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Between Postnationality and Postcoloniality: Human Rights and the Rights of Non-citizens in a “Cosmopolitan Europe”

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This essay examines how the human rights project¹ and the project of the European Union (EU) deal with the rights of non-citizens – particularly, the rights of undocumented migrants. In doing so, it explores the tensions between postnational articulations of EU membership, both in terms of normative expectations and institutional construction, and the post/neocolonial condition expressed in the politics of citizenship and migration in today’s Europe. I argue that the exclusion and exploitation of postcolonial migrants simultaneously underpins and betrays the EU’s ambition to re-establish Europe as a leading “normative power” (Manners 2002) committed to the value of human rights. In fact, “respect for human rights” is enshrined in the Treaty of the European Union as one of the key values on which the EU is founded and thus constitutes one of the EU’s most significant accession criteria. The connections between human rights and the EU project have gained even more prominence since the EU was awarded the 2012 Nobel Peace Prize. However, what seems more interesting to me is the fact that the EU project and human rights face similar criticisms.

The critiques of human-rights politics closely resemble those of the post-national interpretation of the “EUropean” project. Aakash Rathore and Alex Cistelecan (2010) distinguish two approaches to problematizing the international discourse and regime of human rights: the postcolonial and the post-Althusserian approach. According to them, the former is primarily framed in terms of difference, or of “the discontinuous divide between those who right wrongs and those who are wronged” (Spivak 2004: 563); while the latter insists on the presumption of equality, and thus a formal inscription of universality. However, taking a closer look at these claims, we may find that the two approaches are complementary rather than contradictory. Each line of argument is effective in dealing with one aspect of the “paradoxes of human rights”, which are frequently referred to in both academic discussions and public discourses. On the one hand, humanitarian intervention is charged with

¹ By “project”, I mean both a set of international legal documents concerning human rights as well as their implementation through the international human rights regime comprising IOs, NGOs, international courts, et cetera, and corresponding global narratives of emancipation and progress (cf. Baxi 2002).

being “humanitarian war”, and even less militant projects of human rights are accused of imposing “the ideology of the rich on the poor” (Douzinas 2007: 33). On the other hand, human rights continue to be one of the most powerful instruments employed by the oppressed and the rightless to claim equality, rights, and justice. Being neither straightforwardly emancipatory nor unambiguously coercive, the paradoxes of human rights, as Gurminder Bhambra and Robbie Shilliam (2009) emphasize, derive from their essentially contested nature. The instrumentalization of human rights language by hegemonic powers is therefore no coincidental abuse, but more fundamentally rooted in their contested nature. From a postcolonial feminist point of view, Ratna Kapur identifies three problematic claims on which the human rights project is grounded: a teleological narrative of progress, discriminatory universalism, and – most importantly – the questionable construction of the sovereign “subject” of human rights (Kapur 2006). Along a similar line of critique, the arguments for the postnational nature of European citizenship and for the idea of a “cosmopolitan Europe” have been interrogated for their failure to take into account Europe’s history of colonial expansionism, and for their insistence on the genuinely “European” character of cosmopolitanism.

In light of these interrogations, this essay will, first of all, question the problematic construction of the subject of human rights and of the citizen, by addressing the gap between “Man” and “Citizen” through the Arendtian critique of human rights. The second section explores EU citizenship as an institution that reproduces differential inclusion and an essentialist cultural identity. It also examines the postcolonial condition of Europe from the vantage point of the simultaneously politicized and depoliticized “migration question”. The precarious status of certain migrants and would-be-migrants reveals the incapability of the human rights regime in the face of the state’s reassertion of territorial sovereignty. Thus the essay also engages with the work of contemporary advocates of cosmopolitanism such as Seyla Benhabib (2004), who makes an ardent appeal to follow a Kant-inspired world federalism guided by moral universalism. I, however, contend that neither institutional nor morality-based versions of cosmopolitanism can sufficiently account for the profound implications of the struggles of non-members for a political community. The last section accordingly engages with the political significance of migrant subjectivity through Jacques Rancière’s (2004) reconfiguration of the subject of rights. The ambivalences of human rights politics continue to haunt contemporary struggles that both contest and reiterate the gap between the universal human and the national citizen.

The Rights of Man and the Rights of Citizen

There is little doubt that the French Declaration of the Rights of Man and Citizen is one of the founding texts that defined the modern notion of popular sovereignty and the concept of human rights in our time. This concept, however, is ambiguous and controversial. As Giorgio Agamben points out, it is not clear even in the very title of this fundamental document of modern politics, “whether the two terms *homme* and *citoyen* name two autonomous beings or instead form a unitary system in which the first is always already included in the second” (Agamben 1998: 126). Agamben’s discussion on the “rights of Man” unsurprisingly starts by invoking Hannah Arendt, who has offered one of the most famous and powerful critiques of human rights after the United Nations adopted the Universal Declaration of Human Rights (UDHR) in 1948. Her central argument (Arendt 1949, 1976) is that human rights are either the rights of the citizen (as a tautology) or the rights of those who have no rights (as a void).

To make sense of this argument, one must start with Arendt’s understanding of the human condition, that is the Aristotelian idea of human beings as speaking (*zoon logon echon*), and hence as political beings (*zoon politikon*). For Arendt, the discourse of the eighteenth century, by presuming that rights spring from the “nature” of man, degrades the political to nature, so that there is “nothing sacred in the abstract nakedness of being human” (Arendt 1976: 299). In other words, “apart from the institution of the community, there simply are no humans” (Balibar 2007: 733). Human beings qua human beings are never endowed with “inalienable rights”, for all rights depend on “a tacit guarantee that the members of a community give to each other” (Arendt 1949: 34). What is stated in the UDHR as well as in the French Declaration of two centuries ago is in fact not human rights, but the rights of equal members of a political community. Furthermore, since the nation-state is the only legitimate and universalized form of polity of the modern age, what we call human rights are in fact the rights of national citizens. However, if there is something we can call a “human right” (in singular form), according to Arendt (1976: 298), that would be the right to be a member of a political community or “the right to have rights”. Those who have lost the so-called rights of Man are not completely rightless. Rather, absolute rightlessness means the loss of that “one” human right; meaning that one no longer belongs to any community whatsoever.

Arendt’s reflections on the post-war effort to “reanimate the idea of human rights as political foundation” (Menke 2007: 739) are grounded in her observations on “stateless people” in the twentieth century. It is the existence of these people, who are “forced to live outside the common world” and are thrown back “on their natural givenness, on their mere differentiation” (Ar-

endt 1976: 302), which reveals the aporias of human rights. Historical evidence has shown, in her view, that “the restoration of human rights has been achieved so far only through the restoration or the establishment of national rights” (ibid: 299).

Thus there is no way for the stateless, or any person who is not recognized as a member of a political community, to escape their fate of absolute rightlessness. To rescue human rights from being either void or tautological, one must reconsider the dichotomy underlying the argument that humanity exists only by virtue of the political community, now the nation-state, which turns bare lives into political beings. The tension between the realm of the political (of freedom) and the realm of private life (of necessity), or between *bios* and *zoe*, sets them in rigid opposition to one another. I shall return later to this problematic opposition. For now, another immediate question is also triggered by Arendt’s insights, namely, is citizenship to be conflated with nationality, the only attribute that marks the gap between Man and Citizen?

The legacy of the French Revolution serves as an important point of reference in revealing the “different modalities of exclusion that constitutes the founding moment of citizenship” (Balibar 2004: 76). The distinction between *citoyens français* and *citoyens actifs* was immediately introduced in the 1791 Constitution. Emmanuel Joseph Sieyès offered one of the earliest justifications for such a distinction: “natural rights are those rights for whose preservation society is formed, and political rights are those rights by which society is formed”. He continues to state that women, children, foreigners, and those “who would not at all contribute to the public establishment must have no active influence on public matters” (Sieyès 1985, cited in Agamben 1998: 130). In other words, they are merely subjects, not citizens in the genuine sense of the term. This categorical border drawn between those who are qualified to be citizens and those who are not spells out a political anthropology of the modern citizen, or of the human itself.² The Enlightenment notion of rationality plays a key role here, as in Locke’s discussions about the relationship between citizenship and property. Property implies first of all “the property of the self” (Mezzadra 2006: 33), which is, in Sandro Mezzadra’s words:

the capacity of an individual to rationally dominate his passions and to discipline himself in order to be able to do that labour which constitutes in turn the foundation of every material property (ibid: 33).

The case of the Haitian revolution is frequently referred to by postcolonial scholars, yet its familiarity has by no means reduced its impact. When the leaders of the Haitian revolution, who called themselves “Black Jacobins”, declared their independence from colonial rule and slavery, Monsieur Comte

2 Costas Douzinas claims that a person who enjoys the “rights of man” is above all a “well-off citizen, a heterosexual, white and urban male” (2007: 54).

de Mirabeau's speech at the National Assembly was in a way only an exaggerated version of Sieyès' philosophy:

[i]n proportioning the number of deputies to the population of France, we have taken into consideration neither the number of our horses nor that of our mules (Trouillot 1995, cited in Chatterjee 2007: 29).

While the narrative of evolutionary history could easily silence the significance of the Haitian Revolution, it constantly reminds us that the construction of citizenship and of the subject of human rights have never been independent of each other. In other words, both "immanent others" – resident aliens, women, children, and the poor – and "distant others" – "the uncivilized" – constituted the very condition of French citizenship, rather than simply occupying the pre-existing space of the non-citizen.

Citizens, Non-citizens and the Postcolonial

If the French Revolution was the most influential event in the establishment of the paradigm of national citizenship, the creation of European Union citizenship is regarded by many as an exemplar of postnational or transnational citizenship. To be sure, the framework and future of this novel conception of citizenship is subject to continuing controversy. Will Kymlicka summarizes the two main approaches in this debate as "transcending liberal nationhood" and "taming liberal nationhood" (Kymlicka 2008: 130–132). Scholars who embrace the former approach expect the EU to be the optimal realization of the idea of a "cosmopolitan Europe" (Beck/Grande 2007) and view it as a "progressive, human-rights based" (Hansen 2009: 20) normative power, showing the rest of the world once again the direction of history. In contrast, the latter group holds that the vanishing of "liberal nationhood" is neither possible *nor* desirable in our time (Kymlicka 2008, Bellamy 2008). While both camps focus on what is or is not promised, they do not make an effort to address what has been forgotten. What Eleonore Kofman asked two years after the implementation of the Maastricht Treaty has only become more relevant today:

So does this mean that the extension of and debate about the renewal of citizenship in Europe will bring advantages to those groups that have been marginalized or excluded from it until now? [...] [W]ill new political spaces operating at a variety of scales be capable of redressing the limits of citizenship and responding to the needs of the principal groups in question? (Kofman 1995: 122)

The key question, in my view, is whether this kind of politics consolidates the boundary between the subjects of rights, who have benefited from the present citizenship regime, and those who have only limited access to it? Or, to put it

more pointedly, does the project of EU citizenship once again reinforce the paradox of human rights, namely, that those who are most in need of rights have the least of them?

Let us take a closer look at the formal institution of EU citizenship to address these questions: European Union citizenship, by definition, complements rather than replaces national citizenship; yet this does not prevent it from becoming a *sui generis* form of political membership. Yasemin Soysal (1995) has famously spoken of “postnational membership in Europe”, offering the general enjoyment of civil and social rights to all residents regardless of their nationalities, as argued in the previous section.

The enjoyment of “passive rights” by foreigners, however, was already a widely accepted principle in early liberalism. It is therefore the expansion of political rights to nationals of other member states that makes citizenship of the Union arguably “the only formal constitutionalisation of postnational citizenship” (Cornelisse 2010: 108). Most notably, EU citizens have the right to vote and stand for election at the municipal level in their state of residence as well as within the European Parliament. The “postnational rights package” also includes freedom of movement within the territory of the Union as well as the right to appeal to the Ombudsman. Yet its complementary nature continues to maintain and reproduce the differentiating mechanisms of national citizenship. The “postnational rights package” is only postnational for the nationals of member states, and it remains the case that the sovereign state alone decides to whom it grants citizenship. Here we can see once again the contradictions the human rights discourse and the EU project seem to share: while both are supposedly intended to transcend the limits of the nation-state, both implicitly reaffirm the link between nationality and access to rights.

The political anthropology of the modern subject implied in earlier discourses on citizenship indicates that the structure of inclusion and exclusion in the paradigm of national citizenship is not solely based on state territoriality; nor does it entirely overlap with ethno-cultural boundaries. The different images of the Other, or of those who are deemed disqualified to be citizens – foreigners, nomads, the propertyless, and indigenous people – mirror one another and become integral to the construction of modern citizenship. From this perspective, it is clear that the transformation of citizenship in the EU does not only involve the promised triumph of “civilization” over “eros” enthusiastically spoken of by optimistic commentators,³ but also, more importantly, creates an “increasingly complex system of civic stratifications with differential access to civil, economic and social rights” (Kofman 2005: 453), depending on different categories of status. There are full-fledged national

3 The Marcusean expression “eros and civilization” is used by Joseph H. H. Weiler (1999: 324–355) to outline the key issues in the debates on EU citizenship. He contends that the ideal form of European citizenship should be the embodiment of Civilisation, whereas the national stands for Eros.

citizens, EU citizens, permanent residents, temporary migrant workers, refugees and asylum seekers, ethnic minorities, and so on. But outside all these statuses, a group of the population lives “in the absence of any legal recognition” (Monforte/Dufour 2011: 4). According to the normative understanding of the word “person” discussed above they can be deemed “non-persons” (Dal Lago 2009). Depending on the context, different terms such as “undocumented”, “illegal”, or “irregular migrants” are used to refer to those people who live in a country where they do not hold authorized documents for entrance or establishment.⁴ Being “illegalized” by virtue of their mere presence, undocumented migrants are not stateless people in the strict sense of the term. Yet, among all excluded groups, they are the most reminiscent of Arendt’s warning, more than half a century ago, about being denied that “one human right”, or the “right to have rights”.

This is particularly true in those countries or cities where undocumented migrants suffer from the strongest isolation from other social groups and the toughest restrictions on their mobility. For instance, the movement restriction law of Germany (*Residenzpflicht*) defines a specific status of *Duldung* or tolerance. People falling under this category are not deported immediately, but their mobility is highly restricted, and they can barely leave the district they are placed in by the state authority (Monforte/Dufour 2011: 10). In this extreme case, not only is the migration “problem” depoliticized as a bureaucratic matter of population management, the life of the migrant itself also becomes apolitical because of the ubiquitous border that separates it from the rest of society.⁵ The loss of the relevance of speech, as Arendt argues, and the loss of all human relationships established by living in a community amounts to the loss of the most essential attribute of human life.

The predicament of undocumented migration reveals the paradox between the universal norms of human rights and the exclusive citizenship regime of the nation-state through which the articulation of rights is made possible. However, this is only part of the story. The perceived “problem” of immigration has evoked both depoliticizing and politicizing responses in European countries and beyond. In debates on migration, political parties, electoral campaigns, and very often the mass media tend to employ a rhetoric of national identity and thereby imply that the “political self-understanding of the political community” is at stake (Huysmans 2000: 163). Furthermore, the process of European integration has contributed to the creation of what Étienne

4 In this chapter, I use these terms interchangeably, even as I critique the negative connotations attached to some of these categories. I am also aware of the important difference between “irregular” and “illegal” migrants in legal terms, which is concerned with whether the state considers the violation of its established norms on the entry and residence of foreign nationals as a “criminal act” or as a “statutory offence” (Sciortino 2004).

5 One could also argue that the very process of depoliticizing certain groups of the population is essential to the maintenance of the politicized norms on which the biopolitics of sovereignty is grounded.

Balibar calls a “new racism” that is at once “postcolonial and postnational” (Balibar 2004: 122). This is directly related to the formulation of “a European identity” at the supranational level since the 1970s, which has been considered by Europhile politicians and some democratic theorists to be indispensable to the realization of European citizenship. The concept of “European identity” has been criticized for mobilizing an essentialist conception of cultural identity, which inevitably involves “Othering” the rest of the world as well as Europe’s colonial past. Fatima El-Tayeb remarks that this politics of migration functions simultaneously as “a threat uniting the beleaguered European nations and as trope shifting the focus away from Europe’s unresolved identity crisis” (El-Tayeb 2008: 650). Just as the removal of internal borders has to be accompanied by the strengthening of external borders in the geographical space of the Schengen area, the fabrication of a supranational identity advocated by the EU entails a similar process of redrawing identitarian borders in the membership space.⁶

Thus, “illegal” migration is not merely an administrative denomination that classifies a group of foreigners as “illegal” by virtue of their presence. It carries immediately and intrinsically racial and economic connotations. This is indeed not entirely new: racialized immigration filtering was already systematically practiced in the colonies of the British Empire. In Natal in 1897, for example, when migration restrictions were first introduced on the basis of property and language proficiency, the prime minister of the self-governing colony had to explain to the imperial authorities that “it never occurred to me for a single minute that it should ever be applied to English immigrants”, and that “the main object of the proposed law is to prevent Natal from being flooded by undesirable immigrants from India” (Cole 2000: 30–31). However, the postcolonial condition of Europe in our time is not only about the “we are here, because you were there” logic. The perception of fear of and the subsequent control over migration “flows” reveal that, while colonialism is considered a bygone phenomenon, the absolute spatial and temporal borders that formerly existed between the “civilized” colonizer and the “barbarian” colonized are now being reproduced at the heart of the metropolis (Mezzadra 2006). In addition to the border politics within European metropolises, the externalization of Europe’s border policies to migrant-sending countries as well as the role the low-paid migrant labor force in post-industrialized Europe demonstrate the historical continuities of the postcolonial logic.

6 Stein Rokkan (1999: 104) makes a distinction between the “geographical space” and the “membership space” in his analytical framework of boundary-building.

Human Rights, Migrant Rights, and the Postnational

Despite the incapability of international and European human rights regimes to adequately protect the human rights of immigrants, the respect for fundamental rights is a principle inherent in the EU's constitutional order. As was officially stated during the European Council meeting in Tampere in 1999, the project of European integration is rooted "in a shared commitment to freedom based on human rights, democratic institutions, and the rule of law", and this freedom should not "be regarded as the exclusive preserve of the Union's own citizens" (European Council 1999: paragraph 9). However, it was also maintained that defending such a freedom necessitates "a consistent control of external borders to stop illegal immigration" and fighting those who organize the latter (ibid). For normative political theorists, this raises the challenge of how to transform moral principles into concrete institutional arrangements in a normatively justifiable manner. On the other hand, political theorists like Wendy Brown ask instead whether human rights achieve only their declared goals and nothing more (cf. Brown 2004)? Let us start with the normative perspective.

In *The Rights of Others* (2004), Benhabib assesses the transformation of citizenship in the EU after a nuanced philosophical analysis of the different justifications of rights. She offers a "postmetaphysical reformulation" of the Kantian principle of rights through "discourse ethics". This places emphasis on the discursive processes through which norms, and especially the institutional arrangements based on these norms, are validated by all those who would be affected. Within this theoretical framework, her evaluation of the achievements and limits of the "rights regime" in contemporary Europe is rather modest. On the one hand, she observes a disaggregation of citizenship and a dynamic "toward narrowing the divide separating human rights from citizens' rights" within the EU and assesses that the trends toward integrating third-country nationals into the EU's rights regime are "irreversible". On the other hand, she admits that even within the EU, "one of the most developed rights regimes of our world" (2004: 168), the degree of human rights violations against refugees and asylum seekers remains significantly high. Along with other normative political theorists, Benhabib seeks to link universal norms with historically established institutions by appealing to the spirit of Kant, foregrounding a combination of moral universalism and cosmopolitan federalism. The latter still requires democratic nationhood as its foundation, with the *demos* of a nation-state being bound by democratic attachments rather than cultural identity. However, even Benhabib herself is not unaware that universal human rights and sovereignty claims of the state are more often than not in conflict (ibid: 69). In the context of exile and asylum, she rightfully points out that although the right to seek asylum is recognized as a human

right, “the *obligation to grant asylum* continues to be jealously guarded by states as a sovereign privilege” (ibid, italics in original). As many legal scholars have pointed out, the protection provided by the international human rights regime to undocumented migrants is considerably constrained, precisely because international conventions and organizations are fundamentally based on the principle of territorial sovereignty.

Benhabib’s cosmopolitanism is nonetheless an ambitious attempt to reconcile the conflict between universal moral principles that ought to be applied to all – including those “who do not belong” – and the republican values of bounded communities. Other versions of contemporary cosmopolitanism, in contrast, tend to either disregard the issue of migrant rights altogether, or subordinate it to a sort of “cosmopolitan justice”, or rather a particular international order. For instance, John Rawls famously claims that his theory pertains only to the ideal democratic society, which should be viewed as a “complete and closed social system” (Rawls 1993: 40). He does not deem it necessary to take into account problems such as “unjust wars, immigration, and nuclear and other weapons of mass destruction” (ibid: 12). Another example is Ulrich Beck, who, in his discussion of the “success” of European integration, advocates the idea of mobility of whole societies⁷ to overcome methodological nationalism (Beck/Grande 2007: 121–122). Yet, when it comes to human mobility, he contends that in order to lessen the pressure of immigration in advanced societies, we should anticipate a mode of cosmopolitan distribution, wherein low-skilled jobs are exported from rich to poor countries, thereby making the need to look for work on a different continent unnecessary (Beck 2006: 109). This “cosmopolitan” imaginary is not only hindered by “a state-oriented mode of global space” (Campbell/Shapiro 1999: xii), but also takes for granted the reproduction of structural inequalities in a hierarchical inter-state order.

The external border controls of the EU most acutely highlight the failure of human rights – both in terms of moral principle and as an international regime – to achieve the minimalist goal of “saving lives”. At the same time, they reveal the relations of power underlying the political rhetoric of human rights. Practices of deportation and detention across European countries and the high number of migrant deaths in the Mediterranean Sea under the watch of national military forces⁸ are all shameful features of EU policy in connection with the management of external borders, whose primary goal is to en-

7 According to Beck and Edgar Grande, the traditional concept of society and the social theory this concept is based upon only recognizes mobility within societies, while being unable to address the idea of the mobility of whole societies. They argue that the enlargement of the EU offers a unique opportunity to facilitate this mobility through the process of “border-transcending preventive Europeanisation” (Beck/Grande 2007: 122, italics in original).

8 See, for example, the briefing paper Hidden Emergency prepared by Judith Sunderland (2012) for Human Rights Watch.

sure “a high and uniform level of checks on persons and surveillance” (Council of the European Union 2004). Although the ruling of the European Court of Human Rights in the case of *Hirsi Jamaa and Others v. Italy*⁹ is considered to be ground-breaking in protecting the human rights of migrants on the high seas (Hessbruegge 2012, Scheinin 2012), it ironically also reaffirms that the implementation of international human rights law has not altered and continues to accord with the territorial configuration of state sovereignty. The Court ordered the Italian government to pay monetary compensation to the victims and to obtain assurances from the Libyan authorities, which have proven difficult to secure.¹⁰ Even if the compensation was to be paid and if Libya was to ensure the freedom of the applicants from abuse, the divide between those who suffer, those who rescue, and those who are termed “evil” is once again reconstituted in processes of this kind, as convincingly argued by Costas Douzinas. The victims are always powerless, “faceless and nameless”, and the goodwill of the “savers” to right wrongs in no way puts this divide into question (Douzinas 2007: 69).

Reconfiguring the Rights in Human Rights

In this last section, I will turn to the post-Althusserian, or post-structuralist approach in order to redefine the “rights” in human rights and to address the political significance of the rights of non-citizens. Such an approach has been representatively articulated, for example, in Rancière’s critique of Arendt,¹¹ and in his attempt to identify the real “subject” of the Rights of Man (cf. Rancière 2004). According to Rancière, by completely depoliticizing the stateless – those whom “nobody wants even to oppress” (Arendt 1976: 296), Arendt excludes the possibility for stateless people to act in the public realm. This is viewed by Rancière as a “vicious circle”, since it reasserts the distinction between “those who are worthy or not worthy of doing politics that was presupposed at the very beginning” (Rancière 2004: 306). The root of this vicious circle, according to Rancière, can be traced back to her rigid distinction between the private and the public, between labor and action, and between liberation and freedom (ibid). The subjects of human rights, for Arendt,

9 European Court of Human Rights. *Hirsi Jamaa and Others v Italy* (2012). ECHR Application no. 27765/09.

10 For instance, one of the justifications put forward by the Italian government for not paying the full compensation ordered was that it could not ascertain the whereabouts of some of the victims. This was criticized by prominent Italian legal practitioners and activists during a consultation between the UN Special Rapporteur on the Human Rights of Migrants, civil society actors, and academics in Florence in October 2012.

11 This critique is not completely fair; see, for example, Gündoğdu (2011).

consequently could only be members of a political community in which individuals “recognize each other as equal and distinct” (Schaap 2011: 34).

Rancière, seeing this as problematic, tries to revisit the question of the subject of the rights of Man, and hence the subject of politics as well. He contends that the rights of man are not

the rights of a single subject that would be at once the source and the bearer of the rights and would only use the rights that she or he possesses (Rancière 2004: 202).

It is the subject, or more accurately “the process of subjectivization, that bridges the interval between two forms of the existence of those rights” (Rancière 2004: 302). The first form of the existence of rights, according to Rancière, is the existence of written rights that inscribe a free and equal community, and the second refers to the rights of those “who make something of that inscription”, who initiate a dispute about what is given (ibid: 303). This would imply that they could make claims when deprived of the rights accorded by the Declaration of Rights. And they could demonstrate, through political action, “that they had the rights that the constitution denied to them, that they could enact those rights” (2004: 304). Political subjects are not determinate subjects, nor is the “human” in human rights. Rather, these emerge within the process of subjectivization, in the gap opened by the difference between man and citizen, or between the inscriptions of rights and the instances of their denial. Instances of denial provide moments for verifying the presupposition of equality – equality, in Rancière’s view, is “not the end to attain, but a point of departure” (1991: 138). The subjects of human rights are not proclaimed equal, but are always already equal, and the value of this presupposition is only actualized in its attempted verification.

The relevance of the international conventions on human rights thus does not lie in the expectation that they could ensure the realization of those rights, nor in the possibility that international human rights organizations could achieve this task. They are relevant in the sense that citizens of states ruled by illegitimate laws or by the arbitrariness of governments can appeal to them against their laws or governments, and undocumented migrants who are denied all rights and legal personhood can invoke them to claim their rights. It is through the very action of demonstrating that “they have the rights they have not” that they are enacting the rights they do not have. In doing so, they “demonstrate the reality of both their equality as speaking animals and of their inequality within the social order” (Schaap 2011: 34). Rethinking rights and the subject of rights through such an approach enables us to overcome, at least partially, the ontological divide between “the rescuer” and “the victim” in humanitarianism, and thereby to rescue human rights from humanitarian rights.

It is not surprising that such an agency-centered approach to rights has been fruitfully employed in the growing literature on critical citizenship studies. The influential “*sans-papiers*” movement in France, the nationwide

demonstrations of undocumented migrants in the United States, the hunger strikes in the makeshift migrant camps of Calais, and various other forms of migrant movements worldwide provide illuminating empirical resources for us to register the political subjectivity of irregular migrants, refugees, and minorities. However, the tension between abstract equality and particularistic difference inherent in the discourse of rights remains visible in these forms of mobilization, for they have to rely on “the vocabularies of race, ethnicity, religion, and culture” (Soguk 1997: 323) to accommodate themselves to the processes of statist territorial democracy. The claim-making of the undocumented must appeal to both the universal through such transnational slogans as “No Man is illegal”, and the particular through the rhetoric of French or British nationalism. It is thus declared in the *Manifesto of the Sans-Papiers*:

we came to France because we had been told that France was the “homeland of the Rights of Man”...[and] we dreamed of freedom (Manifesto of the Sans-Papiers, cited in Hayter 2000: 143).

Migrants also emphasize the historical links between their home countries and the country in which they take up struggles:

Where do we come from, we Sans-Papiers of Saint-Bernard? [...] [w]e are all from former French colonies [...] So it's not an accident that we find ourselves in France: our countries have had a relationship with France for centuries (Cissé 1997).

Rancière's post-structuralist interpretation of migrant subjectivity is based on the abstractness of human rights and the formal inscription of universality enabled by this abstractness. However, while migrant struggles in reality do use the language of universal rights, they often simultaneously “undermine *and* reinscribe the territorial and citizenship boundaries against which they struggle” (McNevin 2006: 146, italics in original). It is crucial to acknowledge that every process of political subjectivization, which according to Rancière's re-conceptualization of the rights of Man is the only way to restore the validity of human rights, must take place in concrete historical, spatial, and socio-cultural contexts.

Conclusion

The politics of citizenship and migration in the European Union reveal the paradox between the universalistic promise of postnationalism and the territorially confined citizenship regime on one hand, and highlights the postcolonial condition of Europe within global power structures on the other. In this essay, I have sought to examine postcolonial and post-structuralist critiques of human rights to critically engage with these issues. Whereas the former focus on inequalities and domination, the latter re-appeal to the presupposition of

formal equality. Postcolonial perspectives enable us to analyze the ways in which EU citizenship is constructed through differentiating and Othering, and to understand the predicament of undocumented migrants in Europe as more than a consequence of merely “the national order of things” (Malkki 1995). Moreover, the normative articulation of a postnational Europe draws on the cosmopolitan ideal of the European Enlightenment, which reinforces “an intellectual investment in the idea of a common European civilization” (O’Brien 1997: 2). Historically, the civilizational superiority generated by such an investment was mobilized to legitimize colonialism as well as exclusionary regimes of citizenship and rights. A contemporary cosmopolitanism informed by this Enlightenment ideal remains challenged by the inherent conflicts between universal norms and sovereign statehood. So long as they disregard exclusionary and differentialist moments in the idea of universal rights, cosmopolitan responses to global migration are likely to remain largely limited to top-down efforts liable to reproduce existing power relations; they are also unlikely to sufficiently appreciate the political significance of migrant agency.

Through a post-structuralist reconfiguration of rights, we may account for migrant rights as human rights. Or rather, human rights as the rights of those who put the rights inscribed in law to the test by their rights claims. Migrant subjectivity is continuously caught in the paradox between universality and particularistic categories of race, ethnicity, religion, and so forth. However, in the face of the contested nature of human rights, if we are indeed optimistic enough to envisage a “cosmopolitanism to come” (Douzinas 2007), it has to be born out of this paradox. It must recognize one’s desire for and resistance to belonging, thus conceiving of an identity that is not identical to itself.¹²

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¹² As Derrida suggests in *The Other Heading*, “what is proper” to the concepts of identity or culture is “to not be identical to itself”. This does not mean not having an identity, but means “to be able to take the form of a subject only in the non-identity to itself” or “only in the difference with itself” (1992: 9, italics in original).

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