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Citizenship in a post-Westphalian Community: beyond external exclusion?

Introduction

The concept and practice of citizenship has historically embodied a tension between internal inclusion and external exclusion. While the internal development has been an extension of equal rights and duties to all defined members of a state, externally the sharp distinction between insiders and outsiders has remained. This double status is so ingrained in our moral and political thinking that it very often goes unnoticed (Marshall 1963), or, if tackled head on, it is seen as an unalterable feature of modern political existence (Walzer 1983, Miller 1995). Against these odds, are there any prospects for theoretically conceiving and practically realising less exclusionary forms of citizenship? This paper assesses Andrew Linklater's (1982, 1998) theory of the transformation of political community in terms of its success in challenging these naturalised assumptions. Linklater claims that the emergence of more post-Westphalian state forms can bring the inclusionary resources of citizenship to bear on the sphere of international relations, and he suggests that institutional developments in the European Union are encouraging trends in this direction. This paper argues that the case of the EU provides little support for Linklater's assumptions, largely because: 1) the theory fails to recognise the exclusionary consequences of the differentiation of outsider status; 2) it relies too much on the causal effects of institutional frameworks. While fully supporting the theory's normative stance I suggest that the strong reliance

on institutional remedies may have counterproductive effects, and thus that the regionally restricted attempt to externalise aspects of citizenship, while pushing the exclusionary boundary further outwards, has not eliminated the insider-outsider distinction in an EU context.

The paper is divided into three parts. The first part outlines Linklater's theory and draws out some assumptions regarding the inclusionary potentials of current EU developments. The second part analyses the effect on inclusion of policies regulating access to territorial and substantial citizenship rights from the perspective of three target groups and in the light of the institutional arrangements. The third part goes back to the theoretical framework and suggests some possible reasons why theoretical expectations and empirical developments do not correspond.

1. Towards more inclusionary forms of political community?

Linklater (1982, 1998) does not provide a theory of citizenship as such but focuses on the wider question of how to achieve more inclusionary forms of international relations, denoting by this a widening of the sphere of ethical commitments. The main claim is that modern international theory and practice has always contained a tension between obligations towards fellow citizens and those extending to all individuals *qua* human beings. Contrary to realist thought, the issue then is not how morality is confined by the boundaries of the sovereign state, but how to strike the right balance between internal and external obligations.

The precise boundary between insiders and outsiders has fluctuated throughout history, and the aims of Linklater's theory are; 1) to provide a philosophical defence for a commitment to widened inclusion; 2) to give a sociological account of the forces that expand and contract external obligations; and 3) praxeologically to outline how the moral resources on which to draw for creating new international frameworks are hidden in present institutional realities. Philosophically, the inclusionary commitment is defended by recourse to Habermas's notion of discourse ethics, in which moral principles are arrived at through an ideal speech situation in which all those affected by a decision are included in a dialogue aimed at reaching consensus. Two important points for our purpose follow from this: 1) although a Habermasian ideal speech

situation may never be fully realised, participants must always assume (or ensure) that its conditions are satisfied to a sufficient degree. This entails an imperative of expanding the boundaries of inclusion into discourse. 2) The principle of discourse ethics is procedural and does not give guidance in what we may call applied ethics. Habermas (1993: 59) contends that this is beyond the task of political philosophy; as only the participants in actual discourses can reach agreement on substantive moral principles. While it might seem that this stance renders discourse ethics open to the charge of emptiness and formalism, the open-endedness of the principle has in fact radical implications: it makes the point made in 1) of working towards extended inclusion of participants even more important, since such inclusion is essential for reaching impartial decisions (which cannot be reached *a priori*).

Linklater thus accepts the postmodern and communitarian criticism of cosmopolitanism that there is no Archimedian vantage point from which to elucidate a universally applicable morality. However, he also claims that the logic of the demands for a politics of recognition and respect for difference rests on a thin universalist commitment to combat unjustified exclusion. The call for more inclusionary forms of political community that engage relevant outsiders in dialogue on matters that affect their interests thus rests on a general consensus between diverse philosophical stances.¹

The sociological task is to identify which forms of international relations best realise this ideal. In the modern states-system three institutional frameworks are envisaged: 1) a pluralist system of states in which international obligations are restricted to respect for external state sovereignty; 2) a solidarist states-system in which the participants would be able to agree on certain common norms and aims and the institutional arrangements necessary to achieve them; 3) a post-Westphalian community characterised by a dissociation of sovereignty, nationality, territory and membership, which breaks with the principle of ultimate state discretion. There are

¹ Although Linklater is right in claiming that a consensus on this thin universalist commitment has been achieved at the level of abstract theory, I am more sceptical as to how far this agreement holds at the level of applied ethics. In questions concerning the morality of territorial exclusion, for instance, communitarians and cosmopolitans would normally endorse substantially different policies. I cannot go into the problematic relationship between abstract and applied ethics here. Suffice it to say that although practical application is problematic, Linklater is surely right in seeing that the debate on the

three defining criteria of such a community: 1) a high degree of international cooperation; 2) a decisive transferral of sovereignty in vital issue areas; 3) a commitment to widening access to the dialogic community. While the first two criteria are of a technical nature, the third is intentional and implies that cooperation is engaged in *because* states are committed to the inclusion of outsiders. This difference in nature of the defining criteria is problematic both theoretically and empirically, as will be seen below.

To achieve a post-Westphalian society, one must draw on the resources of national citizenship. As Marshall (1963), Rokkan (1987) and others have shown, the development of citizens' rights was a dialectical process in which increasing state monopolisation led to increasing demands from subordinate groups to have their interests heard, thus transforming subjects into citizens on the basis of the ideals of individual freedom and equality. Paradoxically however, this happened at the expense of a stronger exclusion of outsiders (Carr 1995 [1939]). It is this nexus Linklater seeks to break with the notion of a post-Westphalian community. Because the boundary between insiders and outsiders is not precisely given, there is no reason why the dialectical process of extending rights and duties cannot transcend state borders. The idea is that states in a post-Westphalian framework have to give up their exclusionary right to decide principles of membership, citizenship and global responsibilities. Such principles must be decided in a dialogic community in which everyone that stands to be affected by a decision has the right to participate. This framework is expected to entail an important step towards widened inclusion on the basis of an external concept of obligations in which human beings have rights based on common humanity and not on citizenship.

It is suggested that Western Europe provides the most encouraging site for the development of new forms of political community. In particular, the institution of a European Citizenship is seen as an important step forward in giving aliens rights to make claims on the state on the basis of an external concept of obligations. However, Linklater warns that a post-Westphalian community must not become closed in on itself and advocates participation in more traditional pluralist and solidarist

moral importance of individuals' and states' rights requires synthesising approaches rather than taking the form of unbridgeable dichotomies.

international frameworks to enter into dialogue with communities with different priorities. Thus, the transnational citizenship created in a post-Westphalian context must be complemented by a (thin) cosmopolitan citizenship that extends to all individuals on the basis of common humanity.

Several questions arise from this theory. To what degree are individuals, rather than states, participants in the dialogic post-Westphalian community? How is inclusion measured? To what degree are the inclusionary assumptions verified at the level of the EU? In trying to answer these questions I compare the theory's expectations of a dissociation of sovereignty, territory, nationality and citizenship against the attempts at harmonising free movement, aliens and immigration policies in the EU. In this context two issues are crucial: 1) under which type of institutional framework are harmonising measures taken? I use a threefold distinction between intergovernmental arrangements, a mixed approach and Community measures. These can be seen as an operationalisation of Linklater's typology of international frameworks, although the correspondence is far from perfect.² 2) Which collective of outsiders are the harmonising measures directed at? I differentiate between citizens of EU Member States, legally resident third-country nationals and aliens (i.e. persons whose legal territorial presence has not yet been decided upon).³ The key question is: is there variation in the level of inclusion not only *between* each institutional framework, but also *within* each framework depending on the target group? The answer is crucial, as it will shed light on the relative importance of institutional arrangements in achieving the goal of inclusion and the extent to which the identity of the target group may modify this effect. The second part of the paper will privilege the effect of outsider identity, as this aspect is not focused on in Linklater's theory.

2. The emerging membership structure in the European Union

The claim that citizenship has to be made more inclusionary needs to be concretised to allow for empirical analysis. I propose that inclusion can be assessed along three

² The major difficulty lies in the former concepts' technical character and the latter's reliance on intentionality.

³ This is a simplified distinction and all three groups are in reality further subdivided. However, both for expository and analytical reasons I think this distinction captures essential aspects of the emerging EU membership structure.

dimensions: 1) as fact; 2) as rights; 3) as status/identity. Firstly, physical presence on the territory of a particular state is (normally) a necessary condition for the exercise of citizenship rights in this state. An inclusionary development in this regard would be to allow more persons territorial access to the state. Secondly, citizenship can be understood as a sphere of substantial rights and duties. Inclusion in this respect comprises both an expansion of the rights that citizens enjoy and an extension of the number of individuals entitled to them.⁴ This is perhaps the most common way of analysing citizenship, but a danger in focusing exclusively on the rights-aspect is that one is prone to ignore the implicit criteria on which the claim to rights rests. Territorial inclusion is one such criterion, another is status/identity. Citizenship as formal status/legal nationality creates a direct link between individuals and a state that is normally life-long and unchangeable. Inclusion in this sense would entail a liberalisation of naturalisation procedures, reducing the discrepancy between inclusion as fact and inclusion as status.

The three dimensions of inclusion are analytically distinct and the exclusionary aspects of citizenship must hence be assessed from all three perspectives. In the following I use a slightly revised version of Hammar's (1990) three-gate model for mapping out these dimensions in an EU context. According to Hammar, a non-citizen must pass three entrance gates, corresponding to the three types of inclusion identified above, before being fully included in the political community.⁵ However, since this model is designed for a sovereign state its categories must be modified in the context of a post-Westphalian community. In a sovereign state the end-point of inclusion is naturalisation, thus changing the composition of insiders while maintaining the distinction with outsiders. By contrast, the expectation of a post-Westphalian society is the increasing irrelevance of citizenship as status/identity through a dissociation of rights and identity. In this perspective naturalisation should be unnecessary. Thus,

⁴ The debate here also concerns whether citizenship rights should become more differentiated (see Young 1990).

⁵ Hammar's first entry gate embraces persons with short-term residence permits, while the second gate is reserved for 'denizens', i.e. long-term residents with a secure territorial and substantial status. I use the three entry gates in a less stringent way, denoting by the first gate legal territorial presence; by the second gate a certain extension of substantial rights (not only those granted long-term residents); while the third gate denotes naturalisation in both models.

from a theoretical perspective inclusion in a sovereign state and in a post-Westphalian society may entail different types of entry gates.⁶

The above distinctions form the structural framework for assessing the level of inclusion in the context of the EU. In the following I briefly outline the developments in the EU's institutional frameworks for dealing with free movement, immigration and asylum, before going on to discuss the effect the identity of the target groups has on the level of inclusion reached under these different institutional arrangements.

2.1. The institutional framework

In a long-term perspective, the institutional frameworks for dealing with issues of free movement, asylum and immigration policies have changed from little or no coordination in an intergovernmental framework, through the mixed approach of the third pillar of the 1991 Treaty on European Union (TEU), to the first pillar procedures introduced by the 1997 Treaty of Amsterdam (TOA). How far these procedures also signify a movement towards a post-Westphalian community is a different matter.

Before the TEU, cooperation in the fields of asylum and immigration policies was mainly ad hoc and strictly intergovernmental. Few results were achieved, due to both differing attitudes among the Member States and the institutional requirement of unanimity voting. As a reaction to this stalemate, in 1985 France, Germany and the Benelux countries signed the Schengen Agreement, aimed at the total abolition of internal borders among the signatory states.⁷ Although this cooperation outside the institutional framework of the EU yielded some concrete results, there was

⁶ There is an additional possibility for inclusion in a post-Westphalian community; not through mobility of persons, but through mobility of borders (Sicakkan 1997). In the context of the EU, enlargement has and probably will be the main way of transforming aliens into citizens (although still keeping the conceptual distinction). This possibility is not considered in Linklater's theory. However, for reasons of space I choose to disregard this dimension here and focus solely on personal mobility.

⁷ This agreement was supplemented by the 1990 Schengen Convention. Later, Italy (1990), Spain and Portugal (1991), Greece (1992), Austria (1995), Denmark, Finland and Sweden (1996) have signed the Convention, while Norway and Iceland (1996, renegotiated in 1999) have signed a cooperation agreement. With the entry into force of the Treaty of Amsterdam on 1st May 1999 the Schengen *acquis* is incorporated into the framework of the Union. Some provisions will fall under the new Title IV included in the Community framework (TEC), while some will be put in the revised Title VI of the third pillar (TEU). Pending the Council's decision on the legal basis for each of the provisions and decisions which constitute the Schengen *acquis*, they will be regarded as acts based on Title VI of the TEU.

widespread concern with the undemocratic and secretive nature of the arrangement (Meijers et al. 1992). Consequently, efforts towards strengthening the Community framework in issues relating to asylum and immigration were still regarded as important.

The TEU's main institutional innovation was to create a Citizenship of the Union, which codified existing rights and added some new ones for EU nationals. In the field of aliens policies it represented a compromise between traditional intergovernmentalism and a supranational approach in declaring issues in the fields of asylum, immigration, civil and criminal matters as 'areas of common interest'. However, since these policies were to be conducted in the intergovernmental third pillar, the influence of Community institutions was limited. The Commission had to share the power of initiative with the Member States and decisions would normally be taken by unanimity. The European Parliament's role was restricted to consultation and the Court of Justice was not given jurisdiction to ensure the uniform interpretation of the provisions of the Title. Thus, although a number of resolutions, recommendations and conventions were drawn up in this framework, there was widespread disappointment with the lack of binding and enforcing mechanisms and with the deficiencies in terms of transparency and democracy.

The Treaty of Amsterdam was meant to rectify some of these deficiencies. The most radical institutional change was the moving of issues relating to internal and external borders into a new Title IV in the revised EC Treaty (TEC), thus for the first time placing such issues into the ambit of Community law. However, this happened at the expense of changing some of the policy-making rules that normally apply under the first pillar. In contrast to the vague term 'common interests', the new Title IV specified detailed policy goals to be achieved within a time limit of five years from its entry into force. Some of these measures relate to the strengthening of rights and establishing of minimum standards with regard to third-country nationals and asylum seekers, while others concern measures to be taken for the strengthening of external border controls. Institutionally, the intergovernmental procedures of the old third pillar are to govern decision-making in the initial five-year period, and after this period the changes amount to a sole right of initiative for the Commission. Parliament's involvement through the co-decision procedure and qualified majority

voting in the Council are restricted to issues relating to visas. In addition, the powers of the Court of Justice, while expanded in other areas of the Union (Whelan 1997), are restricted in Title IV to an institute of last resort after all possible national courts have been consulted. Furthermore, the Court shall not have jurisdiction to rule on measures taken pursuant to Article 62 (1) relating to the maintenance of law and order and the safeguarding of internal security.⁸

We may then conclude that although there has undoubtedly been a development from strict intergovernmentalism to a modified Community procedure, asylum and immigration policies are far from being conducted in ideal-typical institutional settings. When comparing these developments with Linklater's typology of international relations we find the same pattern. Viewed from the perspective of the Member States themselves there has been a development from a pluralist system, in which domestic politics is an exclusively internal matter, to a solidarist system, in which states recognise certain common norms and aims and work together to achieve them. Whether there are also post-Westphalian tendencies to be traced is a more complex question. The three criteria of cooperation, sovereignty transferral, and commitment to the inclusion of outsiders are not found in equal amounts in the various institutional developments. Clearly, there would be a declining order from the first to the third criterion. Cooperation has been entered into without the giving up of sovereignty (e.g. in the Schengen agreements and in actions taken by a unanimous Council), and sovereignty has been transferred without leading to the inclusion of outsiders (as will be clear from the analysis of target groups). Thus, it is impossible to conclusively decide on which type of political community is emerging in the European Union solely on the basis of institutional developments. The third criterion of a post-Westphalian community cannot be assessed until the specific policy initiatives enacted under the different institutional frameworks have been established for each of the target groups. Only such an investigation can reveal whether the intensified cooperation in the fields of free movement, asylum and immigration also

⁸ This article relates to the absence of controls on persons, be they EU citizens or third-country nationals, when crossing internal borders. In effect, this means that any internal controls and checks, police operations and actions taken against illegal migrants (such as detention) can be shielded from scrutiny of the Court of Justice under the claim that these are matters involving the security of the state (Statewatch 1997).

spells a widened territorial and substantive inclusion into the sphere of citizenship rights (and for whom).

2.2 First-gate entry

The first necessary condition for an extension of citizenship rights is the right of territorial entry and presence. For the category of aliens, the paramount concern is access to the territory of one of the Member States, while for legally resident third-country nationals and EU nationals this access is undisputed and the main concern is access to the EU's internal first gate into the common territory. The inclusiveness of the external and internal first entry gates turn out to be inversely proportional; the extension of the right of internal free movement has gone hand in hand with an enforcement of external borders. However, this correlation cannot be put down simply to the logical requirements of state security, as the increasingly strict entry conditions for aliens have not benefited the internal free movement of third-country nationals. This suggests that the status-aspect of citizenship is still a strong determinant of EU territorial inclusion.

Article 18 (ex 8a) of Citizenship of the Union provides for the right of every EU citizen to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect. This seems an eminently post-Westphalian move, both in the sense of removing the policy area from the exclusive concern of sovereign states and in codifying it as a citizenship right. However, this interpretation is misleading. Neither are all these provisions a result of new institutional advances, nor are all Union citizens covered by this right. From the beginning of EEC cooperation, the right to free movement of workers was seen as essential in creating optimal conditions for the internal market. Restricted in the beginning to the coal and steel sectors, it was later expanded to include all occupations outside the public sector (Niessen 1996). A further expansion occurred in 1990, when a package of directives conferred the right of free movement on non-economically active groups.⁹ While the latter groups' entry is dependent on their economic means and thus excludes those relying on

⁹ See Directive on the general right of residence (OJ 1990 L 180/26), Directive on pensioners (OJ 1990 L 180/28) and Directive on students (OJ 1990 L 93/96).

unemployment benefit, no such requirement is made for workers, in whose case great pains are taken for facilitating free movement.¹⁰ This suggests that, rather than expressing a fundamentally equal civil citizenship right, free movement in Citizenship of the Union is more a codification of a market imperative (Sørensen 1996, Martiniello 1994).

Since Union Citizenship is defined by nationality of a Member State legally resident third-country nationals are excluded from the right of free movement by definition. This group's territorial inclusion has repeatedly turned out to be a problem for the Union. The TOA finally set out an interpretation of Article 14 TEC relating to the absence of controls on the free movement of persons to include non-EU citizens, but only at the cost of exempting the UK and Ireland from abolishing border controls. The TOA (Article 63.4) also includes an obligation to take measures for defining the rights and conditions under which legally resident third-country nationals may reside in other Member States. However, this provision is not subject to the five-year time limit. Furthermore, a proposed Convention on admission of third-country nationals (COM (97) 387 final) restricts this right to individuals that have obtained long-term residence. Thus, no comparable right of free movement, implying the right of residence, is in sight for third-country nationals. However, the 1990 Schengen Convention provides for a right of third-country nationals to travel freely in the territories of the Member States for a period not exceeding three months, subject to the possession of valid travel documents and sufficient funds to cover the period of intended stay and return to the Member State of initial entry. This right is qualified by a requirement to report to the competent authorities within a period of three days of crossing an internal border. Thus, some kind of internal control of third-country nationals is retained even in the purportedly frontier-free Europe.

Citizenship as status also turns out to have decisive importance at the external entry gate of the EU. The expansion of free movement rights within the EU for certain groups has simultaneously made access at the outer gate increasingly restrictive. Two

¹⁰ For the unemployed the citizenship right of free movement is restricted to a period of three months (Cornelissen 1996). For workers, however, facilitating efforts are made in terms of social security provisions, which are sought coordinated between the Member States so that migrant workers are not adversely affected as a consequence of exercising their right of free movement (Article 36 (ex 42))

unambiguous trends can be elucidated from the various policies targeting this group: first, the Member States increasingly try to divert migratory movements away from EU territory; secondly, harmonisation in the field of aliens policy has had exclusionary consequences for the group concerned.¹¹ Both trends challenge Linklater's belief that a post-Westphalian society will be more attuned to dialogue with outsiders, and that higher degrees of cooperation and sovereignty transferral will have inclusionary consequences.

Restrictions on territorial inclusion have been effected in two major ways; removal of aliens physically present on the common territory; and ever stricter entry criteria for aliens not yet present. The first has been achieved through readmission agreements, expulsion policies, and the introduction of novel concepts such as 'safe home country', 'third host country' and 'manifestly unfounded applications for asylum'. Their main effect is a shift of responsibilities from the EU onto third states, which are expected to act as a buffer zone. While the 1990 Dublin Convention sets out a system for ensuring that only one Member State is responsible for examining an asylum application, its provisions only apply if no third host country can be found to which to send the applicant.¹² In addition, if the applicant comes from a country deemed safe from persecution,¹³ or if her application is deemed manifestly unfounded,¹⁴ it will be subject to a special accelerated procedure that need not include full examination at every level. Appeal procedures may be more simplified than those generally available and they have no suspensive effect on expulsion measures. With regard to expulsion there is often no attempt to ensure that the third country to which the alien is expelled

TEC). Liberal rights of family reunification for EU migrant workers are also codified in Community law (Cremona 1995).

¹¹ To some degree this contention must be modified. Most lobbyists for the rights of asylum seekers and immigrants see the Treaty of Amsterdam as a step forward in securing these individuals' rights. This is mainly because of the increased competence of Parliament and the possibility (although limited) of Court of Justice jurisdiction. These institutional developments make for less arbitrary policies and gives aliens certain legal safeguards. However, my focus here is on the belief that harmonised policies in themselves are bound to lead to inclusion. As we will see, the tendency in EU aliens policies has been towards negative harmonisation according to the principle of the least common denominator, thus suggesting that far more important than cooperation *per se* is the political will behind this cooperation.

¹² See Resolution on a harmonised approach to questions concerning host third countries (in Bunyan (ed.) 1993).

¹³ See Conclusion on countries in which there is generally no serious risk of persecution (in Bunyan (ed.) 1993).

¹⁴ See Resolution on manifestly unfounded applications for asylum (in Bunyan (ed.) 1993). An application is deemed manifestly unfounded if it falls within two grounds: 1) there is clearly no substance to the applicant's claim to fear persecution in her own country; 2) the claim is based on deliberate deception or is an abuse of asylum procedures.

in fact accepts the imputed nationality and entry of this individual.¹⁵ The effect of all these measures is to restrict legal guarantees from certain groups of aliens based on collective criteria and to transfer the burden onto other states who are not participants in the post-Westphalian arrangement. This transferral of international duties hardly lives up to the post-Westphalian criterion of discourse ethics. Not only are the individuals who are most affected by the decision bereft of any influence on its outcome, third states are also excluded from a dialogue on principles that will seriously affect them. The call for engaging “relevant outsiders” in decisions on “the distribution of membership, citizenship and global responsibilities” (Linklater 1988: 83) thus turns out to be more state-centrist than expected, as it is confined to other Member States of the EU.

The second method for limiting the presence of aliens is to make sure they never reach the common territory in the first place, by intensifying strict external entry requirements. This has been attempted through measures relating to visa policy, border controls and carrier sanctions. The abolition of internal border controls makes other states’ entry policy a concern for each Member State. So far those aspects of a common visa policy that have been initiated have had an exclusively negative effect (Peers 1996a).¹⁶ A common negative list of those countries whose nationals need a visa for entering one of the Member States has been drawn up, comprising 101 states.¹⁷ Nationals from these states will need a visa when visiting any Member State, even if previously there was no such requirement. Another example of accumulation of entry criteria is the list of non-admissible persons in the Schengen Information

¹⁵ See Recommendation on the practises followed by Member States on expulsion 30.11.92, (in Guild & Niessen (eds.) 1996); Recommendation of 30 November regarding transit for the purpose of expulsion (OJ C 5, 10.01.96); Recommendation concerning checks on and expulsion of third country nationals residing or working without authorisation 1993 (in Guild & Niessen (eds.) 1996); Recommendation of 30 November 1994 concerning the adoption of a standard travel document for the removal/expulsion of third country nationals (OJ C 274, 19.09.96) and Recommendation of 22 December 1995 on concerted action and cooperation in carrying out expulsion measures (OJ C5, 10.01.96).

¹⁶ There are provisions in the Amsterdam Treaty for adopting, within the five-year period, not only a negative but also a positive list of those nationals exempt from visa requirements. The Council shall also adopt measures for the procedures and conditions for issuing visa, thus somewhat belatedly harmonising substantive and not only procedural aspects of visa policy. These measures will be taken in accordance with the codecision procedure in Article 251 TEC, thereby increasing the influence of the European Parliament and thus probably having an inclusionary effect.

¹⁷ Council Regulation No 574/1999 of 12 March 1999 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, (entry into force 19.03.99, OJ L 72). This regulation replaced a similar regulation agreed in 1995, which was annulled by the Court of Justice on 10 June 1997 because Parliament had not been properly consulted.

System (SIS). Aliens reported on this list by one Member State on the grounds of danger to public order or national security are now inadmissible in the remaining Member States regardless of initial legal entry and residence, and they may even have their residence permits in the original state of entry withdrawn. Hence, we see that the expanded territorial inclusion promised by the abolition of internal border controls have adverse effects not only on illegal migrants, against whom the strengthened external border controls are supposedly directed, but also on persons whose entry and stay on one Member State's territory is legal. It is thus not the individual's actions that make her an illegal alien, but a discretionary act taken by political institutions outside her influence. It is doubtful whether such negative side effects can be allowed for in an ideal-typical post-Westphalian framework, which is supposed to enhance a conception of rights based on common humanity.

Another control device the post-Westphalian credentials of which are dubious is the carrier sanctions provided for in the Schengen Convention. Article 26 obliges carriers responsible for bringing in inadmissible aliens to remove them out of the common territory and to carry the costs thereof. It is the carriers' responsibility to ensure that the alien is in possession of all necessary entry documents and they are liable to sanctions if transporting aliens that do not fulfil all necessary requirements. Apart from the unreasonable responsibility put on private companies by these provisions (see Cruz 1992), they put persecuted people in a no-win situation: An applicant will only be admitted into a host state if possessing a valid visa. But if she has a valid claim under the Geneva Convention, it is doubtful whether a visa will be issued by the agents of persecution. Conversely; if the applicant has a valid claim, it is more likely she will try to leave her country of origin with forged documents. But if this is discovered no carrier will be willing to transport the person. Carriers are thus effectively being asked to act as international immigration officers without having the necessary competence and qualifications for executing this task in a fair manner.

Hence, we have to conclude that with regard to first-gate entry, the effective dissociation of sovereignty, territoriality and membership has not included a dissociation of nationality. On the contrary, it is predicated on the status-aspect of citizenship. This is especially clear since the restrictions on aliens' territorial entry has not led to a comparable extension of third-country nationals' free movement rights.

Consequently, with regard to territorial inclusion the three criteria of a post-Westphalian community only go together for EU nationals. For the two other groups, the technical criteria of cooperation and sovereignty transferral have operated without the support of the third intentional criterion. Furthermore, there is no clear correlation between institutional framework and inclusion. Granted, free movement rights for EU citizens have been enacted in a Community framework since the 1950s, but this framework has itself undergone changes.¹⁸ The institution of Union citizenship, which Linklater seems to take as a departure for post-Westphalian arrangements, only codified rather than created rights. As regards third-country nationals, the main inclusionary development actually happened in an intergovernmental framework (the right of circulation in the Schengen Convention). This is more important than the abolition of internal border controls (Article 14 TEC), for the latter does not entail a legal right of territorial presence (and exempts the UK and Ireland). And with respect to aliens, it does not seem to matter much whether entry is barred through an intergovernmental framework (Schengen) or a Community framework (the common visa list).

As mentioned before, the increased involvement of Parliament and the Court of Justice, the two most inclusionary minded EU institutions, provided for in the Amsterdam Treaty, will probably have an inclusionary effect on aliens. In addition, some minimum safeguards are provided for in Title IV TOA with regard to the reception of asylum seekers, the qualification of aliens as refugees and the procedures for granting or withdrawing refugee status. However, these measures have more to do with persons who are already physically present on EU territory. There are no indications that the necessary first condition for citizenship – access to territory – will be made more available. It is also interesting to note that although the transformation of the intergovernmental Schengen Convention into Community law promises certain procedural safeguards, no change in the substantive (exclusionary) content follows from this communautarisation. Consequently, policies enacted at the first gate support the image of an external expansion of citizenship as fact only for EU nationals, and this comes at the expense of other groups' rights.

¹⁸ Until the entry into force of the Single European Act in 1987, unanimity in the Council was required for legislation in the field of free movement and the European Parliament needed only to be consulted

2.3. Second-gate entry

In Hammar's model, the second entry gate guards many of the substantial civil and social rights normally associated with the traditional model of citizenship. These rights have increasingly been extended to (long-term) foreign residents (Hammar 1990, Soysal 1994). Some scholars see this development as a sign of a post-national polity emerging in Western Europe, in which rights are increasingly dissociated from national identity. However, this development has taken place within the institutional framework of the sovereign state. From a post-Westphalian perspective the interesting question is whether a similar development has occurred at the level of the European Union. I argue that this is not the case. Paradoxically, while the post-national model seems to fit citizenship developments at the level of the sovereign state, the second entry gate is much more restricted in an EU context.

As regards EU nationals, a number of substantial citizenship rights are extended through the EC Treaties. However, although these rights are dissociated from national identity if EU nationals are seen in isolation, they are still predicated on territorial inclusion (although in a different state than the home state). EU workers' rights to combine periods of social and pension contributions for the purpose of obtaining social benefits can only be enjoyed if the previous right of free movement has been made use of. Similarly, family reunification with non-EU national family members is only guaranteed under Community law for EU migrant workers who have availed themselves of their territorial rights. In general, therefore, what second-gate rights exist for EU nationals seem to be there to ensure that the internal market works effectively. The only new second-gate right entailed in Union Citizenship is the right to petition the European Parliament and apply to the Ombudsman, whose remit is to conduct inquiries into instances of maladministration in the activities of the Community institutions.

While the right of free movement for EU nationals entails the corresponding second-gate rights of residence and employment, the right of circulation for third-country nationals in the Schengen states is limited to the first entry gate. The substantial

(Niessen 1996). Thus, some amount of sovereignty was still retained, putting this decision-making procedure closer to a solidarist than a post-Westphalian arrangement.

citizenship rights to work and to self-employment in the territories of the Member States are still, as a rule, regulated nationally.¹⁹ However, policy regarding third-country nationals was listed among the 'matters of common interests' in the TEU and the TOA further specified which issues fall within these provisions. Three resolutions were adopted in 1996 regarding admission of third-country nationals for employment, for study purposes and for self-employment, and these were followed by a proposed convention regulating all aspects of access to the territory of Member States for third-country nationals. Only the provisions on family reunification confer an individual right of entry, but these provisions are far more restrictive than the corresponding rights of family reunification for EU nationals, for whom family members are non-EU citizens.²⁰ As regards admission for employment, third-country nationals are only to be allowed entry if the position cannot be filled by Community labour or by third-country nationals already settled within EU territory. Self-employed third-country nationals are only to be allowed admission if their activity is beneficial to the economy of the host state and if they can establish that they have sufficient resources to undertake the activity. As for students, the importance of repatriation after the completion of their studies is emphasised. All these groups thus face strict entry conditions, and no direct rights are conferred on them even if they fulfil all the criteria as set out in the Convention. Thus, it cannot be said that they have fully passed the second gate of inclusion into the substantial rights of citizenship. The situation for long-term foreign residents is somewhat different, as the harmonisation of third-country nationals' legal status with that of nationals of the Member States is one of three main elements in a 1994 Commission communication (COM (94) 23 final). The Convention sets out some proposals for achieving this aim, which, if implemented, would mean a significant step towards recognising EU competence in the field of

¹⁹ Exceptions to this contention include EEA nationals, who in general are treated the same way as EU nationals. In addition the EU has entered into a number of international agreements with third countries, which to varying degrees contain rights for individuals (see Cremona 1995, Peers 1996b). This leads to a confusing situation in which third-country nationals' rights are partly dealt with in a Community framework and partly in the third pillar of the Union. In the following I will concentrate on those rights that apply to third-country nationals who are not covered by any separate agreement.

²⁰ While EU citizens enjoy an unqualified right of reunion for spouses, Member States retain the discretion to judge the genuineness of third-country nationals' marriage in the handling of applications for admission. Secondly, while no waiting period is required for EU citizens, third-country nationals have to wait one year (two years for students) before exercising this right. There is also an obligation to live under the same roof as the admitted spouse. The admitted spouse can only take up paid employment after a six-months period, while no such restriction holds for EU nationals. While children of EU nationals under 21 years of age have the absolute right to be reunited with their parents, children

third-country nationals' rights in Member States and also a possible opening for the right of employment and study in other Member States. However, since some restrictive conditions remain this is not an equalisation of rights as compared with EU citizens.²¹

From the above we conclude that, as with territorial rights, many of the second-gate rights do not depend on the institutional framework. EU national workers have enjoyed the social and economic benefits that follow employment since the right of free movement was introduced in the late 50s. We also see that second-gate rights for third-country nationals in an EU context, disregarding those agreements particular for specific countries, are largely limited to achieving some co-ordination of existing national policies, as the common standards identified in the resolutions and conventions are not binding upon the Member States.²² This testifies to Soysal's (1994) claim that the post-war period has witnessed an increasing expansion of rights on the basis of residence or universal personhood in the nation-state. However, it also validates Sørensen's (1996) assertion that these rights remain confined at the level of the Member States, since few attempts are made at institutionally securing them at an EU level. As regards the civil rights that normally accompany residence in a nation-state, some of these have been extended both to EU nationals and third-country nationals, although on different grounds. For the first group, petitioning the European Parliament and the Ombudsman is a right of Union Citizenship, while for the latter it can more appropriately be seen as a human right that extends to all persons within a state's jurisdiction. Although the effects of the right are the same, this is a crucial symbolic differentiation, which shows that the importance of distinguishing between insiders and outsiders still remains in a post-Westphalian framework.

of third-country nationals must be below the age of legal majority, unmarried and be financially dependent on their parents.

²¹ Long-term residents will only be allowed admission for employment in a different Member State as long as the position cannot be filled otherwise. Furthermore, a long-term resident settling in another Member State shall be granted long-term resident status in this state after two years' residence. However, she thereby loses her long-term residency in her original host state. Thus, as opposed to the situation for EU migrants, long-term residents' rights are not mobile.

²² The measures concerning third-country nationals scheduled to take place under TOA will be drafted as binding instruments. No such regulations have hitherto been drawn up.

2.4. Third-gate entry

The analysis of territorial and substantial rights casts doubts on the proposition that citizenship as rights has become increasingly dissociated from citizenship as status. However, some of the third-gate rights conferred by Citizenship of the Union seem to verify this contention. Some political rights have been expanded in the sense that any EU citizen shall have the right to vote and stand as candidate at municipal and European Parliament elections in another Member State. Previously, such a decision was at the discretion of the Member States themselves. Every citizen is now also entitled to protection by the diplomatic and consular authorities of any Member State in cases where the state of origin is not represented, on the same conditions as the nationals of that state. Looking at EU nationals in isolation there is no doubt that nationality matters less and less with regard to an increasing number of rights. However, the post-nationality of this policy is compromised by the fact that third-country nationals are exempted. Whatever political rights this group enjoys are determined at Member State level. Paradoxically therefore, instead of dissociating nationality and membership, the political rights granted at EU level serves to reinforce the connection between identity and rights, which Soysal (1994) and Linklater (1998) argue has become increasingly decoupled in Western European states in the post-war period.

It is striking that the personal scope of these Community rights, which by definition take precedence over Member State's policies, are in the final instance determined by a unilateral decision by the Member States themselves – the decision as to whom citizenship of the state should be granted (O'Leary 1992). The inclusion into EU political rights for third-country nationals is thus not decided at EU level but is left to the relative inclusiveness or restrictions of Member States' naturalisation procedures. One may argue that as long as Citizenship of the Union contains few substantive rights it does not matter much whether the criterion for inclusion is nationality or residence. This might be true for EU nationals, the majority of which already enjoy rights of free movement, employment and residence under different provisions. For third-country nationals, however, inclusion into Union Citizenship would have substantive implications both at first, second and third-gate level. Apart from the political rights just mentioned, enjoyment of free movement rights and the second-

gate benefits deriving from them regarding employment, social security, non-discrimination on grounds of nationality etc. are also predicated on the nationality of one of the Member States. Citizenship as a bundle of rights and practices, that is, something that individuals 'do', has therefore not become as severed from formal citizenship or nationality, that is, something that citizens 'are', as Linklater's theory predicts.

3. The limits of a regionally restricted post-Westphalian approach

Why are the exclusionary side-effects of externalising certain aspects of citizenship rights in an EU context not foreseen in Linklater's theory? I suggest three possible explanations: 1) harmonisation of state practice is regarded as inherently inclusionary; 2) there is no distinction between the technical and the intentional criteria of a post-Westphalian community; and 3) there is no differentiation of outsider status. These three aspects add up to an over-emphasis on institutional arrangements rather than political will.

When harmonisation is often hailed as an inclusionary development for third-country nationals and aliens, it is because of the increased involvement of the European Parliament and the Court of Justice (i.e. increasing democratic decision-making and judicial accountability) and the expectation that this will lead to the development of minimum standards, the possibility to influence recalcitrant states etc. I do not dispute these beneficial aspects of a higher degree of institutionalisation. However, that harmonising policy measures are also inclusionary in their content should not be assumed *a priori*. Obviously, this would depend on pre-existing state practice. Part 2 showed that a number of harmonising measures in the field of aliens policy have restricted the alien's scope of choice and have led to an accumulation of restrictive entry conditions. Hence, the post-Westphalian criteria of a high degree of cooperation and a high degree of sovereignty transferral do not *necessarily* have inclusionary effects. That depends on the identity of the target group and on the previous inclusionary record of the states in question.

Furthermore, there is a difference in nature between the two mentioned criteria and the criterion of commitment towards widening access to dialogue. The first two relate

to institutional arrangements while the latter concerns intentions. Linklater seems to assume that if sovereignty is dissociated from nationality, membership and territoriality, a widened dialogic community is a logical consequence. It is, to a large extent, for EU nationals, who now enjoy a wide range of rights on the basis of an externalised citizenship. However, even this conclusion must be modified, as most of these rights were developed in an institutional setting different from the post-Westphalian model. Apart from this, it seems that the ‘dissociation criterion’ is only logically related to the dialogic criterion if the target groups for both are identical. In the case of third-country nationals and aliens, Member States have given up sovereignty on issues relating to territory and (factual) membership. Thus, if these groups are looked upon as the object, the policies have been post-Westphalian. If, on the other hand, aliens and third-country nationals are regarded as the subject, as agents expected to influence the outcome of decisions affecting their interests, the policies may be described as pluralist, as there has been no attempt at reaching a common understanding of shared norms and aims between Member States on the one hand and outsiders on the other. Although this is hardly a surprising conclusion considering the EU’s explicit linking of free movement rights to compensatory measures, it is an unwelcome consequence in Linklater’s theory, which claims that “no practice of ‘boundary-fixing’, no practice of exclusion, is automatically beyond question and reproach” (1998: 100).

This point is connected to the final one, the neglect of differentiation of outsider status. In Linklater’s framework there are only two groups; insiders (i.e. the citizens of a particular state) and outsiders (all non-citizens of this particular state). When several states join to form a post-Westphalian community, previous outsiders are thereby conferred insider status. What this image fails to take into account is that state A does not only contain citizens from cooperating states B and C, but also citizens from D, E and F and in addition have a number of people from states X, Y and Z requesting entry at its borders. Hence, dialogic arrangements that only embrace citizens of cooperating states might fit nicely with the ideal image of the nation state, but are inadequate for reaching more inclusionary forms of citizenship based on common humanity in a situation where international migration has decisive effects on the composition of a state’s resident population. Thus, we see that, inadvertently,

Linklater's vision of a post-Westphalian community ends up privileging citizenship as status over citizenship as fact.

Conclusion

The above analysis has tried to find some reasons for why theoretical expectations and empirical developments do not converge. It is not an analysis of the causal factors behind the empirical outcomes, nor does it give an outline of how to make present realities more inclusionary. However, the fact that the EU can hardly be called a truly post-Westphalian community does not mean that present circumstances are unalterable. The normative commitment of Linklater's theory still remains valid. However, the means for realising these ideals might be somewhat different from what he suggests. Regionally restricted post-Westphalian measures may contribute to the externalisation of citizenship rights, but such measures should only be considered when the interests of non-participants in the post-Westphalian venture are taken into account. This could mean a restriction on certain rights granted to post-Westphalian citizens if they conflict with the rights of outsiders. But this might be more in tune with the spirit of a post-Westphalian community than an extension of rights that requires 'compensatory measures' for their realisation.

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