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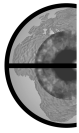
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Privileging the near and dear?

Evaluating special ties considerations in EU migration policy

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ABSTRACT Many studies have analysed the relation between the self understandings of citizenship or identity of western states on the one hand and national integration and immigration policies on the other. As migration regulation in recent years has shifted to a considerable extent to the European level, it seems appropriate to address issues of migration and identity also in that context. The central question of this article is whether European Union (EU) immigration policies that privilege people from some countries over others – because of special cultural, ethnic or historical ties – can be justified. Criteria for evaluation are developed and the EU visa regulations are put to the test.

KEYWORDS equality ● European Union ● evaluation ● immigration policy ● migrants ● national identity ● political theory ● visa policy

INTRODUCTION

Over the last few decades, migration to European countries increasingly has become an issue of European Union (EU) decision making. From a mere national matter in the 1970s, migration regulation has become a matter of international and even supranational concern in the EU (Tholen, 2004).

The ongoing and evolving European cooperation in the field of migration policy has been welcomed for all kinds of reasons. Migration, so one argument goes, is a global issue; the fair regulation of migration can only be realized on a supranational level (Ghosh, 2000). If states want to grant a safe haven to those who need it in an effective and efficient way, cooperation is inevitable. It is necessary, for instance, to avoid ‘asylum shopping’.

In taking restrictive measures, individual states easily become competitors. To avoid a race to the bottom in protection regulations, cooperation is thus called for (AGIT, 1999; Noll, 2000). Some, furthermore, have high expectations of a 'post-national' Europe. The pan-European political community can surmount nationalistic reflexes and it is expected to be more cosmopolitan, guided exclusively by principles of individual freedom and equality. The Europeanization of migration policy promises an end to privileging and discriminating measures in migration regulation (Bigo, 2002; Habermas, 1992; Kostakopoulou, 1998).

Others, however, are less enthusiastic about the increasing European cooperation in this field. They question its advantages in terms of effective coordination and cosmopolitanism. Some doubt that European cooperation in effect realizes the goals that are proclaimed. The way decision making is organized seems to allow states – stimulates them even – to use their discretion for more restrictive measures. Europeanization, in fact, is not a remedy against a race to the bottom but, on the contrary, an instrument for it (Groenendijk and Minderhoud, 2004). Critics maintain that European cooperation did not bring an effective and efficient realization of safe refuge, but an effective and efficient realization of migration restriction (Byrne, 2003; Chimni, 2000; Lavenex, 1998). Some suspect that the actual European policies are in fact less cosmopolitan than many think them to be (Guild, 2001; Vink, 2003).

Europe's cosmopolitanism is a matter of empirical debate, but the ideal itself is also an issue of dispute. While some dream of a post-nationalist Europe, others envision a united Europe, guided by particular norms and values, and fostering a common identity. Both these perspectives are reflected in many debates, both political and theoretical. The public and political debates mostly concern specific issues: the European Constitution and its preamble, the future EU membership of Turkey, integration of Islam or immigration. In political theory, these perspectives are typically present in debates on the necessity of a European *demos*, or 'thick' shared understandings, and the like (Bader, 1999; Lacroix, 2002; Lehning, 1998). The claims in the political field concern specific issues, but are highly assertive. The debates in political theory, on the other hand, are of an abstract nature and often not clear as to their specific consequences.

To expand this debate further, in this article we will focus on the specific terrain of migration policy in Europe. We will point out EU regulations that seem to involve special ties regulations; that is, policies that privilege some people that are near over all others. The special ties, or nearness, might follow from specific historical relations, from a shared culture or religion, the idea of a common fate, and the like. Relying on special ties considerations implies some kind of shared identity. Our central question is: *can special ties considerations in EU migration policy – under certain conditions*

– *be justified?* The answer to this question will shed light on the issue of Europe's identity, and especially on the appropriateness to act upon it in specific policies.

In the next section, we will start with a brief overview of the process of European integration in the field of migration and give some examples of regulations that seem to be guided by special ties considerations. In the third section, turning to the philosophical debate on migration issues, we will distinguish special ties considerations more systematically from other kinds of considerations. In the fourth and fifth sections, two kinds of special ties considerations will be distinguished and evaluated. That analysis enables us to formulate an answer to the question and it allows us, furthermore, to formulate criteria for evaluating specific policies. In the sixth section, we offer an illustration of the applicability of these criteria.

EU MIGRATION POLICY AND SPECIAL TIES CONSIDERATIONS

European integration in the field of migration

European cooperation, as it started in the 1950s, gradually led to the development of a common market and the disappearance (to a large extent) of 'internal borders' between member states of the European Community (EC)/EU. European governments agreed upon treaties and regulations that aimed at establishing an area for 'free movement of capital, goods, services and labour', abolishing all kinds of privileges for some and barriers for others. This involved equal rights and anti-discrimination measures for third-country nationals that had been admitted to this European inner area. Issues of admission and control of the outer borders, however, were, with some exceptions, a matter of member states' discretion.

As the internal free market was taking shape, European countries started to cooperate on issues such as asylum application and border control. In 1985, the Benelux countries and Germany and France signed the (first) Schengen Agreement. This can be taken as the starting point of European integration in the field of migration policy. In this process of integration, three dimensions might be pointed out. First of all, soon after the establishment of the Schengen Agreement the other EC member states joined the cooperative scheme, with the exception of Ireland and the UK. This association of western and southern European states expanded again as central and eastern European countries started implementing the Schengen rules (Geddes, 2003).

European integration in this field, however, is not only a matter of a growing number of states coordinating their policies. It means, second, a

growing institutional intertwining. The Schengen Agreements were established outside the EC/EU. The Amsterdam Treaty (1997) brought these agreements under the EC/EU umbrella. Subsequent treaties made migration regulation to a considerable extent a supranational policy issue. Decision making, implementation and judicial review of migration regulations involve multilevel structures in which national and European parliaments, agencies and courts are formally involved (Guiraudon, 2000).

Integration, third, means a continuous expansion of issues of cooperation. National regulations have been harmonized in an increasing number of fields (asylum applications, family unification, visa), and an ever-growing number of common instruments have been introduced (Schengen Information System, Eurodac, European Agency for Border Control, etc.) (Guild and Harlow, 2001).

Special ties considerations

In European migration regulations, as they have come into being over the years, principles of individual freedom and equality have had their impact. Equality and non-discrimination, for instance, have had a central role in the development of the internal free market. It means that admitted third-country nationals are given a legal position that closely resembles that of European citizens (Guild, 1999). Ideals of individual freedom and equality have also been effectuated by rulings of the European Human Rights Court – not part of the EC/EU of course, but highly relevant for its acting in the field of migration (Groenendijk, 1999).

At the same time, however, the European migration policies involve preferential treatment of some potential immigrants over others. The asylum regulations, for example, 'favour' those that can show they have a well-founded fear of persecution in their country of origin. The EU policy on family unification, to give just another example, makes it possible for some to come to Europe and join their spouse – others who do not have any relatives here are not granted entrance. In these examples, the special treatment of particular individuals is related to their personal experiences or their personal ties. Some are admitted, while others are not, taking into account individual characteristics or experiences.¹ Other regulations, however, can instead focus on group characteristics. This results in preferential treatment of those who belong, in some sense, to specific groups. Of such group privileging we can also find instances in EU migration regulations. In an indirect sense, this privileging occurs in the field of labour migration, as the EU regulations allow member states to invite labourers from specific countries. More generally, we can witness ethnic preferences in national migration regulations that imply privileged access for those admitted by one of the Member States to the European inner area and EU-citizenship (Joppke, 2005; Vink, 2003). In a more direct manner, special

treatment follows from specific treaties of association between the EU and third countries. These treaties often contain articles on migration and the rights of migrants. Another example of this kind is the EU visa regulation.

The case of the EU visa regulation for short stay is of specific relevance for us. This measure is one of the first common European regulations in the field of migration. It gives us an indication of what might lie ahead. Moreover, the visa regulation, although formally regulating admittance for short stay (up to three months), has large consequences for the possibilities of many to come to Europe. The EU visa regulation is an important element of the European system of migration regulation, a system that might be characterized as one of 'remote control' or 'policing at a distance'. Other elements of this system are *carrier sanctions* (penalties for corporations transporting passengers to Europe who are not properly documented) and the *Schengen Information System* (database with information on persons to be excluded from territory). Those who want to travel to Europe (as a refugee, to look for work, or for any other reason) already meet the European border long before they arrive – if ever – on the European continent, for instance when they apply for a (short-term) visa. Visa and the visa regulations are therefore not only of relevance for tourists, but for (potential) immigrants as well (Bigo and Guild, 2005; Guild, 2001; Guiraudon, 2003).

As we will use this case as an illustration in our argument, we will look into it more closely here. In the EU visa regulation, a distinction is made between nationals of countries who require a visa for a short-term visit to Europe and those of other countries who do not.² Both sets of countries are listed in a 'black' list and a 'white' list. Those who, because of their nationality, do not require a visa can simply travel to Europe. Others have to go to the consulates of one of the EU member states to apply for a visa. To be granted a visa, specific conditions have to be fulfilled, making the application process often costly and time consuming (Bigo and Guild, 2005).

Currently, the EU white list consists of about 40 countries, the black list consists of 130. On the latter list is almost all comprised of African countries. Of the countries in South America, Guyana, Guinea and Surinam, and also Colombia and Peru are on the Black List. So are all the English-speaking Caribbean islands. On the Black List are, furthermore, some eastern European countries, and countries in the Middle East and Asia. Exceptions to the latter two categories are: Israel, Brunei, Hong Kong, Macao, Japan, South Korea, Malaysia and Singapore. In an explanatory memorandum of the European Commission, three kinds of considerations are expressed for including countries in the black or white list: (1) illegal migration; (2) security; and (3) the type of relations that the EU is intending to establish or maintain with them.³

These considerations in the memorandum, however, leave some questions unanswered. For one, it is not specified why any specific country is on

one or other of the lists. Furthermore, the first two considerations (illegal migration and security) seem to refer to individual traits and not to national (that is group) characteristics, as one might expect. It is implied that nationals of countries on the black list are more likely to turn to crime or illegal migration – specific data substantiating such claims, however, are not provided. It is only the third criterion that involves considerations referring to states as collective entities. What is exactly meant by the special ‘type of relations’ the EU has with these countries is not further clarified in the memorandum (Guild, 2001). We might suppose, however, that considerations of special ties between the Europeans on the one hand and specific (national) groups elsewhere in the world motivate the preferential treatment expressed in the visa policy. Our question is: can migration rules like this one, involving special ties considerations, be justified? To clarify: our question is of a normative kind. We will not engage here in an empirical enquiry into the actual motivation of, or explanation for, any specific EU policy.

SPECIAL TIES ARGUMENTS IN THE DEBATE ON JUSTICE IN MIGRATION

In the normative disciplines – political theory, philosophy of law and ethics – issues of migration have had increasing attention in the last two decades. The major part of the studies in the normative field focuses on the question of whether a restrictive migration policy of states can be justified. Should liberal democratic societies open their borders, or are there good reasons to control borders? To answer this question a broad array of theoretical perspectives has been employed (utilitarian, liberal-egalitarian, etc.). The issue was often analysed in terms of opposing universalistic and particularistic considerations: general duties against special duties, individual liberty as opposed to the value of belonging to a community or, more generally, liberalism versus communitarianism (Ackerman, 1980; Barry and Goodin, 1992; Carens, 1987; Cole, 2000; Tholen, 1997; Trappenburg, 1998). Notwithstanding their differences in theoretical perspectives and in levels of abstractness, the conclusions of these studies were remarkably similar: there can in fact be valid reasons given for migration control (Barry and Goodin, 1992: 283).

If any restriction is legitimate, one must conclude that the issue of the proper selection criteria, or proper rules for a migration policy, becomes of central importance. On this issue, however, the studies mentioned say but little. In legal studies, to be sure, rules that should guide the selection of migrants are given much more attention. In such studies, however, it is often positive law and not philosophical justification that is in focus. A more

promising approach for our purposes is one that starts with distinguishing different kinds of considerations for selecting among potential migrants. Following Walzer, we might distinguish three such kinds of considerations: of *need*, *mutual advantage* and *special ties* (compare Brugger, 1994; Tholen, 2004; Walzer, 1983: Ch. 2). In each of these considerations, a specific understanding is involved of the basic character of a political community and of relevant norms and ideals in migration issues.

The consideration of *need* refers to an obligation to grant people entry and offer the necessary support when their life or well-being is in danger. A classical formulation of such a duty is Immanuel Kant's *To Perpetual Peace* (2003[1795]). Individuals that present themselves must not be sent away if doing so would bring them into severe danger. The rule of *non-refoulement* in contemporary international law can be understood as the legal formulation of that duty. Kant argued that in a bounded world, as our globe in fact is, no individual has an absolute right to some particular place. Societies have their worth, and for their flourishing a territory is necessary. But the right of self-determination of these territorially based societies is restricted. After Kant, others have presented other arguments that involved ethical principles like that of Good Samaritanism (Walzer, 1983: 33) or utilitarian considerations (Carens, 1991, 1992; Singer and Singer, 1988). These arguments also provide an articulation of the principle of need as a consideration essential to migration regulation. As to the specific understanding of this principle, opinions differ. Debates concentrate on issues such as: is the source of the danger that the needy are exposed to of any relevance (Shacknove, 1985), and do states have special obligations towards people whose hardships they in some way caused (Walzer, 1983: 33, 49)?

The consideration of *mutual advantage* is closely linked to an understanding of a receiving country as an association for mutual benefit of each member. States are understood as systems of economic cooperation or collective safety. In Rawls's *Theory of Justice*, for instance, a national society is defined as 'a cooperative venture for mutual advantage' (Rawls, 1971: 126). From this point of view, judgements on migration policy should concentrate on the contribution candidate migrants could make to the national economy, or on the risk they might pose to law and order. The specific interpretation and application of this principle is also a matter of dispute. What should count as the relevant understanding of 'the national economy'? Should the consequences for future generations be taken into account? Should some general indicator like the gross national product (GNP) be decisive, or should the consequences for specific groups on the labour market be taken into consideration (Somek, 1998)? Or, to give just one more example, are the consequences for the countries of destination to be taken into account (Pogge, 2002)?

In public and political debates on refugee policies and labour migration, we can readily recognize the presence of these principles of need and mutual

advantage. There are other arguments in public debate, however, that cannot be articulated by either of these principles. In such arguments, the special relation with specific potential immigrants is brought into play. It is not skilled workers as such, but workers from specific countries that should be given access. Priority should be given to helping refugees fleeing from war and disaster in *our* region of the world. What is basically maintained is that some people should get the possibility to immigrate because they are 'like us'. In this kind of popular argument, a third principle is active: access to specific migrants should be granted because of existing *special ties*.⁴

Considerations of need and mutual advantage present a simple dichotomy between people that are members of a particular association on the one hand, and all the others in the world on the other hand. In considerations of special ties, however, another model is involved. The members of this particular political community are understood to have things in common. Most of the people in the rest of the world are, in all relevant senses, strangers to them. To some, however, they feel related. According to Walzer, 'citizens often believe themselves morally bound to open the doors of their country . . . to a particular group of outsiders, recognized as national or ethnic "relatives". In this sense, states are like families [. . .] for it is a feature of families that their members are morally connected to the people they have not chosen, who live outside the household' (Walzer, 1983: 41). It is 'the principle of nationality', as he calls it, that is active here.

Some people now living outside this country may be in some sense nearer to its citizens than others. With some they share common understandings, a culture, a religion, etc. With the others they only share their common humanity. The principle of nationality, or that of special ties more generally, states that people who are near in some sense should have the possibility to immigrate. One might think of former citizens, or their descendants, that now are living abroad, or of people living in another country but sharing the religion and culture dominant in this country. Examples of the latter category are *Aussiedler* who want to return to the country of their ancestors (Germany) to Germany, or Russian Jews who wish to migrate to Israel. The preferential treatment of specific (groups of) migrants might involve access to the territory and inclusion in the social service system, but it might also imply easy naturalization (For an overview of (ethnic) special ties in national migration policies see Joppke, 2005).

This first articulation of special ties considerations has not brought us yet any justification, however. For such a justification two approaches might be of value. One approach starts from the common intuition, or natural tendency, that it is appropriate to be especially concerned for those that are near and dear to us. The other refers to the desirability of a continued common enterprise and the consequences thereof for migration. In the next two sections, we will take a closer look at each of these two approaches.

NATURALISTIC SPECIAL TIES ARGUMENTS

The 'naturalistic' approach to articulate the moral relevance of special ties has its roots in ancient Greek and Roman philosophy. In Aristotelian and Stoic ethics, being respectful towards all human beings, even if they are absolute strangers, is understood as a virtue that is in accord with human nature. Having a virtuous disposition, however, for the ancients also involves showing a special responsibility towards those that are next of kin, co-members of your tribe, or fellows in your (city) state. These special relations and the appropriate special concern for those involved are also presented in terms of a natural inclination (Aristotle, 1982: 1155a 17, 1165a 31). In Stoic texts, those of Cicero for instance, this understanding is presented in a model of 'circles of proximity'. The more near and dear someone is, the more encompassing or demanding one's responsibility towards that person is (cited in Annas, 1993: 254).

In more recent times, the issue of natural duties has played an important role in discussions on utilitarian ethical theory. A topical case is that of the burning house. There are two people inside – someone dear to you and somebody who is of great societal importance – and you may only rescue one of them. From a utilitarian point of view one would expect that the important person should be rescued, given his or her importance for the well-being of all. Many a utilitarian theorist, however, has developed intricate arguments to make the utilitarian calculus compatible with the moral intuition that one should rescue the dear one. According to Sidgwick, for instance, given the naturalness of certain affections, we come to expect others to act on them, and so pain is caused by deviations from these expectations (Sidgwick, 1981[1907]: 439). Whatever we think of utilitarian arguments like these, they present special ties as natural and as being grasped intuitively. They understand these natural inclinations, furthermore, as morally relevant. Therein, they resemble the ancient virtue-ethical arguments.

The ethical significance of special ties, moreover, is not only articulated by virtue-ethical and utilitarian theories. The same concern can be found in Communitarian theories or Ethics of Care theories. Such theories criticize liberal theories of justice for understanding people as 'unencumbered selves', thereby forgetting the specific ties that people value and that are necessary for living a good life (Elshtain, 1981; Gilligan, 1982; Sandel, 1982).

Theories that accept natural duties privileging the near and dear have not remained unchallenged. Some have argued that ancient ethical theories tend to be misinterpreted. Annas, for instance, agrees that proximity models, like that of Cicero, are readily recognized. But our 'natural' focus on the near and dear, so she argues, in Stoic ethics is an attitude we should

try to overcome. The core of the Stoic moral view is that a person should try to broaden his or her concern to ever larger circles. For this development in personal morality there is no rational stopping place. We have to try to broaden our horizon, our concern, to every human being. Such an orientation thus does justice to our human nature as the ancients understood it. Annas argues that Aristotle laid the foundations for such an ethics that goes beyond mere conventions; an ethic that has been further developed by the Stoics. This truly moral point of view, eventually, has been purified by Kant in his formal maxims of universality and impartiality (Annas, 1993: 173, 169–70, 254, 265, 445).

Utilitarian authors also maintain that the moral relevance of special ties must not be misunderstood. Special duties to the near and dear are morally relevant because of the specific functions they can have. To realize the greatest good for all, some division of ‘moral labour’ is instrumental. Special duties towards the near and dear are thus to be understood as distributed general duties. Special duties are appropriate and justifiable, and they are only so in a system in which they lead to maximum welfare or concern for all. Parents taking care of their children, and countries securing the welfare of nationals, is acceptable only if it leads to the greatest good for all. Consequently, special concern for the near and dear is not intrinsically valuable. Its validity depends on its contribution to realizing the greater good for all. Privileging citizens and migrants with whom special ties exist, therefore, is only justified if it means that others are sufficiently taken care of by their own states (Carens, 1992; Goodin, 1985: 145, 153; Shue, 1988: 696).

Communitarian and Ethics of Care articulations of special ties have also met with disapproval. Baier, for instance, maintains that although the importance of concern for near and dear is rightly articulated in the Ethics of Care, this must not make us neglect considerations of justice. By the latter she means considerations that take all individuals into account. To illustrate her point, she explicitly refers to migration policy (Baier, 1995).

We note that the validity of migration regulation following considerations of special ties is being contested. In different ways, articulations of natural special duties towards the near and dear are questioned. If we take a closer look, however, the comments cannot completely rule out the validity of special ties considerations.

Annas (1993), to begin with, probably is right when she points out a strong cosmopolitan orientation in Stoic texts. In her effort, however, to bring forward this point, she loses typical virtue-ethical elements. That is odd, given that systematically articulating virtue-ethics is her objective. Friendship and the correspondence between friendship and citizenship, as Aristotle for instance articulated it, seems to disappear from the picture all together. We can also note that in her ambition to present an ethical tradition that becomes ever more cosmopolitan and egalitarian, she even

seems to over-stretch Kant's cosmopolitanism. As we mentioned earlier, Kant, at least in his *To Perpetual Peace* (2003[1795]), gives a significant place to communal particularism. (On misinterpreting Kant's cosmopolitanism, see also: Mertens, 1996; Tholen, 2004).

Utilitarian authors, in their efforts to include special ties into their theories, tend to reduce the meaning of these special considerations completely to their functionality. By doing so, they lose sight of the intrinsic value and meaning that special ties and special duties have for people. People are understood to take responsibility for their near and dear not because of their special relation, but because it is functional for the greater good of all. That construction, in Williams's apt phrase, 'provides the agent with one thought too many' (MacIntyre, 1983; Williams, 1981: 18).

Baier (1995), finally, in her argument against the dominance of special care arguments, is worried that the interests of strangers are completely neglected. She, however, does not rule out the validity of special ties considerations as such.

In sum, commentators are not convincing in arguing that special ties considerations, for instance in the field of migration, are totally invalid. What they do bring forward strongly, however, is that special ties considerations cannot be the only guidelines. In some way, these considerations need to be constrained by principles that take into account the interests and well-being of all others.

CULTURE'S VALUE ARGUMENTS FOR SPECIAL TIES CONSIDERATIONS

In the previous section, special ties with people (yet) living outside the political community were understood in analogy to, for instance, family relations. The specific character of a political community and the relationship between its members was not taken into further consideration. In a second approach of articulating special ties considerations in the field of migration, the specific character of community is of central concern. Its continuity or flourishing in some sense is understood to justify the exclusion of some and the privileged access of others. Within this approach, three kinds of arguments can be distinguished. All these arguments maintain that a continuing shared culture is an essential element for political communities and this is what justifies special ties considerations in migration policy. They differ, however, on the specific understanding of 'culture' and in the way it is essential for the community's flourishing.

A first category of arguments might be labelled *order and stability arguments*. For a society's functioning it is taken to be essential that its members understand each other, that they have shared understandings and agree on



basic values; in short, that society in a certain respect is homogeneous. If these conditions are fulfilled, there can be societal trust, along with people willing to contribute to collective benefits. Solidarity and social stability demand that migration policies are selective, granting entrance to those that already share – or at least do not deviate too much from – the common culture in this society (Carens, 1988: 46; Perry, 1995: 112).

A second category is that of *context of choice arguments*. Adherents to this line of reasoning argue that people need culture because it is the source from which they draw materials to shape their lives and activate their freedom and autonomy. As Kymlicka puts it: '(I)t's only through having a rich and secure cultural structure that people can become aware, in a vivid way, of the options available to them, and intelligently examine their value' (1989: 165). If one takes the individual's well-being and autonomy to be of value, one should take care of the ongoing existence of their cultural setting. That might imply special rights and measures to support threatened cultures. One of such arrangements is territorial self-government and a migration policy that privileges those that fit well within this cultural structure (Gans, 1998: 164; Kymlicka, 1989).

A third category is that of *intrinsic value arguments*. Culture, here, is not valued because of its instrumentality for a society's stability or for individuals' autonomy. In both earlier arguments, the existing culture could in principle be exchanged for any other. Intrinsic value arguments hold that this culture for this society is valuable. Its members not only need it, but find it important itself and hope that their children also can fully engage in it. They understand it as a common project that is worthwhile to continue and guard against all kinds of threats. They think it to be better than other cultural projects or a mixture of cultural projects. For migration policy this implies not only that a country is justified in selecting those individuals that match this cultural project. It might mean, furthermore, as Gans maintains, that a political community has a duty to admit migrants that share its culture (or religion). That is the case if this community is the only one of its kind that enjoys self government. Gans's example is that of Israel, which, so he argues, has a duty to take in Jews who want to immigrate (Carens, 1988: 47; Gans, 1998: 164; Tamir, 1993; Taylor, 1994; Walzer, 1983).

Advocates of the cultural special ties arguments emphasize that these considerations do have their limits. Walzer, for instance, in discussing the case of the 'White Australia policy' notes: 'The right of white Australians to the great empty spaces . . . does not seem to be a right that one would readily defend in the face of necessitous men and women, clamouring for entry' (Walzer, 1983: 46). Similar reservations can be found in others (Gans, 1998; Tamir, 1993). Thereby they confirm the constraint on special ties considerations in migration regulation that we already encountered in the section on naturalistic arguments.

Special ties arguments involving cultural value, however, have to confront further criticism. Some critics suspect these arguments to be racist or to have racist consequences. Others maintain that the understanding of a political community that these arguments imply is empirically incorrect.

The racism critique is presented, among others, by Carens. He is willing to accept the claim that some societal homogeneity might be of importance. If people have the same cultural background, they will probably understand each other better and may be more inclined to cooperate. A sense of fellow feeling and attachment will probably also make them support redistributive measures to the benefit of the least well-off in society. The common culture might, furthermore, be understood as an achievement that must be defended and developed. But this does not justify, Carens continues, implementing any migration policy that is said to keep society homogeneous. To illustrate his point he also turns to the case of the 'White Australia policy'. That policy, according to Carens, expressed a history of imperialism and colonialism. It was vested on racist understandings and related to superstition, stigmatizing and deprivation. In fact it was not about privileging English-speaking people thoroughly entrenched in British values, but whites, even non-anglophone ones (Carens, 1988: 51). Migration restriction and migrant selection to safeguard a common culture might be valid; but then it is only a shared culture that may count. Non-British Europeans should thus not have gained access, but rather individuals from India or the British West Indies, for instance. Note that Carens's comment, in fact, contains two points. First, he points out that the Australian policy was in fact not consistent with the argument that was given. Second, he claims that the cultural special ties argument in migration is invalid if it means selecting on racist grounds.

A second line of criticism concentrates on the notion of community that is involved in value-of-cultures arguments. A 'national community of shared understandings' is a fiction, at least for western countries, critics maintain. As far as notions such as 'our own way of life' and 'a sense of relatedness and mutuality' have any meaning at all, they can only refer to cosmopolitan ideals such as human rights, rule of law, democracy and the like. Affinities and special ties differ among the citizens of modern societies (Scanlon and Kent, 1988: 86). The value-of-cultures arguments for privileged access build on a mistaken correspondence of state and nation. Specific rights for groups and policy measures to protect their cultural structure might be justified. Modern states, however, encompass many cultural groups (Hampton, 1995: 84). If migration policy grants privileged access to migrants that share the majority's culture, this might have serious consequences for the already present minorities. They – Arabs in Israel, Aborigines in a 'white' Australia – might feel themselves classified as second-class citizens (Carens, 1988; Gans, 1998: 170). Critics conclude



that any selection among applying migrants based on special ties must nowadays be judged invalid.

However, that conclusion is, considering the reasons given, not completely valid itself. Carens surely has a point when he refers to the inconsistency between the actual 'White Australia policy' and its justification. But his analysis of racism is not quite clear. At what point must we disqualify a migration policy as being racist? Carens does not disqualify, for instance, exclusionary measures of countries such as Japan for reasons of protecting the national culture (Carens, 1988: 57). Surely the societal composition of that country might be more homogenous than that of Australia. That, however, is beside the point. The Japanese migration policy could also be presented as expressing a history of imperialism and colonialism. A similar case can probably be made for every country. That would mean, however, that the cultural argument should be discarded altogether; and that is not what Carens wants to do here. What his analysis of the 'White Australia' case clearly shows, is the hypocrisy involved. While arguments of culture were given, it was in fact a criterion of race that was applied. Race, furthermore, we do not accept as a characteristic that can justifiably be used in differential treatment of people.

In the second line of criticism on value-of-cultures arguments, the cultural plurality within modern societies was emphasized. The liberal states we find in Europe, for instance, must not be mistaken for nation states, critics maintain. This is a point few will want to contest. Yet this in itself does not imply that cultural special ties arguments in migration policy have to be ruled out as invalid or irrelevant. For one, cultural plurality of modern societies in itself does not imply that it is inappropriate to take measures to support the continuity and flourishing of these cultures. A second reason for not discarding special ties arguments involves the understanding of 'national culture' and 'cultural plurality' in modern states. The issue here is whether a modern state can do without some kind of shared culture? It is on this issue that communitarians and republicans in recent years have criticized liberal theories. They have argued that for reasons of stability and cohesion a shared civic culture is necessary. A civic culture may be 'thin' compared to broader national cultures, but it still is a particular culture, and one that people can value as their own. Even if what is shared is values and principles of individual autonomy, equality, participation and the like, they are understood and valued in this specific realization, in these institutions, in this common project, together with people who understand and value them (MacIntyre, 1984; Tamir, 1993). Critics, to be sure, are right in emphasizing that nation states are at the most something of the past. But this observation is in no sense lethal for value-of-culture arguments for special ties considerations in migration policy.

THE CONDITIONALITY OF SPECIAL TIES POLICIES

We must now gather the findings that follow from the discussions in the last two sections. Our conclusion must be that special ties considerations in migration policies in principle can be justified, but that their implementation is constrained by three conditions:

- Special ties considerations must not overrule considerations of need. Admitting those that are in some sense near, or that have a culture that is familiar to ours, does not in any sense relieve us of duties of helping the needy.
- Special ties arguments only support migration policies that privilege those sharing our culture. Race is not a characteristic that may be used for selecting among potential migrants.⁵
- The majority culture must not be mistaken for 'a national culture'. If minority cultures are neglected, their members easily become stigmatized and second-class citizens.

What does this mean for the EU migration policy? In the second section, we saw that some EU migration regulations seem to express special ties considerations. Sometimes, special ties privileging is indirect: when privileging national policies offer access to all EU member states and imply EU-citizenship (Joppke, 2005). Yet the privileging can also be of a direct kind. In the following, we will focus on a regulation that is of the latter sort. We will concentrate, for reasons mentioned above, on the EU visa regulation for short-term stay, and put it to the test.

The visa policy distinguishes, as we may recall, between two kinds of countries. Nationals of countries that are on the white list are not required to apply for a visa when travelling to Europe, where others are. Of course, a thorough evaluation would involve gathering specific data. As our intention here is limited to illustrating the applicability of our findings, we rely on indications expressed in existing literature to perform a preliminary evaluation.

In an effort to grasp the logic behind the dichotomy between countries on the black and those on the white visa list, Guild has formulated some implicit criteria. Focussing on the black list she suggests:

one view of its contents is that in respect of race and religion almost all countries, the majority of whose population is either black or Muslim are on the list. Further, it could be suggested that those prejudices are supplemented by a second level of privilege or discrimination: wealth. (Guild, 2001: 38)

If we look at the black and white lists employed in the EU visa policy it is indeed remarkable how lines of race, religion and wealth seem to make for the distinction. Does this disqualify the visa policy?



- *Considerations of need:* One line of distinction between the visa lists is that of wealth. Privileged access for reasons of wealth does not seem to be an issue of special ties considerations. (It might be, in a cynical way, in relation to Europeans being used to a culture of welfare and feeling comfortable in the companionship of the wealthy). In line with our argument above, privileging some would be justified if it is accompanied by policies helping the needy. Political scientists and experts in European migration law, however, maintain that in the process of the Europeanization of migration policy in general, the possibilities for refugees to travel to Europe and find asylum there have been limited. EU migration policy has been labelled 'collective restrictivism' (Chimni, 2000; Ucarer, 2001). European governments and the EC programmes have proclaimed to remedy the causes of migration by enhancing economic development, ending human rights violations or supporting refugee protection in other regions. The effectuation of such programmes, however, has not been given much priority, at least so far (Boswell, 2003). If we follow these indicative statements, we must doubt that the EU visa policy of special treatment of some (rich) nationals is compensated adequately by policies that take care of the needy.
- *Racism:* In the EU memorandum on the visa lists, no reference to racial motivations can be found. In the 'White Australia' case we discussed earlier, that was lacking too. Yet the discrepancy between the justification in terms of cultural homogeneity and the actual measures we saw in that case is not apparent in the case of the EU. Although most countries with majority black populations are on the black list, a disqualification because of racism is not easy to make.
- *Stigmatization:* A third dividing line pointed out between the black and white list was that of religion: Muslim countries in particular are on the black list. Following our list of criteria, contrary to race, religion as such is not an invalid criterion for selection in migration policy. But given the religious diversity within Europe, it would hardly be appropriate if reference had been made to 'the non-Muslim shared culture of Europe'. Blacks, like Muslims, are not explicitly mentioned in European migration policy as categories of people that should be hindered from immigrating. To black and Muslim citizens of European countries it will, however, not be a secret that nationals of African and Muslim countries are treated differently. The stigmatizing effect, therefore, is probably quite real.

The conclusion of this preliminary evaluation must be that the EU migration policy in an important respect has to be disqualified.

CONCLUSION

In our time, Europe's identity and its consequences for European policies are broadly debated. The issue of Turkey's future membership, that of including 'European values' in an EU constitution and also migration and integration policies have led to high-pitched disputes. Here we have tried for a more subtle approach of coming to terms with Europe's identity and of evaluating its actions. We concentrated on an aspect of EU-migration policy expressing culture and identity: the occurrence and the evaluation of special ties considerations in EU migration regulation.

Some might be inclined to disqualify special ties measures in migration regulation without further consideration. In modern society, they might maintain, no grounds for privileging some over others is appropriate. Especially when it concerns EU migration policy, they could continue, such notions should be discarded. Isn't this, after all a post-national project, guided by ideals of individual equality and non-discrimination?

In this article, a more modest approach has been chosen. Considerations of special ties in migration policy have not been disqualified out of hand. Instead, arguments for applying special ties measures have been articulated and an effort made to develop criteria that guarantee reasonable checks on their application. We formulated three basic limitations to special ties considerations: one involving concern for strangers in need, a second prohibiting race-criteria and a third demanding to take into account the cultural and religious composition of modern societies.

In the last section, we put an important aspect of EU migration policy to a preliminary test: the visa regulations. Central to the EU visa policy is a distinction between the nationals of two groups of countries. Nationals of some countries travelling to an EU member state have to apply for a visa (black list), others do not have this obligation (white list). We applied our criteria to this policy and concluded that this policy failed to meet them.

That, however, is not our only result. What we have also tried to show is that it is possible to extend the debate on Europe's identity and its consequences for migration policy beyond abstract debate and political demagoguery.

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Notes

- 1 That refugees are 'privileged' in migration regulations because of individual characteristics is not falsified by the fact that the Geneva Refugee Convention explicitly recognizes persecution because of membership in a social group. Here it is the persecutor that acts upon group characteristics, not the country of asylum. The fact that countries (or the European community) under specific conditions choose to refrain from individual checks (as in the case of 'war refugees' from Bosnia and Kosovo in the 1990s) for practical reasons is not contradictory to the principle of individual experiences either. For this latter case, see also note 5 below.
- 2 EU Council, March 2001: OJ 2001 L 81/1 (cited in Guild, 2001: 31).
- 3 Document 500PC0027: Commission Proposal – COM (2000) 027 (cited in Guild, 2001: 33–4).
- 4 In special ties considerations, two different categories might be distinguished: considerations referring to personal ties, with relatives for instance, and considerations referring to national ties with specific groups (Tholen, 2004). In this article, we will focus on the latter understanding.
- 5 In cases in which considerations of special ties and considerations seem to interfere, this rule might be too strict. Is there no legitimacy to giving privileged access to those that share the (dominant) race and suffer because of that race? Examples might be the Israeli Law of Return for victims of severe anti-semitism or specific preferential policies of other countries on behalf of victims of ethnic cleansing.

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