces and trans-national movements which challenge any inclination to equate ‘society’ with the boundaries of the nation state. In formulating this argument, however, he seeks to distinguish the normative ideal of cosmopolitanism from the empirical fact of ‘cosmopolitanisation’, while at the same time recognising that national sentiment persists as a potentially conflicting force. Although the institutionalisation and application of human rights have been key reference points for attempts to elaborate the relation between the normative and empirical aspects of cosmopolitanism, many writers sympathetic to the cosmopolitan ideal adopt a tone of caution. Habermas (2001), for example, notes a tension between the universal meaning of human rights and the local conditions of their realisation, while Fine (2007) sees a dilemma for citizens confronted by their own nationally constrained interpretations and a more distant cosmopolitan view. For those seeking to grapple with what appear as contradictory tendencies towards both the institutionalisation of human rights and enhanced national closure, an additional theoretical tool is required which can do justice to both the expansive potential of universal rights and the restrictive national forces at play.

A mediating mechanism

We need therefore to look at the ways in which the universal/particular opposition is mediated, and one key mechanism which allows the state to determine the terms of entry and stay on the national territory is immigration status. An early indication of how this process functions is to be found in Hammar’s (1990) distinction between citizenship, denizenship and alien status, respectively signalling full membership, permanent residence and conditional presence. Similarly, Brubaker (1989) has elaborated distinctions in relation to legal status and associated entitlements which allow the state to designate differential rights to a variety of national resources. He also argues that the process of managing access to territory and resources has become increasingly complex, such as to render a ‘proliferation of statuses of partial membership’ (ibid.: 5), which requires fuller theorisation.

A promising framework for such theorising can be derived from the work of David Lockwood (1996) and the concept of civic stratification – a system of inequality which operates through the
differential granting and delivery of rights by the state. Lockwood’s own work is concerned with inequalities generated by the functioning of citizenship, such that: ‘In contemporary capitalist democracies, the ethos and practice of citizenship is at least as likely as class relations to structure group interests and thereby fields of conflict and discontent’ (ibid.: 536).

His argument, however, is well suited to analysis which moves beyond citizenship to address the differential granting of rights for different categories of migrant, as in the varying terms of access to the national territory, and to rights of residence, work and welfare, whose purpose is to encourage desirable categories of migrants while discouraging others. In Lockwood’s argument, civic stratification operates along two axes: the presence or absence of rights, as governed by rules of eligibility, which may be termed the formal dimension; and possession of moral and material resources, which may informally influence access to or enjoyment of particular rights.

Applying these ideas to immigration status, it may therefore be argued that the formal dimension dictates the terms of access to the national territory, while the informal dimension reflects and/or shapes the public perception or standing of a given migrant group. There is therefore an interesting possibility that these two dimensions have a dynamic interconnection – as already implied by Lockwood’s framework. Thus, where there are rights without moral or material resources we find civic deficit, while civic gain occurs when existing rights are enhanced by prestige factors. Where there is an absence of rights but access to moral or material resources we might expect to find civic expansion, and where there is both a formal denial of rights and an absence of moral or material resources we find civic exclusion. I have described elsewhere (Morris 2002, 2003) the way in which this system functions, but the dynamic of these two dimensions of civic stratification may repay further study in the context of immigration. While Lockwood’s schema addresses movement through the idea of civic expansion, driven by recourse to moral and material resources, we must also recognise the logical possibility of civic contraction, especially where there is an absence or erosion of moral standing for a given group.

To take the UK as an example, at the formal level there is currently a five tier system for labour migration, and there are three statuses of protection for asylum seekers, while in addition there will be incoming family members for some of these statuses, and an unknown number of undocumented migrants, some of whom will be failed asylum seekers. The formal designation of varied statuses with different rights attached illustrates the way in which rights can be harnessed as a means of governance, and indeed the number and designation of statuses can shift over time, as in the UK elaboration of first four and then five tiers for labour migration (see Morris 2007; Travis 2006), and the expansion of different statuses of protection (Home Office 2002). At EU level, a growing awareness of the need for highly skilled migrants saw the creation in 2009 of a blue card which extends free movement in the EU to highly skilled non-EU workers.

Changes in the formal contours of civic stratification may also be accompanied – or more likely preceded – by a justificatory discourse, as for example when UK asylum numbers were rising and we saw a growing rhetoric of disbelief linked to assertions that a majority of claims were ‘bogus’. A number of restrictive measures then followed, including the selective use of visa requirements, the elaboration of carrier sanctions and the reduction or removal of welfare support for asylum claimants. Conversely, with increasing employer demand for skilled workers, the UK government rhetoric shifted from a generalised denigration of economic migrants (Home Office 2002: 7) to an emphasis on the ‘disproportionate contribution’ (Blunkett 2003) that migrants make to the national economy. This sentiment is currently being revised in relation to free movement within the EU, as the UK Alliance government seeks to restrict access to benefits for workers from other member states, and to deter what it terms ‘benefit tourism’ and ‘health tourism’ (The Guardian 2013: 6). A statement from the Council of Europe’s human rights
commissioner, Nils Muiznieks, notes: ‘The UK debate has taken a worrying turn as it depicts lower-skilled migrants as dangerous foreigners coming to steal jobs, lower salaries and spoil the health system’ (Travis and Malik 2013: 6).

The commissioner goes on to make a link between such statements and wider public perceptions insofar as they may encourage negative stereotyping and hostility towards migrants. He refers in particular to the climate of concern over the newer EU member states, whereby: ‘A stigma is put on Bulgarian and Romanian citizens just because of their origin’ (ibid.).

**Formal and informal status dynamics**

These and other developments suggest a link between the formal and informal aspects of immigration status by virtue of a distinction between ‘desirable’ and ‘undesirable’ migrant groups, which is often accompanied by attempts to shape public perceptions as a means of garnering political support. This phenomenon is addressed by Schneider and Ingram (1993) in relation to the construction of ‘target groups’ in policy development more generally, such that a particular public image is deployed in the course of policy formulation to convey the sense of a problem with which politicians are actively struggling. Their analysis shows some similarities with Lockwood’s in that it reflects differing degrees of moral standing, as implied by their classification of advantaged, contender, dependent and deviant. These categories would correspond to immigration status as follows: highly skilled migrants – advantaged/contenders; asylum seekers – dependent; and undocumented migrants – deviant. The ‘target group’ framework thus adds political motivation to Lockwood’s conception of civic stratification and makes the dynamic element more explicit; indeed, Schneider and Ingram refer to ‘pendulum swings’ in policy over time as the political climate and policy preferences themselves undergo change. The combined effect of both analyses is to raise interesting questions about the source and direction of change in relation to both the formal and informal aspects of immigration status.

The informal status of particular groups seems to play an important role in this dynamic, and there is an apparent circularity in operation. According to Schneider and Ingram, politicians construct problems which are then amenable to policy treatment, and we have already noted examples from the UK, in the form of campaigns against ‘bogus’ asylum seekers and ‘benefit tourism’. In such cases the negative presentation of a given group seeks to shape public opinion in advance of the introduction of a policy ‘solution’ which then confirms the group’s ‘undeserving’ status by the denial of a right. Indeed, such manoeuvres often alight upon issues around which there is already potential public unease that can be engaged in support, and policy can thus both reflect and heighten existing public sentiment. Conversely, and perhaps in response, target groups may seek to engage public sympathy and support to challenge both their informal denigration and the formalised policy measures which follow, but their success will, in Lockwood’s terms, depend on the ability to mobilise moral and material resources. However, both Lockwood and Schneider and Ingram recognise that, once established, negative perceptions or marginal groups become difficult to dislodge and indeed may be internalised such that: ‘The capacity and opportunity to engage in collective action is further diminished by the indignity of the status itself’ (Lockwood 1996: 546).

These writers therefore highlight the difficulties of mobilising for improved formal status confronting groups whose informal status has been diminished, and in this context they see increasing recourse to the courts as a possible means of asserting the rights of vulnerable groups. This possibility returns us to our opening question of how far national control over the terms of entry and stay can be overridden by international conventions, and more specifically how far the claims of trans-national migrants can be pursued through the courts. Alexander’s (2006) writing
on the civil sphere and the potential for building solidarity around commitment to a common secular faith is relevant here, and he suggests an approach to the law that views it as a form of symbolic representation. This argument complements a civic stratification framework in recognising not only that the law can function to formalise relations of exclusion and domination, but also that such divisions may be challenged through a process of civil repair. In this context, Alexander suggests that legal interpretations on the part of judges can serve both to reflect and to initiate broader social change, such that: ‘In the course of social conflicts, individuals, organisations and large social groups may be transferred from one side of the social classification to another’ (Alexander 2006: 234).

This type of argument draws our attention not only to the content of change in the standing and rights of particular groups, but also to the process whereby such changes may be established or challenged, and the judiciary will often be located at the critical edge of decisions over the content and boundary of rights.

**The role of judgment**

Noting a massive increase in judicial activism, Jacobson (1997) has argued that: ‘The state is now a forum where trans-national laws and norms are administered, mediated, and enforced’ (ibid.: 106).

This is in some respects a variant of the post-national argument, which sees state legitimacy rooted less in popular sovereignty than in trans-national human rights, such that sovereignty becomes secondary to the jurisdiction of the courts. Jacobson, however, argues that this development is not necessarily driven by intrinsic normative concerns, but operates in a piecemeal way, and through a series of *ad hoc* accommodations which nevertheless reflect a shifting locus of legitimacy. He therefore concludes that these accommodations do not constitute an emergent global society, and we find an echo of the civic stratification argument in his recognition that ‘social distinctions are becoming ever more multifarious’ (Jackson 1997: 134). The judiciary thus comes to occupy a central position in mediating the tension between post-national universalism and national particularism, while the courts as a deliberative forum can offer a participatory space for those excluded from the national polity (see Habermas 1995). Such legal procedure, especially where universal commitments have been written into domestic law, provides support for Beck’s (2006) endeavour to break with a dichotomising view that sets the global and the national in opposition, and to see the national and trans-national as interlocking and mutually constituting phenomena.

However, a focus on the judicial process as a form of procedural deliberation (Habermas 1995) draws our attention to a degree of indeterminacy with respect to the content and boundary of rights, which is especially to the fore in developing areas of law, such as universal human rights (Dworkin 2005). Judgment does not stand apart from social and political life, but may both be shaped by and seek to shape prevailing social norms and values, so there is considerable scope for deliberative disagreement to take place both within the judiciary and between the judicial and executive branches of government. An example of this three cornered dialogue can be found in extended judicial deliberation over the UK withdrawal of welfare support from in-country asylum claimants. This entailed a total of 14 legal judgments over the legitimacy of such policy, and came to turn on the interpretation of inhuman and degrading treatment as expressed by article 3 of the European Convention on Human Rights. The legal history reveals opposing interpretations of article 3 which respectively endorse a restrictive and expansive reading (see Morris 2009), though it is the latter that eventually prevailed, albeit in cautious terms, making it clear that the ruling had no purchase for the indigenous homeless or for failed asylum seekers.
The example then raises one final question in relation to status, rights and recognition, and that is whether the restitution of rights through judicial rulings can restore the public standing of vulnerable groups for whom public denigration has served to legitimate a denial of rights. A link between rights and status was present in the work of T.H. Marshall (1950), who saw the conferral of citizenship as more than the guarantee of a set of civil, political and social rights, serving primarily as a recognition of equal status. This idea is further developed by Honneth (1995), who sees the granting or denial of rights as reflecting a struggle over normative conceptions of the social community and dominant interpretations of social worth, in which we can read the ‘moral grammar’ of a conflict. The law and legal judgment are therefore in close interaction with broader social and cultural forces which may respond positively or negatively to attempts to expand the boundary of rights. Indeed, instead of civic expansion we may witness civic deficit, whereby the claiming of a right may provoke a backlash, and can itself confirm a group in its negative status or condition of disrespect. In other words, rights alone cannot secure recognition, but may first require ‘an alteration in our cognitive orientations and normative expectations’ (Kompridis 2008: 305) to bring together the respectively formal and informal character of legal and social status.

Recognising the tendencies both in social and political sentiment and in academic debate that threaten to polarise opinion with respect to conceptions and perceptions of post-national society, this essay has looked rather to the intermediate terrain on which rights actually function. In so doing, it has opened up difficult questions about the delineation of formal inclusions and exclusions with respect to rights, and the informal status judgments which formal entitlements may variously influence or mirror. The associated outcome in terms of civic stratification constitutes a complex ground of status diversity, mediated by political decisions, public sentiment and judicial rulings, all of which are in close interaction. Negotiation and contestation over rights therefore reveal their indeterminate nature, shaped on any given occasion by the mutual friction between universalism and particularism, and holding a constant scope for both expansion and contraction that may defy attempts to conclusively fix their boundaries and their content.

Notes
1 For a fuller elaboration of these ideas see Morris (2010, 2013).
2 Full refugee status, Humanitarian Protection and Discretionary Leave.
3 See, for example, HC Hansard, 20 February 1996, col. 160; Lords Hansard 17 October 2002, col. 991.

References
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