Immigration, Asylum, and Cycles of European Exclusion.

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David Jarvis LLB (Hons).

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ABSTRACT.

The hypothesis of this thesis is that hidden behind the European legal approach to issues of Immigration and asylum is the deeply embedded European philosophy of exclusion. The thesis argues that exclusion has its roots in historical interpretations of Difference and Otherness. It is cyclical in nature, and the identity of groups targeted for exclusion changes over time. The thesis argues that the practice of exclusion has been honed and perfected into a societal norm from which exclusionary law claims legitimacy. It goes on to develop the idea that exclusion is a reflection of a deeper societal unease rooted somewhere in European history culture and philosophy, the influence of which continues to have a deleterious effect on contemporary attitudes towards immigration and asylum, and on the corresponding laws of the European Union and its member states. Whilst law indicates the methods and grounds of exclusion it does not indicate the philosophy and psyche behind the law.

In order to test the hypothesis, the thesis explores the social and legal history of exclusion in Europe from the 19th century to the present time. It strives to establish the identities of the excluded in the pre-first World War European Empires, and suggests that they were essentially defined by their Europeanness, and often based on internecine conflict. The thesis goes on to look for similarities in the identities of the excluded of the interwar years, and notes how issues of race resurfaced to form a new ideology. The chronology continues by exploring the post Second World War period, and notes how the identities of those who occupied the symbolic space of exclusion evolved from an essentially European identity, to new non-European characteristics, linked to the rise of non-European immigration.

The thesis therefore suggests that Difference, Otherness and Exclusion have evolved into a societal norm from which exclusionary law claims legitimacy. It suggests that the concepts of
Difference Otherness and Exclusion continue to influence contemporary society, and suggests that Europe remains preoccupied with issues of identity and of responding to these issues in a traditional exclusionary manner.

Finally the thesis begins to consider whether the animosity and mistrust previously reserved for the European Jewry is now being re-focused on Europe's Muslim community. It asks if the restrictions on the entry into Europe of those fleeing conflict in the Middle East, and of those who hail from the Indian sub-continent and who wish to settle in Europe, are an expression of a new cycle of exclusionary practice where only the identity of the excluded has changed.

Therefore the thesis aims to contribute to knowledge by re-visiting some of the ambiguities inherent in European history, law and society; and challenge assumptions of what gives rise to pejorative attitudes towards immigration and asylum. Through the exercise of independent critical analysis it aims at a new interpretation of known facts. By applying theoretical interpretations to historical and contemporary narrative, the thesis seeks to demonstrate that the identity of the excluded is seldom static, and advances the idea that exclusion, based on ethnicity or religion or gender - the list is not exhaustive – has cyclical characteristics. In terms of law and scholarship it is of societal benefit to understand who were the excluded of the past – and why; who are the currently excluded – and why; and how, given an understanding of the past and the present, it may be possible to forecast who are to be the future excluded, and why this might be so.
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For my Grandson

Robert Page
‘It is strange that the problem of ‘Others’ has never truly disturbed the realists. To the extent that the realist takes everything as given, doubtless it seems to him that the ‘Other’ is given. In the midst of the real, what is more real than the ‘Other’?’

Jean-Paul Sartre¹

Chapter One.

Introduction

The welcoming of the ‘Other’ is, ipso facto, the consciousness of my own injustice - the shame that freedom feels for itself.

Emmanuel Lévinas, Totality and Infinity, an Essay on Exteriority.

Over the last two decades the issues of immigration and asylum have become an increasingly pressing subject on the political agendas of the European Union and member states. For a number of years, discussions on immigration remained less than overt, having been largely shunned by mainstream European politics and confined to what was regarded, with some distaste, as the populist arena. But in more recent times some of the European Union’s fundamental principles are being questioned by politicians whose raison d’être may be the platform of anti-immigration, but who nevertheless command a commonality of support in many parts of the Union. Governments in some member states are also beginning to respond to what they believe to be populist electoral advantage, by re-evaluating approaches to the wider question of immigration. The political moratorium on the immigration debate is being challenged, and the emerging discussions, although ostensibly related to the functioning of the European Union, are laden with hidden meanings. Legal judgements appertaining to immigration and immigrant communities are the subject of intense public scrutiny, and it is clear that the honeymoon period that followed the end of the Second World War, when immigrants were welcome, and those escaping the ‘unsound’ ideologies of the Eastern Bloc were seen as a cause célèbre, is over.

During the second part of the 20th century there were perceptible changes in the disposition of European states towards the reality of immigration and its residual consequences. For example, communities of temporary immigrant workers, who, from
1945 found themselves in Europe by invitation, and as part of elaborate schemes to help rebuild post war economies, eventually transformed themselves into settled immigrant communities. But this move from transient workers to permanent residents came to be regarded as creating a threat to societal cohesion, and of exacerbating what had become the contentious question of immigration. Moreover, issues relating to immigrant communities began to acquire a jaundiced character, reflected in the 2008 report of the Economic and Social Committee of the European Union on the Prevention of Terrorism and Violent Radicalisation.¹ Whilst the intention of the report was to look at how civil society could play a part in understanding the underlying circumstances in which violent terrorism breeds participants; it also noted that when civil society misinterpreted episodes of urban violence and wrongly lumped them together as incidents flowing from the process of radicalisation, such episodes were then said to be precursors to terrorism, leading to an overly broad definition of complicity to cause terrorist activity. The report noted that in such an environment, the social, political, and economic alienation felt by new immigrant communities was compounded by the double standards applied to them when judgements were made on the actions of individuals from those communities.² This alienation said the report, was often fed by feelings of exclusion and discrimination, sometimes highlighted by the intrusion into citizens’ lives demonstrated by the rise in checks on ‘Certain specifically targeted visible minorities, who feel increasingly stigmatised and subject to ethnic or racist discrimination.’³

Intrusion into the lives of immigrant citizens acquired more sinister overtones in the linking of issues of immigration with questions of security, leading to calls for tougher action against those seeking to enter the area of the European Union as immigrants.

Measures introduced to control and restrict immigration into the European Union have led to accusations of the creation of a ‘Fortress Europe’, and to concerns that restricting the entry of specific groups into the Union, may call into question the much acclaimed multicultural nature of European society. However there is a sting in the tail, because the ‘immigration debate’ has developed new and unexpected dimensions. There are now reservations concerning the entitlement of European Union citizens to move and settle in other states of the Union, or of their entitlement to enjoy the benefits afforded by the state in which they choose to live. These new developments are contrary to the principle of the free movement of people, and contrary to legal entitlements which have been developed during the recent history of the Union. But the political rhetoric that labels the free movement of people as an immigration issue is a bewildering development, in a supra national, culturally diverse organisation consisting of more than 507 million people, where discrimination on the grounds of nationality is prohibited, and which has acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

The Central Thesis of Study

This thesis researches the hypothesis that underpinning the Pan European approach to immigration and asylum is the practice of exclusion, which may be rooted in historical interpretations of difference and otherness, but which has developed a cyclical nature in

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which the identity of groups targeted for exclusion changes over time. The thesis explores the proposition that difference and otherness have provided the stimuli from which the practice of exclusion has evolved into a societal norm and from which exclusionary laws claims legitimacy. It explores the extent to which concepts of Difference, Otherness and Exclusion continue to influence contemporary evaluations of the place of immigration and asylum in European society. It poses the question of whether exclusion is a reflection of a deeper societal unease, rooted somewhere in European history culture and philosophy, the influence of which continues to have a deleterious effect on contemporary attitudes towards immigration and asylum, and on the corresponding laws of the European Union and its member states.

**The Aims and Objectives of the Thesis**

**The Aims**

The aims of this thesis rest on the premise that the present exists only with respect to the past, and the past influences both the present and the future. Consequently and in order to gain an insight into what may lie behind societal attitudes towards immigration and asylum, and how these influences can translate into contemporary law; the thesis juxtaposes historical episodes of internal and external exclusion against contemporary happenings, and in so doing looks for evidence of cycles of exclusionary practice. By identifying cycles of exclusionary practice, it then becomes possible to explore the identities of those who have been excluded, and consider the reasons for their exclusion. On the basis of those findings, it may be possible to venture an opinion as to the identity of those likely to be excluded in the future. Given the premise that there is a cyclicality of exclusion, the thesis will consider whether earlier lessons arising from the uncontrolled rejection of the Others, the heirs to a contested identity, have gone unheeded.
The Objectives

There is, according to Derrida, a conceptual phantasm⁸ which fuels the proliferation of inter-ethnic wars, based on ideas of community, the nation state, sovereignty, borders, native soil and blood. Given Europe’s history of internecine conflict it is not difficult to be persuaded by Derrida’s view, and one of the objectives of this thesis is to explore those inter-ethnic conflicts which have helped shape European perceptions of difference and otherness, and which, even now, seem to influence the formulation of immigration and asylum policy in the determination of who is welcome and who is not. Therefore founding a causational link between past and present; difference and exclusion, identity and citizenship, and the cycles of exclusionary volatility they precipitate, raises issues of why society appears to be ignoring the salutary warnings of history when the obsession with identities and difference led to the ultimate recital of 20th century exclusion which took Europe to the brink of the abyss.

Realising such an objective involves interrogating traditional interpretations of the European legacy, which is said to embrace notions of democracy, citizenship and inclusiveness, by asking if this legacy is anything more than a conceptual phantasm which has contributed towards creating a pejorative identity of the stranger. In order to address this question, the thesis employs the concepts of Difference, Otherness and Exclusion to observe how, in the construction of borders and boundaries, identities are created that owe their legitimacy to ideas of native soil, or to theories of the exclusivity of homogeneous communities of the likeminded.

The concept of borders and boundaries, in both a specific and broad sense, together with the determination of the identity of those who may cross borders and be welcome, those who may cross borders and be unwelcome, and those who may not cross the

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borders at all; are defended on the grounds that these are not arbitrary decisions, rather they have their basis in law. It is a weak defence because it seeks to apportion the responsibility for such decisions to an exclusive legal domain, rather than concede to the nebulosity that arises from law having no existence for itself, rather, as Savigny says, its existence lies, from a certain perspective, in the very life of men. The argument that law is no more than a function of society is credible, but it also means that in the context of this thesis, there is a need to draw from an eclectic mix of disciplines in order to understand the uneasy relationship between European society and the stranger, and between European society and the laws which regulate immigration and asylum.

The thesis sometimes uses the term stranger when referring to immigration and asylum and the wider issues. In this context, the term stranger is used as a metonym for the milieu that includes immigration, but whose meaning extends far beyond the legal definition of immigration and asylum, to include a societal preoccupation with issues of difference and otherness. In this way, the use of the term ‘stranger’ encompasses, among other things, the subject of minority or immigrant communities, and those who may be neighbours, but whose religion, ethnicity, gender or societal standing defines them as strangers. Understanding these relationships inevitably means exploring societal encounters with the stranger and, in more experiential terms, developing an insight into how societal boundaries have created pejorative historical identities, most notable of which has been those of European Jewry and the Roma. Given that Europe remains preoccupied with issues of identity and of responding to these issues in a traditional manner, it is salutary to consider whether the animosity and mistrust previously reserved for the Jews and the Roma is now being re-focused on Europe’s Muslim community. Might the reluctance to restrict entry into Europe of those fleeing conflict in the Middle East, and of those who hail from the Indian sub-continent and who

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wish to settle in Europe, be an expression of a new cycle of exclusionary practice where only the identity of the excluded has changed.

Exploring these possibilities requires the compilation of both historical and contemporary evidence, and the need to carefully interpret that evidence. Therefore, and overall, the objective of this thesis and its conclusions is to temperately reflect on the wider issues of exclusion, and how society has developed and manipulated law to accommodate some deep seated intolerance of the immigrant – the stranger in our midst. Nevertheless, my thesis will aim at avoiding aggressive over analysis, and is more of an invitation to consider whether there are any universal truths, and how the manipulation of invented and transient concepts of morality shape our understanding of society and its attitude towards the question of the stranger.

Therefore in order to achieve these objectives and cognisant of Emmanuel Kant’s imperative that ‘experience without theory is blind, but theory without experience is mere intellectual play’; the thesis divides into the empirical and the theoretical, set within the spatial and temporal parameters of Europe from the mid-19th century to the present time.

**Theoretical Perspectives**

Max Horkheimer and Theodor Adorno also considered the question of those who were ‘different’, sometimes referred to as the ‘stranger’ - and who, in a dark period of European history, were said to disturb the harmony of society. Of course, identifying those whose difference was said to disturb societal harmony presented little difficulty at the time Max

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10 Jennifer Castle and Neil Shephard, *The Methodology and Practice of Econometrics: A Festschrift in Honour of David F. Hendry*, (Oxford 2009). Kant is frequently quoted in support without a specific reference as: ‘Theory without empirics is empty. Empirics without theory is blind.’ or ‘Experience without theory is blind, but theory without experience is mere intellectual play.’ Both seem to be overly free translations of ‘Gedanken ohne Inhalt sind leer, Anschauungen ohne Begriffe sind blind’ (Thoughts without contents are empty; opinions without concepts are blind)—Hoover translation); Kant (1787, part 2, section 1)

Horkheimer and Theodor Adorno considered the question, because the stranger, the alien in society, was clearly identified and excluded. But the issue of the stranger and how the presence of the stranger should be accommodated in society is nothing new; it can be found in Leviticus 19:33 34 and has been a topic favoured by Talmudic scholars over many years. They concluded that the stranger who comes to live among us should be loved as we love ourselves, and we should know this because of our own experiences of being strangers. This reminder that we may all have been strangers - and could be again, emphasises our vulnerability to the fickleness of society; but it also has a prophetic quality insofar as although the nature of exclusion may prove to be a constant, the choice of victims is a variable.

Hermann Cohen was one of the Talmudic Scholars whose 19th century commentary on the Tanakh claimed that the ‘alien was to be protected, not because he was a member of one’s family, clan, or religious community; but because he was a human being’. During the 20th century, various schools of philosophy again considered the reception of the stranger, and, utilising the metaphor of hospitality, began to interrogate the issue of whether the hospitality to be extended to the stranger should be conditional or unconditional.

This debate posed a number of moral and societal dilemmas, not the least of which was the assumption that the stranger is always external to our society, such as a foreigner, an immigrant, or citizen of another country. The reality is that the stranger may not necessarily be unfamiliar; but the danger is that they may expose society to that which is unfamiliar, and bring about a consciousness of the outside. However passively or innocently this may happen, the stranger is perceived as challenging the structure,

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12 Sifrei K'doshim, ‘Chapter 8, Section 3’.
comfort and order of society; therefore their presence becomes antithetical to our sameness, highlighting difference and emphasising Otherness.

Although the allegorical figure of the stranger may well stand accused of disturbing the homogeneity that is said to bind communities together, the stranger fulfils the important role of being seen as a common enemy, reinforcing the boundaries of difference between ‘us and them’. In this way the stranger who has brought to the community a consciousness of the outside, occasions the community of the likeminded to celebrate their sameness, reject the outside, and reinforce notions of their own identity constructed in opposition to the identities of the stranger.

These situations are commonplace, and can be illustrated by events which arise in the workplace, whereby one colleague with different views, might find themselves, unwittingly, in opposition to the rest of the workforce. The rest of the workforce, in the face of a perceived threat to their like-mindedness, forms a common bond of friendship amongst themselves in order to face the threat posed by the common enemy. It is also true of the neighbourhood where the recalcitrant family unites other families who otherwise would have no connection with each other. It then becomes apposite to blame the recalcitrant family for all the woes of the area, or the colleague for the breakdown of relationships in the workplace. In a philosophical context they take on a role analogous to that of the Greek pharmakos; they are the metaphor for the evil that resides inside the city, which has to be wiped out in order to maintain civic purity - the scapegoat for the city’s ills.¹⁵

Therefore, when notions of difference are located within the contested debate about immigration, nationality, citizenship and belonging, the idea of exclusion, honed and

perfected over many generations, is able to emerge, and the societal triumvirate of Difference, Otherness, and Exclusion is firmly established as a norm.

The idea of exclusion as a societal norm is contestable ground, but there is a school of thought that promotes the idea of exclusion as an inherent characteristic of modernity. For example Habermas reflects on modernity’s obsession with marginalisation, with determining identities and refining the subjectivity of ‘self’. “Balibar takes a similar view, believing that the marginalisation of communities because of their difference, is a shocking aspect of the exclusion that characterises modernity, because ‘it takes place within the realm and the time of legality and normality’. The idea that modernity embraces exclusionary processes, and that these processes are set within the frame of legality and normality, are fundamental to the narrative of the thesis and to its objective.

Nevertheless, exploring exclusionary processes would be incomplete without reference to what is believed to be the ameliorating influence of the post war phenomenon of human rights. The post-war years saw the development of the concept of human rights which took many forms; from the declaratory position of the United Nations, to the obligatory nature of the European Convention for the Protection of Human Rights and Fundamental Freedoms, from dictum to jus cogens, with much in-between. But human rights are not benign, and when introduced into the complex ideological argument surrounding exclusion, human rights become a challenging and provocative concept which eventually leads to their becoming the subject of scrutiny, and to their legitimacy being contested.

Among the contestable areas of human rights theory are those which claim that human rights are the rights one enjoys simply because one is a human being. It is a position that seems to run contrary to Arendt’s proposition that the world found nothing sacred in the abstract nakedness of being human. Arendt claims that the concept of human rights, based solely on our humanity, broke down at the very moment when those who professed to believe in the concept of human rights, ‘were confronted, for the first time, with people who had lost all other qualities, other than the fact they were still human’. 19 Habermas too exercises some caution when reflecting on human rights. He suggests that as legal norms, human rights protect individual persons only insofar as the latter belongs to a particular legal community. 20 Thus, and even before applying human rights to the subjects of exclusion and immigration there is an issue related both to the meaning of rights, and to their applicability. Perhaps Lévinas captures this dilemma when he poses the question of whether the state, society, law and power are required - because ‘man is a beast to his neighbour’ (homo homini lupu) or ‘because I am responsible to my fellow’. 21 The quintessence of the question posed by Lévinas, represents one of those moral quandaries that exist just below our civilizational horizons. But whilst Lévinas may see the dilemma in terms ethics and morality, Bauman wonders whether, perhaps more prosaically, society has created the notion of human rights as a last-resort attempt to find a guiding principle of human coexistence”; 22 a notion which paradoxically engenders an environment that is receptive to the production of ideas of difference. 23 In other words there is a possibility that in some situations human rights have the contrary effect of creating perceptions of difference where previously no perception of difference existed. In reality, such ethical and moral arguments have given way to the mediocre in which the values of human rights are lost to a civilizing process which seeks to persuade that the coarse is gentle, the cruel benign, the uncouth refined. 24

22 Zygmunt Bauman. The Great War of Recognition Theory Culture Society 2001 18: 137
History and Empiricism

‘Philosophical argument cannot be divorced from the textual and contextual conditions of its historical emergence’; in this way, historical perspective is not just for itself, it is fundamental to explaining both the real world and to providing the fertile ground from which philosophical explanations of life arise. Consequently, historical empiricism is the raw material on which theoretical explanation of European attitudes towards contemporary immigration policies are to be based; in this case the raw material is the historicity of Europe from the mid-19th century to the present time. The choice of the mid-19th century is deliberate insofar I contend that it marks the beginnings of a different approach to the concept of the nation state influenced by increasing industrialisation, nationalism, and a growing intensity in the notion of identity and the nation state. It was a time which witnessed the growth of, or the consolidation of post enlightenment Empires, and emphasis on who belonged and who did not. The material to be explored can be roughly categorised as being germane to the period up to the beginning of the 20th century; the early 20th century and the inter-war years; the immediate post war years and the rise and influence of the European Union.

Drawing from the facts of history can often prove to be a challenging experience, particularly where the sanitised past of one state can appear, uncensored, in the contemporary history of far-away places. Bearing this caveat in mind, events in Imperial Russia, Austria-Hungary, France, Germany and the United Kingdom provide the social, political and legal material to be examined. The choice of states is important insofar as they were consumed by 19th century notions of race, nationality, citizenship, and religion. Some of these states embraced a polyglot of peoples who answered to a political elite with whom culturally and linguistically, they had little in common. Minority languages and

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26 In The Origins of Totalitarianism Hannah Arendt describes the mid-19th century, and the rise of New Imperialism as a time of “race thinking” which gave succour to increased anti-Semitism in western and central Europe; these events should then be seen in the context of racism becoming an ideology.
expressions of cultural identities were the subject of suspicion, and whole groups of Europeans were physically excluded to live in officially ‘approved’ areas; attempts by minorities to exercise a degree of cultural, political or social independence were usually met with hostility. The issues of transnational identities, which are seen as troublesome in 21st century Europe, were also a commonplace issue in the 19th century.

In the last quarter of the 19th century France witnessed the politicisation of anti-Semitism, particularly by the French Socialist movement; this in turn may have laid the foundations for the Dreyfus affair and later attitudes towards the issues of German refugee seeking safety in the period immediately prior to the Second World War.

The United Kingdom was not a passive spectator in issues of exclusion. At the beginning of the 20th century for example, the East End of London was the focus of much hostility directed at new immigrant neighbourhoods. These neighbourhoods were said to feature men with long hair and beards who wore black hats and had signs above their shops in Yiddish.\(^28\) Such a presence acted as a catalyst for discontent across political and social classes,\(^29\) eventually leading to a Royal Commission on Alien Immigration, and the introduction of the 1905 Aliens Act. The 1905 Act represented the beginnings of modern immigration control, and also saw an end to what had, up to then, been the relatively free movement of people throughout Europe.\(^30\)

The ideological empires which emerged at the end of the First World War continued the tradition of exclusion. Fascist Germany eventually selected Jews and the Gypsies for industrialised killing, whilst the Soviet Union purged the intelligentsia and anyone who was believed to be politically unsound. Between 1935 and 1939, the Soviet Union was

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\(^29\) Wray.
engulfed by the ‘Great Terror’, a period of ‘sweeping or even total fear among the Soviet population’.31

In the period just before the Second World War, European states cited many political, economic and bureaucratic difficulties which would arise if borders were opened to refugees fleeing fascist Germany. The Évian Conference of 1938, its minutes and its aftermath clearly demonstrate a Pan European reluctance to address refugee issues.

The post war period appeared to show a temporary change of heart to the question of exclusion, and to the specificity of immigration, possibly because of the need for cheap labour to assist in reconstruction. In any event, France, Germany and the Netherlands32 decided to recruit labour from outside Europe, and the British decided to recruit European workers. However the United Kingdom Government was alarmed by the arrival of a ship containing immigrants from Jamaica, and the following year a report by the Royal Commission concluded,

‘Immigration into Britain ...could only be welcomed without reserve if the immigrants were of good human stock and were not prevented by their religion or race from intermarrying with the host population and becoming merged in it’.33

Shortly thereafter, European states began what appeared to be the effective exclusion of non-European, by means of immigration controls, which have largely continued in various forms, to the present time.

The development of the European Union introduced a new dimension to the wider issues of exclusion and inclusion; an approach that needs to be contextualised in relation to the wider legal, political social and economic ambitions of the Union and the growing number of member states. The place of immigration and asylum within the legal and constitutional structure of the European Union has been subject to change, nevertheless it is important to determine the extent to which entry regulations per se, are detached from any moral or ethical obligations towards those seeking asylum. Might it be, for example, that despite the rhetoric, immigration and asylum occupies a subaltern position in relation to the wider ambitions of the European Union, and has been seen as somewhat of a burden in the fulfilment of the Union’s ambition of the free movement of persons in the single market.

The creation of the Schengen area in the European Union, which facilitated the abolition of internal state borders between contracting states, was a radical idea which inevitably had the effect of transforming traditional ideas of sovereignty. But this new approach to sovereignty raised other issues related to the policing and managing of the common borders of the Union, not the least of which was the procedures to be applied to those wishing to enter the union. A convention for determining state responsibility for examining applications for asylum, known collectively as the Dublin regulations, together with the London resolution were implemented to bring about a unified structure for the reception of those seeking asylum; but the introduction of regulations to address the asylum question were soon bypassed by some member states who simply extended their geographical sovereignty, and positioned immigration officials at airports of embarkation, to stop immigrants or asylum seekers boarding transport to European states. The

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34 In order to avoid confusion, each stage in the development of the European Union has been known by a different name; The Common Market, The European Economic Community, etc., I shall use the generic title of the European Union to refer to all stages of this development unless there is a specific need to do otherwise.
purpose in reviewing history in this way, is to look at possible contemporary parallels with historical exclusion, and to apply some theoretical interpretations to those instances, in order to explore the possibility of there being a cyclical nature of exclusion.

**Significance of the Study**

The thesis aims to contribute to knowledge by re-visiting some of the ambiguities inherent in European history, law and society and to challenge some assumptions in relation to the Janus like approaches to immigration and asylum, which will be identified and developed in this thesis. Through the exercise of independent critical analysis the thesis aims at a new interpretation of known facts. By applying theoretical interpretations to historical and contemporary narrative, the thesis seeks to demonstrates that the identity of the excluded is seldom static, and advances the idea that exclusion, based on ethnicity or religion or gender - the list is not exhaustive – has cyclical characteristics. Therefore in terms of law and scholarship it is of societal benefit to understand who were the excluded of the past – and why; who are the currently excluded – and why; and how, given an understanding of the past and the present, it may be possible to forecast who are to be the future excluded, and why this might be so.

**Methodology**

The question of methodology is an area to be approached with some caution. Derrida warns that

‘A thinker with a method has already decided how to proceed, is unable to give him or herself up to the matter of thought in hand, is a functionary of the criteria which structure his or her conceptual gestures.’

Notwithstanding Derrida’s imperative, this thesis utilises a qualitative research method principally because qualitative research lends itself to exploring meanings that people have constructed; it enables an examination of how interpretations of reality change over

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38 Richard Beardsworth, Derrida and the Political (Routledge 1996). pg. 4
time and how people make sense of their world. In order to explore meanings, and how different versions of reality are constructed, I have drawn from ideas and methodologies of several interpretive theories. Principally however, the thesis is influenced by the Frankfurt School’s Critical Theory, which provides a platform from which it is possible to interrogate the norms of law and society for evidence that they are motivated by a residual loyalty to concepts of Difference, Otherness and Exclusion. In this respect the method employed is designed to show the way in which society acts; to examine social conditions; to uncover hidden structures and to look at some of the symbols of law and society which may ultimately lead to various groups being oppressed.

Examining law and society for evidence that various groups have been or may currently be oppressed, is easier said than done, because any analysis must accept the notion that there are competing accounts of reality, and these competing accounts may rely on multiple perspectives of human agency, such as those related to class, race, gender and other identities.

Therefore I intend to use the form of enquiry which suggests that such analysis should,

- Broadly explain what is wrong with the prevailing social reality.
- Identify the main actors in that reality.
- Provide clear norms for criticism, in order to bring about the transformation of society.

More importantly I want to avoid the idea of using a single scientific criteria as the best approach to understanding and resolving the many paradoxes of human activity and their associated social structures. This is because the wider subject of this thesis, which is

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human experience, can never be the subject of infinite certainty and exactness. Moreover, the Frankfurt School's argument that in order to bring about human emancipation, social inquiry should combine philosophy and the social sciences in a form of interdisciplinary research, is an attractive proposition. It offers a rounded approach to exploring the notoriously difficult issues of why, for example, European states preach the credo of inclusion, whilst formulating a corpus of law based on the contrary notion of difference and dissonance. As I have already mentioned, this Janus faced approach might represent the epitome of hypocrisy or it might be said to represent what some would interpret as the struggle between what is good and what is bad; but here there is a need to be cautious in settling on any definitions, because human activity and the structures it creates can not necessarily be meaningfully quantified or explained in a rational manner. Moreover meanings and truths are prone to shifts and redefinitions over time underlying the need to understand the contextual circumstances germane to any interpretation. Perhaps it is useful to point out too, that whilst the thesis highlights some binary opposition it does suggest that clear cut opposites probably do not exist because one concept may actually rely for its definition largely in terms of the other.

In any event there is a little homily which says ‘not everything that counts can be counted, and not everything that can be counted counts’;\(^\text{42}\) therefore critical theory offers the opportunity of exploring circumstances I believe to be important, and noting but not necessarily counting, those things I believe to be of lesser importance.

In keeping with the theory that no one single criteria can be employed to resolve some of the paradoxes of human activity, the thesis is also draws on Post-structuralism as a benchmark for holding that there are many truths, and for advancing the idea that power structures maintain and enforce hierarchies. In this respect the thesis draws from the postmodernist thinking of Emanuel Lévinas, Jacques Derrida and Julia Kristeva to inspire alternative and new interpretations about the social constructions of realities, truth, value,\(^\text{42}\)

\(^{42}\) Attributed to Albert Einstein. Sign hanging in Einstein's office at Princeton
and otherness. The thesis looks to the social commentary of, among others, Zygmunt Bauman and Étienne Balibar, and to historical perspectives in the works of political theorist Hannah Arendt.

Finally the thesis is located within the concept of Modernity. This is because the cultural and philosophical influences of Modernity saw a shift in western societal thinking, heralding the beginnings of modern sciences, nation-states, industrialisation and capitalism. Local values became fixed as universal and introduced a ‘cultural chauvinism that refused to recognise the values of other non-European cultures’ 43; modernity therefore failed to recognise the implicit series of exclusions upon which it came to be constituted. “But the ideas which came to be identified with Modernity certainly influenced the way in which society conceptualised the state, democracy and citizenship; and also helped establish the European perception of political, legal and societal structures. I shall be exploring whether law and society remains influenced by these dynamics and whether they sanction exclusion within the framework of legality and normality.

The primary sources of data to be used in the thesis includes International and European treaties; European Union regulations and directives; Acts of Parliament of the United Kingdom, and case law of Her Majesty’s Courts of Justice of England and Wales. The thesis uses information drawn from cabinet minutes, reports and papers of the United Kingdom Government; and parliamentary papers, reports, and information contained in the index and analysis to minutes of evidence of the Royal Commission on Alien Immigration 1904. It uses other materials and documentation from the National Archive at Kew, London. Other primary sources include Acts of the Parlement Français, and Acts of the German Bundestag, and laws enacted during the period of the Third Reich.

44 Goldberg, ‘Modernity, Race, and Morality’. 
Telegrams and correspondence contained in Congressional Papers, as part of the collection of ‘Executive Documents of the House of Representatives of The United States of America’ are a further primary source. The thesis also uses papers, items and documentation from the Yad Vashem Archive, Jerusalem, Israel. Other primary sources include case aw of The European Court of Human Rights and The European Court of Justice. Secondary sources will analyse, inform or reflect on primary sources and will include scholarly articles, books, journals, criticisms and commentaries; biographies, histories and relevant newspaper articles.

However, it is appropriate at this stage to make the point that this thesis does not pretend to be an exercise in philosophical relativism, nor does it aspire to be a detailed examination of immigration and asylum law. Put simply, and in the context of the immigration debate, I shall try to avoid objectively defining either truths or morality because I believe that they exist only within a cultural context. What I will suggest, is that those things which are often thought of as being the permanent truths of human nature, or the permanent truths of society and law, are actually transient notions that change throughout the course of history. The heirs to this continuous uncertainty are the people, their confusion and their vulnerability, and they, as victims, are the real subject of this thesis.

**Structure of the Thesis and Outline of chapters**

The thesis consists of 6 substantive chapters in addition to the introduction, and divides into a chronology of historical and contemporary observations of social reality and its principal actors. The thesis takes social reality as the empirical data, and uses a theoretical approach to analyse and interpret that data, although this is not to suggest that theory is simply a mirror of reality, or vice versa.

The chapters constitute a chronology of historical and contemporary happening, set within spatial and temporal parameters of Europe from the mid-19th century to the present
time. The choice of the mid-19th century as a starting point is deliberate insofar as this was a period that drew inspiration from the late Enlightenment and characterised an age in which the classification of the world using science saw the dawn of anthropology - a discipline which sought to explain nature and humankind from an objective and scientific perspective. This new approach - including that of Darwinism - was full of ironies principally because although the new scientific approach dismissed old myths, it rapidly created new ones, including that of 'race', and introduced this notion to a European world fixated with the rhetoric of empire. I contend that it marks the beginnings of a different approach to the concept of the nation state influenced by increasing industrialisation, nationalism, and a growing intensity in the notion of identity and the nation state. It was a time which witnessed the growth of, or the consolidation of post enlightenment Empires, and an increased emphasis on who belonged and who did not. After setting a scene based on recent refugee issues and contemporary history, the chapters begin by focusing on Europe, its Empires and the construction of nation states; before exploring how issues of race became pivotal to political and societal control and stability from the mid-19th century to the First World War. The chronology continues by exploring the inter-war years, and the re-emphasis of race as an ideological issue; it moves on to look at the immediate post war period, refugees, the Cold War and the formulation of United Kingdom Immigration policy. The penultimate chapter explores the rise and influence of the European Union, and seeks to address the question of whether the Union represents progressive or regressive influences in relation to the underlying shaping of immigration and asylum policy.

Outline of Chapters

Chapter Two ‘Genesis of European Alienation’

[45] In The Origins of Totalitarianism Hannah Arendt describes the mid-19th century, and the rise of New Imperialism as a time of "race thinking" which gave succour to increased anti-Semitism in western and central Europe; these events should then be seen in the context of racism becoming an ideology,
This chapter sets the scene for the chronology that follows, and is divided into the empirical and the theoretical. It begins by taking a vignette of contemporary reality set within events surrounding the recent civil and military upheavals in North Africa. It explores the reception afforded to those fleeing what has become known as the Arab Spring, and it looks back to the reception afforded to those fleeing the ‘Prague Spring’ 48 years previously. Political and military upheaval represent a common factor in both events and provided the impetus for people to leave their countries of origin to seek safety elsewhere. The chapter explores inconsistencies in the way Europe extends hospitality, and asks if this inconsistency might have its genesis in 19th century canons of belief.

The second part of the chapter is a theoretical perspective that explores the issues of why there may be inconsistencies in the reception of those seeking safety; it draws from conceptual ideas of Modernity, Difference, Race, Identity and Imperialism. The chapter continues looking for answers by exploring another ‘Spring’, this time the 19th century ‘Springtime of the People’ where concepts of identity, belonging and citizenship came to play a pivotal role in emerging nation states.

Chapter 3 Strangers in the Land of Another

The purpose of this chapter is to develop some of the themes introduced in the previous chapter. It explores the empiricism of exclusion during the 19th century; it considers the identity of those who were excluded, and looks for explanations of why this should be so. It takes as its empirical data the lives of minorities in Austria-Hungary, Imperial Russia and France and explores concepts of Czech and Slovak Identity, anti-Semitism in Austria and France. The chapter also looks at exclusion in Imperial Russia, where Jews, considered alien to Russian society, were exiled to the western provinces of the Empire.46 The chapter explores the situation in which many young Jews, frustrated by their

excluded status, abandoned the yeshivas for revolutionary politics; it explores the situation of Jewish émigrés who chose France as their destination, and who then faced a new and different kind of institutionalised anti-Semitism.

From a theoretical perspective, the chapter moves on to consider how, in some parts of Europe during the 19th century, it may have been considered irresponsible not to use the law to facilitate exclusion, and deny citizenship. It considers Costas Douzinas' proposition that 'exclusion is absolutely crucial for concrete personhood, in other words, for citizenship'. Douzinas proposes that the main characteristic of modern law is the separation between human and citizen, in which the modern subject can only achieve their humanity by acquiring political rights of citizenship. In other words he argues that the alien is not a citizen; therefore they do not have rights because they are not part of the state and consequently they are lesser human beings because they are not citizens. The alien represents the gap between universal man and citizen. We become human through citizenship, and the exclusion of those who are not citizens, the others, is absolutely crucial for our personhood and citizenship. To this end, there was a significant issue concerning the internal exclusion of the 'strangers', those who often had a generational history of living in a state, but who were defined as not being part of it, and who therefore often existed without rights. The chapter looks at how they constituted the 'Others', those who were considered to be lesser human beings because they were not citizens, and they came to represent the gap between human and citizen 'which has become the main characteristic of modern law.' The chapter briefly explores the Kafkaesque situation in which the state pressurised minorities to assimilate; but based the assimilation process on shifting criteria, which was impossible for any minorities to satisfy. ‘This meant’, says Yolanda Jansen, ‘that the rules of the game established at the

48 Ivianski. 137.
outset of the emancipation process, were being changed by members of the majority while the game was still going on’. The chapter concludes by noting that when economically impoverished and politically humiliated minorities are offered hope and dignity through engaging with the dialectics of the intelligentsia; some of them may well look towards alternative politics in order to achieve what they believe to be the promise of an equality of the human condition.

Chapter Four *Stateless Persons and the Deprivation of Rights*. ‘Stateless Persons and the Deprivation of Rights’ is a description borrowed from Arendt who believed that stateless persons, refugees and those deprived of rights, would be the mark of the 20th century.

This chapter explores the turbulent period from the turn of the 20th century to the 1940’s, and is divided into the empirical and the theoretical. It begins by looking at the social reality of how Czechs and Slovaks came together in a nationalist cause, and, with the approval of the International community, established the Czechoslovak Republic. The chapter notes how the Polish Republic was re-created in central Europe, and how the international community approved changes in the citizenship of more than a million Germans who were living in the Polish Corridor. The chapter notes how the principle of self-determination turned the excluded into the excluders. The chapter goes on to look at Difference, Otherness and Exclusion at its most sinister, exploring how German law under the Nazis, legitimised exclusion.

During the 1930’s Europe faced a growing crisis in relation to refugees leaving Germany, and the chapter looks at the League of Nations; at its efforts to implement a refugee

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regime; and at the Evian conference where meetings of European states steadfastly avoided dealing with the humanitarian crisis of refugees.

The theoretical perspective considers exclusion as a normal function of society; and reflects on the views of Giorgio Agamben who sees the birth of the camp as an event that decisively signals the political space of modernity itself, and which still defines the political space in which we are living. The chapter notes that the 1930’s was indicative of a time when Difference, Otherness and Exclusion became more than anodyne theory, and pointed instead to a defining juncture in the emergence of a pattern of exclusionary practice, which came to include the broad questions of immigration.

Chapter Five Locating immigration policies and the law within a moral maze

This chapter explores the realities of internal and external exclusion a little further, and considers the extent to which previous internal norms of Difference, Otherness and Exclusion began to adopt an external dimension. In other words it explores how norms of Difference, Otherness and Exclusion came to be applied to those who wished to enter European states through immigration or asylum; and to non-Europeans already in Europe who had begun to establish settled immigrant communities.

More specifically, the first part of this chapter focuses on the United Kingdom and explores early constitutional and legal realities of immigration control, and probes different understandings of the concepts of transnational identities. It explores the Aliens Act of 1905, the first of its kind in Europe to use state sovereignty to regulate the effects of immigration. The chapter looks at how the process of immigration controls began again in the post war years, and how restricting the entry of British subjects into the

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United Kingdom would be open to criticism. The 1962 Commonwealth Immigrants Act was intended to introduce controls that would curtail the historic right of Commonwealth Citizens to freely enter and stay in the United Kingdom. It was accepted that however carefully the legislation was drafted, it would be represented as a measure of discrimination against coloured people. Cabinet papers reveal that discrimination against coloured people was exactly the purpose of the 1962 Commonwealth Immigrants Act, and the turmoil that followed.

The second part of the chapter explores some theoretical and controversial ideas, by exploring poststructuralist concepts of hospitality and the reception of the stranger. It asks whether hospitality, the reception of the stranger, should be conditional or unconditional. It notes that although the state, as a host, can function so as to create a rational political order that welcomes the stranger, the probability is that the state, with its realpolitik, will not do so. The chapter also explores the issues of the normality of exclusion and the idea of apocalypse within normality.  

Chapter Six Cycles of Exclusion, the European Union, Immigration and Asylum

This chapter brings together the different threads of Europe’s history of exclusion, and explores the proposition that historical factors remain the motivating factor in contemporary attitudes to immigration and asylum. The chapter explores conflicting attitudes towards post war immigration and asylum issues, and looks at the struggle between the desire of Member States desire to block unwanted immigration and asylum, and the determination of Brussels Eurocrats to take (at least on the face of it) a pro-immigrant line. The chapter also reviews early attempts to incorporate immigration and asylum into the legal structure of the union. Reminiscent of the 1930’s and the reluctance of European states to accept refugees; the chapter explores how the issue of those

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seeking asylum in the European Union is again the focus of disputes that are claimed to put Europe in grave danger and threaten its continued stability.56 Finally the chapter raises the question of who are the new excluded, who is seen as not belonging and who has been nominated to occupy the symbolic space of exclusion.

Chapter Seven Conclusion
The final chapter addresses the evidence to support the hypothesis that there is a cyclicality of exclusion in Europe, and considers the proposition that the only unknown factor concerns the identity of the potentially excluded.

Conclusions
Whilst the thesis is divided into past and present and into theoretical and empirical as a way of ordering thoughts and events in to a coherent sequence that makes them interesting to read; the divisions may sometimes be blurred because the subject of the thesis is life, which seldom conforms to regimentation and essentialism. Finally I have made no attempt to construct a detailed analysis of immigration and asylum law because the purpose of the thesis is to explore the complex reality hidden behind the law. Arguably, having identified the reality, the effects are largely predictable and flow with such inexorable purpose that analysis is unnecessary and superfluous. In other words, acknowledging a Faustinian concept of law with its Mephistophelean influence, helps understand that when societies surrender their integrity for short term gain, the time to examine legal minutiae is gone; rather all that is left is to watch, as society is transported to some unimaginable place of despair, from which there may be no return.

Chapter Two. Genesis of European Alienation

Introduction

*The foreigner comes in when the consciousness of my difference arises, and he disappears when we acknowledge ourselves as foreigners unamenable to bonds and communities.*

*Julia Kristeva. Strangers to Ourselves.*

In chapter one I raised the question of whether the many problems which currently beleaguer the issues of immigration and asylum in the European Union and some of its member states, were symptomatic of an historical pattern of exclusion which, whilst only marginally changing its character during the course of the twentieth century, sought different victims at different times. The chapter also considered the extent to which law was complicit in the process of exclusion. Central to the question of this exclusionary influence was the subject of difference, and the suggestion that the values associated with the ontology of difference were a key to understanding exclusion.

This chapter sets the scene for the chronology that follows, and is divided into the empirical and the theoretical. It begins by taking a vignette of contemporary reality set within events surrounding the recent civil and military upheavals in North Africa. It explores the reception afforded to those fleeing what has become known as the Arab Spring, and it looks back to the reception afforded to those fleeing the ‘Prague Spring’ 48 years previously. Political and Military upheaval represent a common factor in both events and provided the impetus for people to leave their countries of origin to seek safety elsewhere.

The second part of the chapter is a theoretical exploration of why there may be inconsistencies in the reception of those seeking safety and asylum; it draws from conceptual ideas of Modernity, difference, race, identity and imperialism. The chapter continues looking for answers by exploring another ‘spring’, this time the 19th century
‘springtime of the people’ where concepts of identity, belonging and citizenship came to play a pivotal role in emerging nation states.

Empirical Reflections

The Arab Spring

But first to the Arab Spring, where ongoing events at the Southern Mediterranean borders of the European Union provide an interesting account of social reality. An alleged growing desire in the Arab world for political and economic reforms, afforded an irresistible opportunity for the exercise of European sanctimoniousness which urged reform and change in parts of the Arab world. Changes did take place, and whatever the catalyst for change may have been, the effect was a catalogue of humanitarian disasters.

Civil unrest across North Africa and the Middle East brought about an almost inevitable human exodus across the Mediterranean, linking events in North Africa to controversial issues of immigration and asylum in the European Union. The developing political situation in North Africa was dubbed, perhaps a little unwisely, the ‘Arab Spring’, invoking memories of historic struggles in Europe.

In fact, the term ‘Arab Spring’ was an expression borrowed from an earlier time, and harked back to the 1960’s and what has since become known as the Prague Spring, the short lived period of democratic reforms in Czechoslovakia under Alexander Dubček. Although the term ‘Arab Spring’ was probably intended to conjure up images of democratic struggles, the loss of life and the threats faced by civilians during the Prague Spring was relatively low, whilst what is perhaps better described as the Arab Renaissance, has proved to be a bloody affair.

But both events share an area of commonality; political change in Czechoslovakia and in North Africa, created an environment in which people left their countries of origin to
seek safety elsewhere. Back in the days of the Prague Spring, European governments made every effort to accommodate those who, because of compelling needs, were leaving Czechoslovakia; an apparently different approach from that taken towards those fleeing the ‘Arab Spring’.

The language of European leaders welcomed moves towards establishing democratic regimes in parts of the Arab world. But when it came to the reality of dealing with those who were caught up in the violence surrounding this transition, and who sought safety by fleeing to Europe; reality failed to match the expectations promised by European rhetoric, and the language of European leaders became more opposed to accepting those seeking safety. This is undoubtedly a controversial issue insofar as there is an argument which claims that the often violent move towards more democratic regimes in the Middle East should not be taken to imply that those caught up in change should automatically assume a safe haven in Europe. But such an argument is part of what I earlier called the redefinition of meanings and truths which eventually morph in a central narrative in which context becomes a casualty, truths become victims, and the primacy of reason ignored. There emerges a residual indignation that the given view of Europe’s relationship and concomitant responsibilities in the Middle East is challengeable and open to scrutiny. In reality the issue of whether Europe should be automatically seen as a safe haven because of its military economic and political interference in the region, is a matter dependent on a particular choice of ‘truth’ and often on what Zola described as a conscience that allows for ‘many accommodations’.

Moreover there is an assumption that a collection of values which are often labelled by Europeans as ‘democracy’ have an inherent suitability for other regions of the world. This post imperial attitude rejoices in the struggle – however bloody – to bring about regime

change, but seems to adopt an equivocal attitude in respect of the humanitarian consequences.

Europe’s response to those seeking safety by crossing the Mediterranean was to deploy Frontex, Europe’s quasi-military frontier protection force. Frontex was created by the European Union and tasked with managing the external borders of the Schengen area. In March 2011, operation ‘Poseidon Sea’, was the response to the ‘highly volatile’ situation in North Africa. A further Frontex mission, ‘Operation Hermes’, in March 2011, was implemented to assist Italy in managing the inflow of migrants from North Africa, and the operation focused on the small Italian Island of Lampedusa. Whilst the European Union’s Home Affairs Commissioner Cecilia Malmström believed that Frontex operations were “a concrete demonstration of European solidarity”; there was a contrary concern that

‘the information available on projects co-ordinated by Frontex gives no adequate account of how the principle of non-refoulement has been observed. UNHCR has expressed concern about the respect for refugee protection in Frontex’ activities’

In April 2011 the French closed the rail border with Italy at Ventimiglia and refused entry to trains carrying Tunisian nationals, who had arrived in Europe having fled unrest. In May, Denmark announced the re-introduction of border controls as a response to the same issues. Notwithstanding the Schengen arrangements, and the free movement of people in the European Union, the European Commission issued a communication that

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59 March 26 FRONTEX, Warsaw, ‘Update to Joint Operation Poseidon 2011’.
60 23 March Frontex Warsaw, ‘Extension and Expansion of Joint Operation Hermes in Central Mediterranean’.
did not rule out the possibility of allowing member states to put in place internal border controls in exceptional circumstances. 65

Drawing analogies between the Arab Spring and the Prague spring of 1968, can prove to be a little uncomfortable because although more than 40 years separate the events, drawing comparisons between the two, points to some kind of societal disjuncture. For instance, in 1968 the British Government instructed its embassy in Prague to issue ‘on the spot’ visas for Czechs wishing to travel to the UK; 66 and those who tried to leave the Eastern Bloc found a far more sympathetic reception in the West than did those arriving from countries with a former colonial past in Africa and South Asia, and those from the Middle East and North Africa.

This analysis is, of course open to criticism, principally relating to, among other things, the fact that the numbers of people involved in the two events are very different, and contemporary social conditions shows that a number of European cities have large isolated immigrant communities - a situation which did not exist previously. Added to this, the issue of terrorism is said to play an important role.

At face value the criticism seems to have merit, but in order to understand the ‘then’ and ‘now’ analogy, it is necessary to move away from the exactness of numbers into more contextual understandings of societal and political influences. Many differences or similarities cannot be explained by simply relying for authenticity on, for example, a given legal system or a set of statistics. In later chapters I look at the 1905 Aliens Act in the United Kingdom. The Act which did not mention the restriction of Jewish immigration into the United Kingdom was designed specifically for those purposes, and the anticipated influx of refugees from Russia. In addition, the Royal Commission which preceded the Act, certainly gave the impression that in terms of numbers the United Kingdom had a


66 Smith, ‘Britain Eases the Visa Rules for Czech Refugees.’
‘problem’. But, other than in the east end of London, the numbers of the existing Jewish immigrant communities in the United Kingdom was low. So too in the period immediately before the Second World War, when Jews were desperate to leave Germany, many European states, including the United Kingdom closed their borders to Jewish immigration and Jewish refugees. As explored in later chapters, Jewish immigration to the United Kingdom was not possible because, as Lord Winterton told the Evian conference, Britain was not a country of immigration, it was fully populated. The French Republic’s position at the same conference was that France had unfortunately exhausted her own resources, which were not as boundless as her zeal to serve humanity. Both positions amounted to the same thing – neither France nor the United Kingdom were prepared to open their borders to Jewish refugees. Penetrating beyond the given in both cases leads inescapably to some murky moral reasoning in which neither the United Kingdom nor France wanted to admit Jews; it epitomises ‘us’ and ‘them’, the ‘Others’, the arbitrary exclusion of those who society has determined are different. Therefore the comparison or analogy between the Prague Spring and the Arab Spring has little to do with numbers or threats of terrorism or overwhelming numbers; it is about the emergence of a new common enemy, a new ‘them’ to our ‘us’. Indeed, Rainer Bauböck also claims that Europe is currently faced with a humanitarian crisis similar in scale to that triggered by the Nazi regime and, in reflecting that Europe’s response has been shamefully inadequate, he cautions against replicating the situation of the 1940s when one state after the other ‘turned away ships with Jewish refugees pointing to others that should take them in.’

Therefore, and moving on, the issue of immigration and asylum from the third world (by third world in this context I refer to nations that were not aligned to the policies of either the U.S. or the former Soviet Union), was still an issue in 1986 when Jonathan Steele of the Guardian, published an article in which he suggested that for ‘ideological reasons if not outright racial reasons’, the German Government was more sympathetic to

refugees coming from Eastern Europe, despite the fact that their real status as economic migrants, was an open secret.

His argument that Germany had more sympathy for Eastern Bloc refugees because of ‘racial reasons’ is not convincing, particularly in the context of the time. It is true that during the Cold War years, the West preferred to welcome those escaping from Eastern Europe, principally because their arrival served an ideological purpose; but, what Steele may have seen as a German preference for Eastern Bloc refugees was more of a reflection of a European approach to the wider question of immigration to the West. This European approach came about because, as the Cold War came to an end, there was a gradual shift taking place in the pattern of immigration. Immigration from the Soviet Bloc to the west was being outstripped by predominantly non-European immigration from the third world, which resulted in European States being confused as to how to react to this new phenomena. Some of the new wave of immigration had been as a direct consequence of European policy, but the response to this change was an exponential growth in immigration legislation, and accusations that European states were racializing immigration control measures. The racializing of immigration controls was a charge levelled at the United Kingdom in particular, but restrictions on immigration was a process being introduced throughout Europe. In France, zero immigration was the objective of the ‘Pasqua laws’ introduced during the 1990’s; and the question of immigration was high on the political agenda in Germany, when the constitutional right to seek asylum was reviewed together with future policy towards immigration. A similar situation developed in Italy where restrictions on immigration and asylum were introduced through the “Bossi-Fini” Laws of 2002.

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At the same time as the new wave of non-European immigration and asylum was taking place, questions were being raised as to the nature of and entitlement to citizenship of the state; a debate which ultimately informed and influenced the development of immigration law. The entitlement to citizenship as either *jus soli* – citizenship by the right of being born in a particular country, or *jus sanguinis*, citizenship flowing only from parents and history, remains the subject of debate in some European states. It is certainly true that that there are many permutations on this theme, and although it may be an anathema to today's European Union, there are member states who continue to provide extraterritorial access to citizenship for third country nationals who can prove the right ancestry. Whilst there are commentators who say that ethnic origin is not a fair criterion for admission of immigrants there is some posturing here. Ultimately, ethnicity and citizenship, nationality and identity are factors that continue to be pivotal in the determination of 'us' as opposed to 'them'; and in a sense, and despite the wider political disapproval of the European Union, it is slightly irrelevant how society makes this determination. In chapter 5, I note that it is often claimed that 'liberal' societies have weak identities, and in such societies their identity is to have no identity; but when this idealist mantra is tested, as in the Treaty Establishing a Constitution for Europe, the Netherlands rejected the proposals because of what was claimed to be a perceived threat to Dutch culture, and France too rejected the constitution because of a fear of loss of national identity.

In any event, those fleeing from the Eastern Bloc, despite the enormous economic pressures faced by receiving countries, became part of a European consciousness that chose to see them at the time, not with hostility or suspicion, but with the affection reserved for heroes. This affection has now become part of the European conscious, and is portrayed in many ways. The continuing popularity in Central and Eastern Europe of the iconic image of Border Guard Conrad Schumann jumping over the Berlin Wall in August 1961, remains a 'best seller'. Of course, and in reality, many of those Eastern
Bloc ‘refugees’ were economic migrants who moved west in search of what they believed to be a better life, a pattern which has continued largely uncontested following the free movement of people in the European Union. The ubiquitous Le plombier polonaise still continues to bring a wry smile of recognition to the face of many Europeans.

But European sentimentality does not extend to those fleeing the ‘Arab Spring’ nor does it appear to extend beyond the boundaries of Fortress Europe. What does appear to have happened is that a new and external ‘other’ has been identified, and laws related to accessing the territory of the European Union and its member states have become the ‘site of permissible discrimination to meet state objectives’.  

The fate of those fleeing the Arab Spring is a melancholy story. In October 2013, and adjacent to the Island of Lampedusa – the place where those crossing the Mediterranean to seek safety in the European Union are interned - Italian divers were recovering the bodies of those who died when a boat with an estimated 500 asylum seekers on-board, sank, within sight of the tiny island; there were only 155 survivors. Pope Francis who visited Lampedusa in July 2013 pleaded for more tolerance and attention to the plight of refugees.

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But the catastrophes repeated themselves a dozen times. In the space of a few days in April 2015, 400 people traveling from Africa to Europe drowned in the Mediterranean, then a boat with over 800 refugees capsized, and only 28 survived.\footnote{Spiegel Staff, ‘An Unending Refugee Tragedy: Europe’s Path to Deadly Partition.’ Spiegel Online International (April 2015).}

On 21st April 2015 the permanent representatives of the 28 European Union member states met in Brussels to discuss the situation; and the European Commission compiled a 10 point plan to be submitted to the Council of Ministers. The plan included proposals for mandatory national quotas of refugees allocated to each member state; the reinforcement of joint operations in the Mediterranean, namely Triton and Poseidon; the fingerprinting of all migrants; and a new return programme for the rapid return of irregular migrants coordinated by Frontex from frontline Member States. Strategies also involved the deployment of Immigration Liaison Officers (ILO) in key third countries, to gather intelligence on migratory flows and strengthen the role of the EU Delegations.

Making comparisons between the reception afforded to those who sought safety from North Africa and those who sought safety from events in Czechoslovakia 48 years previously can only be a limited exercise. Moreover there is a danger of drifting into parsimony, and of dismissing the argument that it is not unreasonable for the European Union, its institutions and its Member States to exercise responsibility in safeguarding
citizens of the Union from collective and individual economic vulnerability. The growing affluence of the European Union was planned to be shared by those who were considered to have a just and legal entitlement to its benefits. But European resources are finite, and permitting all those who desire to enter Europe to freely enter and share these benefits would constitute an unreasonable drain on resources, jeopardise economic stability, and pose a threat in the workplace. Arguably there is a need to maintain and preserve a public culture which reflects societal continuity through past generations, and highlight values which resonate with, and are recognised by the community as being their own. It would follow that in order to maintain economic prosperity, social reality requires the compilation of a set of rules to establish who is entitled to share the benefits of European affluence, and who is not. Rules have been compiled either at member state or European Union level, and they are clear; those seeking entry in to the area of the Union without prior entry permission, or who do not satisfy the asylum or immigration criteria, will be turned away and refused admission. In terms of the reception of those seeking asylum, the French prime minister, Manuel Valls, made the point in more recent times that Europe cannot take in all the refugees fleeing wars in Iraq and Syria without putting the concept of Europe itself in grave danger; the Prime Minister went on to say that Europe needed to take urgent action to control its external borders. “Otherwise,” he said, “our societies will be totally destabilised.”

This thesis explores the cyclical process of exclusion which rests, substantially, on the disguised process of determining who belongs and who does not. This is a murky process, whose shifting criteria continues to have a deleterious effect on contemporary attitudes towards immigration & asylum. Therefore I propose that economic justifications for limiting immigration, some of which may indeed have merit, nevertheless come after

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the decision to exclude, rather than before, and this process is illustrated in the chapter 4 discussions of the Evian Conference; and in chapter 5, by the minutes and discussions of the United Kingdom Cabinet.

Moreover, some caution has to be exercised in utilising economic arguments as the justification for limiting immigration, particularly so as locating immigration policies in an economic framework moves the discussion into areas associated with some unsavoury activities, where economic activity often takes place between the most ideologically incompatible of regimes and is seldom hampered by the inconvenience of borders, ethics or morality. Although globalisation tends to encourage the dismantling rather than the erection of frontiers, in reality whilst barriers are dismantled to facilitate trade and the movement of capital; a different system of barriers aimed at controlling the movement of the third factor of production, labour, are accepted as morally just, and an international norm. Such restrictions lend themselves to populist slogans of “Europe for Europeans”, and to the reception of the immigrant becoming racialized securitised and militarised. ‘Europe for Europeans’ encapsulates an increasingly negative view of immigration, or more specifically a negative view associated with non-European immigration, and as this factor has taken centre stage in the current dialogue on immigration and asylum issues, it is helpful to explore, from a theoretical perspective, the reasons why this may be so. But there is a final point before doing so. There is an element of naivety, or even wilful blindness in liberal assertions that Europe, as a whole, rejoices in its love of diversity. The reality, on the other hand, presents proponents of this view with something of a dilemma, particularly because the liberals now accuse the United Kingdom of voting to leave the European Union because of immigration issues, and suggest further that the United Kingdom is experiencing the highest levels of racism in years. Moreover, and on the issue of diversity and immigration, it would be folly to

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76 Jeffery T Checkel and Peter J. Katzenstein, European Identity (Cambridge University Press 2009). pg13
deliberately ignore the rise of anti-immigrant political parties across Europe. From Geert Wilders and the Freedom Party in the Netherlands, to Viktor Orbán in Hungary, and from *Alternative für Deutschland* in Germany, Marine Le Pen in France, and Norbert Hofer, in Austria, all have a platform of anti-immigration, and all appeal to what was once called the proletariat. The lessons of history suggest that it is dangerous to underestimate the ‘fringe’ of political opinion.

**Theoretical Perspectives**

Offering a cogent theoretical explanation for the disparity between attitudes to European and non-European immigration proves to be something of a conundrum, the key to which lies at the core of European values. To this end I suggest that regardless of whether those seeking safety hail from North Africa, the Middle East or Eastern Europe; the problems encountered in crossing the geopolitical boundaries of the state, are less daunting than what are perhaps the more formidable obstacles they have to face in respect of negotiating societal boundaries, constructed for the purposes of maintaining the integrity of the homogeneous community.

Trying to explain or interpret what is obviously a wider question than just that of the *Arab Spring v the Prague Spring* disparity; involves exploring the idea that fundamental to the construction of boundaries, either by the state or by society, is the role played by difference. Of course, the whole concept of difference is contestable and often the result of a flawed ontology. Nevertheless, in a very real sense, and however flawed or imaginary the ontological argument of difference may be, it is a concept that has come to influence a whole corpus of law, and forms an essential element in the journey towards the affirmation of identity and belonging.

Understanding the powerful influence of difference on society is usefully approached by exploring the concept of Modernity and its values; in which Difference, Otherness and
Exclusion play a significant role in determining identities, and in deciding who belongs and who does not. Looking at the ideological foundations of Modernity and considering its links with Difference, Otherness and Exclusion may help to explain why there is a disparity in the welcoming of the stranger, and how this disparity influences the issues of immigration and asylum.

**A View of Modernity**

Perhaps as a brief explanatory parenthesis, it is useful to remember that Modernity should not be seen as a historically real event, rather it should be seen as an ethos, a way of thinking and of viewing the world, or, as Foucault describes it, a method of relating to reality.\(^7\)\(^8\) The term ‘Modernity’ might best be explained as a label which has been given to a way of thinking that forms a unique perspective through which the world and society can be viewed. Modernity can indicate a particular way or method of relating to reality, or it can be indicative of a new repertoire of ideas engaged in the evaluation of traditional values; but essentially it relates to a range of philosophical and ethical concepts which extend through the many branches of politics arts and sciences. However, I want to accept, as a given, that a function of Modernity is to exclude; this exclusion may take many forms and this thesis suggests that law has been shaped by societal influences influenced by modernity which accommodate exclusionary practice. In any event, exclusion has influenced the approach to many historical and contemporary issues, be they social, religious, racial or political - the list is not exhaustive.

This is contestable ground, but arguably, whilst Modernity seemed to offer the promise of inclusiveness through political participation,\(^7\)\(^9\) there emerged a curious paradox insofar as there is a point where inclusion becomes dependent on ethnic and national forms of

In this way it may be argued that the ideas identified with Modernity have influenced the way in which society has conceptualised the state, democracy and citizenship, and the political and legal structures of the state. Exploring the extent to which society remains influenced by these dynamics and continues to sanction exclusion within the framework of legality and normality, is an issue explored throughout this thesis; but for the moment it is salutary to take a closer look at the notion of Modernity, its values, and the influence these values may have on the broader issues of the stranger in society.

*The values associated with modernity*

There is a view taken by some scholars that central to understanding the notion of Modernity is the concept of rationality. Rationality in this context refers to the rational wisdom which was used to evaluate a host of emerging values adopted by European society, roughly coinciding with the development of industrialisation and the industrial society. These emerging values were centred on capitalism and economics, and gave rise to the re-evaluation of societal divisions, religion and the issue of race. It was believed that these emerging values also represented a balanced and logical approach to evaluating European and world issues, and although they were the sum total of a multiplicity of influences, there was a conviction that they embodied an inherent universal and objective quality. Although these values, and the way in which they were applied, represented an essentially narrow European view, they were promoted as being applicable to all the world. In a sense this is unsurprising given the influence that European states had come to exert through colonial ventures. The disproportionate influence of Europe on the rest of the world led to a cultural chauvinism, in which European values took on an obligatory nature which had to be accepted by other societies and cultures, regardless of their heritage. But not only did European values become dominant, taking on a universal air, they also ‘rejected the values of other non-

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European cultures’. In this way the rationality of European values came to be promoted as truly universal, whilst the rationality behind the values of other societies were discarded.

In reality there often exists what Isaiah Berlin dubbed, an incommensurability of values between cultures and societies, but it does not follow that the values of one group must be true and the others false. Nevertheless and with the expansion of colonialism, Europeans sought to make the world conform to a single ‘ideal’; and in proclaiming what they believed to be the certainties of their ideas, it followed that the exclusion of those who did not share a European belief system was natural, ‘inoffensive and tolerable’. Writing in 2013, Kishore Mahbubani says that there remains a deep psychological reluctance by many in the West to accept the simple proposition that we are all equal. The West unconsciously still assumes itself to be a morally superior civilization, and tragically, the idea that the West is an inherently ‘...benevolent force on the world stage, is a deeply embedded myth.’ I suppose the moral of the story is that total dominance for the wolves, is death to the lambs; and total liberty for the powerful, is incompatible with the rights of the weak.

If there is validity in the premise that the values associated with modernity flow from beliefs of superiority and exclusion, then perhaps the causation of the inconsistencies in the reception of those seeking to enter European states in modern times, is much deeper than anticipated. It begs the question of whether race and identity still have a residual influence on the way European society conceptualises the stranger, and the extent to which these largely hidden influences impact on the formulation of law. But there remains the question too, of how European society conceptualises the nature of race and identity,

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81 Goldberg, ‘Modernity, Race, and Morality’.
83 Goldberg, ‘Modernity, Race, and Morality’.
and these are issues which need to be explored a little further by looking at the connections between difference, race and identity, and considering some 19th century thoughts on these issues.

**Difference, Race and Identity**

It is unwise to underestimate the influence exerted by the idea of difference on societal structures, and when difference becomes the barrier to entry into the nation state or to citizenship, many tensions arise. Therefore it would be fair to assume that if the concept of difference plays such a fundamental role in the formulation of law and societal structures, it should not be too difficult to define its constituent parts. But there is a real aporia in pursuing a definition, particularly because of the difficulties that arise in trying to construct an account of difference *per se*, in which interpretations of difference do not imply unequal relationships.

In other words, difference appears to be grounded in the classic inferior/superior interpretation, so that ‘different from’ is never a neutral descriptor, rather it has a meaning that implies ‘less than’. A further difficulty is that difference is often defined as ‘fact’, and fact implies a degree of essentialism. In the real world, difference is a fluid and evolving concept which has, over time, become hostage to societal subjectivity, and is redeemable at any time and any place.

But there is a further and intriguing suggestion that claims a synonymy between the concepts of difference and race. The argument is that during the late 18th and 19th centuries, and at a time when the European world had become captivated by thoughts of Empire, a new kind of scientific enquiry emerged which attempted to classify and rationalise everything from objects to plants and from animals to human beings.\(^6\) It was

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at this time that the contemporary notion of ‘race’ was introduced to European society, partly in order to explain the nature of humankind from an objective and scientific perspective. However, this new scientific approach was full of contradictions because although it exposed many of the old myths which had guided society for centuries, it replaced them with new pseudo-scientific myths, including that of race.

It seems that the new and exciting science of race emerged as being able to offer explanations for everything, from criminal behaviour and the origins of savage peoples, to the character of individuals and the structure of social communities. “All is race, there is no other truth” declared Disraeli. Although this classification of humankind in to races was seen as bringing a degree of order to global society, the biological case for its construction was flawed. Attempts to construct race, in biological terms, necessitated a set of essentialist and fixed criteria, and these could not be sustained as a matter of fact.

But the opportunity of separating humanity into natural divisions, even though the biological base for doing so was discredited, was not to be missed by the political élites who saw it as a chance to legitimately police and control many sections of society, including the growing and increasingly politicised proletariat. Therefore when Disraeli declared there was no other truth but race; perhaps he, like many other Europeans, saw race as providing a mechanism through which societal forces could classify and police the degenerates who posed a challenge to society. Among the degenerates were the militant working class, the Irish, Jews, homosexuals, the insane, and the black gender deviants in the colonies, who embodied some prehistoric promiscuity and excess. The idea of the divisions of humanity may have been seen as new and

88 Benjamin Disraeli, Tancred Or, The New Crusade (Henry Colburn 1847).
90 Disraeli.
innovative to European society; but it is interesting that, similar to the Talmudic approach to society, the Quran reflects:

\[ O \text{ mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise (each other).} \]

Demonstrating a very different approach in European thinking to that of the traditional Abrahamic approaches to the stranger.

But what of the proposition that there exists a synonymy between the terms race and difference, leading to the term ‘difference’ being used as a new descriptor for race.\(^3\) The theory claims that the process of equating difference with race was brought about as a result of the ‘discourse of race’, having to distance itself from increasingly doubtful theories of racial biology.

Therefore, and in order to maintain the notion of race as a reason to divide and categorise, ‘race’ was reinterpreted in the contextual setting of difference; for example people were familiar with the idea of gender as difference, or culture as difference; \(^4\) consequently, in a society that understood and pursued the pejorative influences of difference in everyday life, the notion of race as difference did not appear to be outrageous. In other words, the question of race underwent a metamorphosis which saw it stripped of most of its dubious scientific origins and its reference to fact, and become conceptualise. This is what contemporary society would probably describe as re-merchandised and re-packaged.

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\(^{32}\) The Quran - Transl Yusuf Ali, 'Chapter (49) Sūrat L-Ḥujurāt (The Dwellings)

\(^{33}\) Colette Guillaumin, Racism, Sexism, Power and Ideology (Routledge 1995).

\(^{34}\) Balibar, 'Difference, Otherness, Exclusion. Anthropological Categories in the Analysis of Racism . A Public Lecture Delivered to Columbia University New York, on the Invitation of the Department of English and the Centre for Comparative Literature and Society. Marc'.
In this way the discredited biological pretext for arguing the theory of the ‘natural divisions of people’ into races, was adapted into a concept in which race became interchangeable with the societal understanding of difference. This new approach to explaining race was then easily understood by a society that practiced and enforced social and gender divisions based on their own understanding of how society should be regulated.

If Schopenhauer’s reasoning⁹⁵ is to be followed, this transition from dubious fact to conceptual belief, involves disregarding those parts of a theory which do not support the desired outcomes, and retaining others that do. The final concept then becomes little more than an array of arbitrary ideas compiled with the single objective of proving the unprovable.

But perhaps what really happened was that race, in which ever form the establishment chose to portray it, allowed for the introduction of a powerful idea which was not just about race or difference, rather it was about justifying and manipulating the classification of humanity according to societal and political choices.

It is fair to say that, on the whole, European society did not see the idea of humanity being divided and categorised as an abuse; indeed there seemed to be a theological justification for such a position. For example, the theological teaching of the English Church appeared to indicate that divisions and differences in human kind were divinely ordained. A verse from a popular English Church Hymnal encapsulates this view,

“The rich man in his castle, the poor man at his gate, God made them, high and lowly, and ordered their estate”.⁹⁶

⁹⁶ Cecil Francis Alexander, ‘All Things Bright and Beautiful, ( Hymn ).
Christine Weir claims that the new conceptualisation of race produced a value laden and proscriptive demarcator of unbridgeable human difference, calculated to refute the indivisibility of human kind. In other words there is a societal choice between, on the one hand, a belief in humanity as being distinguished only by its unbridgeable human difference; and on the other, the notion of “Homo sum humani a me nihil alienum puto”. “I am a man, and think that nothing human is foreign to me” which speaks to a commitment to the fellowship of humankind.

A future European agenda rested on the outcome of societal choices related to issues of race and difference, particularly as this was a time when previous social and religious certainties had to be accommodated within the growth of economics and capitalism, and where the position of the ruling élite was under scrutiny from a burgeoning middle class. It marked a time of simmering unrest in emerging industrialised societies, where change was greeted with suspicion and intolerance, and diversity was viewed as subversive. It was also a time when the mantra “every race is a separate complete whole”, was often used as a means of filling the lacuna between frustrated nationalism and the lack of political nationhood. The possibility of civil unrest seemed acute and emphasised the need for European society to change and adapt to a new social and political agenda; this was a time which has since become known as the ‘Springtime of the Peoples’.

**Springtime of the Peoples**

Europeans are prone to describing civil unrest, change or revolution in any country other than their own, as some kind of ‘spring’, but the ‘Springtime of the Peoples’ or the ‘People’s Spring’, was a period that directly affected European states, largely because it

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98 Michael Montaigne, “I am a man, and think that nothing human is foreign to me” on the ceiling of Michel Montaigne’s study.
101 Arendt, The Origins of Totalitarianism. 166.
was a time when new identities were being established along the lines of social, economic, and racial divisions that emphasised difference. To put it into perspective, this was a time when Marx and Engels were writing about the impoverished conditions of the Verelendung, the new urban working classes, and it was a time that saw the development of the nation state; growing urbanisation; the consolidation of European territorial claims, and the pursuit of a new kind of aspirationalism connected with visions of Empire.

Perhaps the best way of approaching these events and their relevance to Difference, Otherness and Exclusion is to look at them from the perspectives of the nation state and identity; Continental Imperialism, and Identity and Imperialism.

The idea of the nation

During the 19th century there was a miscellany of peoples whose shared language and culture transcended many geopolitical boundaries, and who could not be defined as belonging to a specific state; they are sometimes described as the pre-politicised nation. Alternatively they are seen as a more ‘organic explanation’ of the nation, and are said to breed exclusivity and xenophobia. As 19th century political and economic events began to unfold, there was an urgency for states to consolidate new found wealth and influence, and to revalidate themselves within clearly delineated geopolitical boundaries, formulating a criteria of citizenship as they did so. But an impediment to this re-validation were those whose language and culture was not confined by state boundaries, and they presented an anomaly that had to be redeemed if the long term political and economic aims of the nation state were to be realised.

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Perhaps I can illustrate what I mean in relation to the 19th century desire to create an Italian State and to the Prussian aspirations to establish a German state. Garibaldi’s dream of *Risorgimento*, uniting Italian speaking peoples hailing from many Principalities under one ‘Italian identity’ and into one geopolitical nation state, was achieved only in part by 1861. In the mid-19th century Otto von Bismarck, the Minister President of Prussia, was seeking the unification of German speaking Principalities, under Prussian leadership.¹⁰⁵

Drawing on historical myths and culture, Bismarck aimed at creating a German national identity, centred on the belief that German speaking peoples were blessed with the good fortune of being a genuine people, of pure unmixed stock.¹⁰⁶ There was a belief that the “world spirit”¹⁰⁷ would flourish in Europe when Germany achieved a privileged position¹⁰⁸ and was able to demonstrate the superiority of Germanic culture.

But Bismarck’s ambition to unite German speaking peoples and create a national identity was also contingent on who fitted the Germanic profile, and who did not. This process of determining Germanic identity involved the categorisation of other European nations in terms of their race.¹⁰⁹

The identity of the Polish speaking peoples of Eastern Europe, Germany’s eastern neighbours, was reasonably easy to determine because it was said that they stemmed from a different biological race. The progressive German bourgeois acknowledged Polish difference, although to some extent they saw Polish identity as arising from a deficiency of *Kultur*, not just of biological race.¹¹⁰ The sociologist Max Weber believed

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¹⁰⁶ Arendt, *The Origins of Totalitarianism* pg. 167
¹⁰⁷ GWF Hegel, ‘Enzyklopädie Der Philosophischen Wissenschaften’.
that in the agricultural areas of East Prussia, Poles and Germans should not be allowed to work together; Poles were differently constituted and in order to work with them, Germans had to descend the cultural ladder. Consequently when Bismarck established the Kaiser Reich, a united Germany with a national identity, it did so within Kleindeutsche or narrow borders, rather than Grossdeutsche, or wide German borders. The reason for the decision to establish the new German state in tight boundaries was that it incorporated an overwhelming ethnic German majority, wider boundaries would have led to the incorporation of more Slavic or Magyar peoples.

The German philosopher Hegel, saw the Slav nations as being ‘agrarian peoples’ with appropriate cultural and political identities; ‘Mahammedans’ were only worthy of exclusion. As for the Jews, their only identity was as outsiders to the administrative and social system, and this was reflected in 19th century anti-Jewish images and stereotypes.

But the assumption of racial divisions was not exclusive to Germany; Hume and Kant saw white races as being superior, as did Benjamin Franklin, whilst Thomas Carlyle saw even further divisions among European Races. The London Times in its analysis of the “Irish Question” used the idea of race and identity to distinguish between the British and Irish, and used the concept to illustrate the parameters of inclusion and exclusion in the United Kingdom. Bismarck’s vision for Germany was based on the conceptualised version of race mentioned earlier, but it served the purpose of giving legitimacy to the

113 Bruce Hall.
114 GWF Hegel, Philosophy Of History (Transl Sibtree ed, George Bell and Sons, York Street, Covent Garden London 1878).
117 Times Staff, ‘The Irish Question’ The Times Issue 25996 (December 1867) 6.
creation of state boundaries and a national identity, a process which results in ‘...the state being partly transformed from an instrument of the law into an instrument of the nation.’

This raises an interesting issue insofar as, everything else being equal, it is fair to accept that boundaries are fundamental to the creation of the state, but when concepts of the nation are integrated into the state, there can be situations where the demands of the ‘nation’, as expressed through national consciousness, come to dominate the state, ultimately determining who belongs to the national community, and who does not.

Perhaps it is important to clarify the context of references to the nation; it would be an error to see the nation as simply a pseudo political body or ideology, rather the nation is more accurately seen as a cultural phenomenon which embraces a common culture, language, ‘sentiments and symbolis’, and is applicable even to those without a state of their own. Julia Kristeva sees the nation in terms of sharing a familiar ethnicity, which can become a form of "defensive hatred".

So however nebulous the idea of the nation may be, its impact is disproportionate and can lead to a process which results in ‘...the state being partly transformed from an instrument of the law into an instrument of the nation.’ Minorities in the state may then find their status subject to the vagaries of transient national consciousness. Perhaps an analogy would be during the period of the Nazi rule in Germany, where the idea of the nation was elevated to a position where the state became subservient to the alleged demands of the nation as expressed through the National Socialist party.

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119 Arendt, *The Origins of Totalitarianism* 230
122 Kristeva.
123 Arendt, *The Origins of Totalitarianism* 230
On the other hand, if the state is defined as having legal dominion, and is structured in such a way as to give all its inhabitants, regardless of their difference, a guarantee of equality before the law, this could in some way conflict with the aspirations of the nation. Hobsbawm disagrees with such an analysis and says that “Nations do not make states, rather states make nations”.125

The reality is probably somewhere in between because, in order to re-enforce the notion of identity, the state can be said to enforce ethnic, religious, linguistic and cultural homogeneity. But whilst the state invents historical memories, and preaches the credo of a common mission and a common destiny, the state also breeds animosity towards everyone standing on the outside.126

It is at this point that law becomes utilised as a vehicle for expressing, representing and articulating the nation-state and national identity, by exercising its prerogative to control entry into its territory and regulate those permitted to enter. Of course, this is a situation which might be mitigated if the nation decided it was ‘open to contestation and reinterpretation by newcomers’. In reality however, the influences of Modernity saw states emphasise the factors through which the dominant ‘majority’ exercised sovereignty in the name of the people, and exclude Others.

In Europe the continuous re-composing of borders and boundaries, reshaped and continues to reshape European territory and affairs, as with, for example the contemporary face of the European Union. But Boyd Shafer observes, rather cynically, that within the boundaries of the emerging 19th century states, ‘Patriots had to be made

126 Bauman, Modernity and Ambivalence. 64
129 Cohen.
because nature could not be trusted to develop men unassisted.'132 In any event, the process of defining boundaries, establishing identities and categorising difference, was to eventually give rise to a cycle of conduct which saw ‘luminous and dark periods encompassing the good and the bad, and inspiring both hope and despair’.133

**Continental Imperialism and identities**

Although European nation states drew strength from establishing communities of the likeminded, there emerged another of Modernity’s paradoxes. Whilst some European states preached the credo of homogeneity, they also pursued the contradictory principle of ‘overseas’ imperialism. For those European states that possessed the necessary resources, imperial ventures proved an attractive proposition, but for others the opportunity for overseas imperialism was not an option. Not to be outdone, they took the option of pursuing what Hannah Arendt calls Continental Imperialism; in other words extending their power and influence by annexing into their sphere of control, other European states. The practice of Continental Imperialism re-shaped the geographical and political boundaries of Europe, and created new identities that lasted through the 19th and 20th centuries and beyond.

**Imperialism and Identity**

Continental Imperialism saw the Habsburgs create a Central and Southern European Empire; Imperial Russia annexed eastern Poland and advance into southern and central Asia. The Hohenzollerns of Prussia and the Habsburgs of Austria-Hungary both engaged in the drive eastward for territorial and economic gains. This expansionism subsumed a diversity of peoples and cultures, and as will become evident in the next chapter, issues of identity and difference became an issue in states that had hitherto preached the credo of heterogeneity.

Arendt argues that Imperialism was the result of the nation-state’s attempt to survive under the circumstances of a new economy and in the presence of an emerging world

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133 Checkel and Katzenstein. Pg3
market,\textsuperscript{134} and this in turn gave rise to more complex interpretations of identity including that of race. This relationship between imperialism, industrialisation race and identity largely arose in connection with the emerging urban working class, whose discontent was constantly feared\textsuperscript{135} by the establishment.\textsuperscript{136} It was this discontented urban working class who were the subject of a prediction by Cecil Rhodes to the effect that growing industrialisation across Europe and the United States, would eventually limit markets, and the working classes, looking out for themselves, would begin a flirtation with imperialism; “the workmen see that if they do not look out they will have no place in the world to trade at all. And so the workmen have become Imperialist”.\textsuperscript{137} This strange alliance between the proletariat and capital, or the phenomenon of an ‘unnatural alliance between the mob and capital’,\textsuperscript{138} seemed, according to Arendt, oblivious to the dangers of dividing humankind into ‘master races and slave races, into higher and lower breeds, into coloured peoples and white men’.\textsuperscript{139} So, in a sense, the urban working classes became captivated not only by capital, but by the illusion that they were not at the bottom of societal structures; beneath them lay the ‘black deviants in the colonies’. It rather reminds me of the lines loosely based on Jonathan Swift’s poem "On Poetry: A Rhapsody",

\textit{Big fleas have little fleas,
Upon their backs to bite 'em,
And little fleas have lesser fleas,
And so, ad infinitum.} –
\textit{The Siphonaptera.}

Thus the role of identity is intimately linked with industrialisation and imperialism. But, as Horkheimer and Adorno point out, there is a further irony because the same industrialisation which arguably increases economic productivity and creates the conditions for a more just world; also affords the technical apparatus and the social

\textsuperscript{134} Arendt, \textit{The Origins of Totalitarianism}.503
\textsuperscript{136} McClintock. pg 43-44
\textsuperscript{137} Arendt, \textit{The Origins of Totalitarianism}.
\textsuperscript{138} Arendt, \textit{The Origins of Totalitarianism}.
\textsuperscript{139} Arendt, \textit{The Origins of Totalitarianism}.
groups controlling it, to exercise a disproportionate advantage over the rest of the population. It seems that once again European society is enjoying the fruits of economic prosperity, and once again in an economically prosperous area, society continues to face the unresolved dilemmas relating to the divisions of humankind; these dilemmas have returned, in various guises to haunt the European demos since the 19th century, and appear to remain unresolved.

**The New Others**

This is an opportune moment to draw together some of the strands of this chapter, and recognise that looking for an explanation for the inconsistencies in the reception of those seeking to settle or seek safety in Europe in modern times, has its roots in past intolerance. But dwelling on the injustices of the past can obscure the current need for Europe to assume a responsible and reflective role in responding to a number of challenges, not the least of which is the need to develop an openness of the concept of Europe through its relation to the other non-Europe. Although this is a position that indicates a departure from the certainty of some European values, and advances the idea that the rights to beliefs of Others are recognised and accepted, it is also germane to how Europe, at least in principle, should welcome the stranger.

These are controversial areas that are not easily addressed. But they do not represent anything new; Europe has been plagued by centuries of internecine conflict which drew strength from exploiting difference and otherness; and which excluded those who were believed to pose a societal threat. For the time being, European states are now friends, and are part of the same club. They focus on those things that unite them rather than on their differences. Therefore, in the next chapter I want to explore what I have referred to as 19th century internecine conflict to discover the identities of the excluded. Having done

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140 Horkheimer and Adorno.
141 Engin F Isin, "‘We, the Non-Europeans: Derrida with Said’" in Agnes Czajka and Bora Isyar (eds), Europe after Derrida Crisis and Potentiality (Edinburgh: Edinburgh University Press 2013).
so, I want to look behind societal behaviour in order to ascertain if it is reasonable to argue that 19th century exclusion provided the base of practices which continued into the 21st century.

Conclusions
Drawing comparisons between the way in which Europe has chosen to welcome those seeking safety from conflict is a challenging exercise, principally because, and in order to understand the process, there is a necessity to look beyond the given, and locate the issue in the wider context of European society, history and culture. The apparent disparity between the reception of the Czechs and those from North Africa and the Middle East does not claim to be an objective analysis, neither is it intended to be. But it does afford the opportunity to reflect on the question of societal values, how these values influence the reception of the stranger, and ultimately how they determine the identity of who is to be welcomed, and who is not.

Acknowledging that prevailing societal values are pivotal in the compilation and implementation of law, is a fundamental step in understanding how the stranger is likely to be welcomed, or of the degree of intolerance the stranger is likely to face. An intolerance of others is not unique to European society, and neither do I pretend otherwise, but Europe, and European values continue to be promoted as being morally superior, whilst at the same time making every effort to disguise and deny a fundamental intolerance of difference.

Explaining these contradictions necessitates the exploration of Europe’s history of internal conflict, its colonial past and some early pseudo-scientific enquiry, all of which have contributed towards formulating some core values, which, whilst not always being overt, nevertheless are the foundations of attitudes towards those whom I have chosen to call the strangers in society. Even so, the identity of the stranger is not fixed, because
societal values have a fluidity which allow for a darker side in which concerns for security and societal regulation have prevailed over other concepts of freedom and rights.

A later chapter explores the views of those who choose to see Europe as being in grave danger from the consequences of immigration; but these fears should not be summarily dismissed, because although objectively they may not be based on fact, they are indicative of a legacy of 19th century thinking that draws strength from Difference, Otherness and Exclusion. Critics of this notion will point to the German Chancellor, and will cite her invitation to refugees as undermining such a theory; but it does not, it serves only to emphasise that her position on refugees verges on the unique among European leaders, and may be as the result of her experiences as an East German before reunification.

In much the same way as I would suggest that Chancellor Merkel’s understanding of the refugee situation has evolved from her experiences; I also believe that the legacy of 19th century thinking that drew strength from Difference, Otherness and Exclusion remains influential in broader European approaches to immigration. I suggest that the identity of those whose alienation from society led to their exclusion is still germane to our understanding of contemporary events.
**Chapter Three. ‘The Stranger in the Land of Another’**

**Introduction**

“The alien was to be protected, not because he was a member of one’s family, clan, or religious community; but because he was a human being. In the alien therefore, man discovered the idea of humanity.”

- Hermann Cohen, 19th-century commentary on the Tanakh.

By looking at the contemporary reality of those seeking safety from political upheavals, and comparing the situation with similar events 48 years previously, the last chapter set the scene for the chronology of the chapters that follow. Chapter two raised the question of the disparity in the reception of those seeking safety now and then, and questioned whether these inconsistencies might have their genesis in 19th century canons of beliefs. Chapter two explored some theoretical possibilities of how the construction of the nation state, boundary formation and identity, had influenced the reception of the stranger; and asked whether these beliefs continue to exert an influence on contemporary European society law and politics. Chapter two established the identity of those who, as a feature of European cultural dominance, had been pejoratively institutionalized as outsiders, and raised the issues of whether there exists cycles of practice which selects different groups at different times to occupy a symbolic space of exclusion.

This chapter moves on to explore the proposition a little deeper, and looks at the empiricism of exclusion during the 19th century; it considers the identity of those who were excluded, and looks for explanations as to why this should be so. It takes as its empirical data the lives of minorities in Austria-Hungary, imperial Russia and France, and explores concepts of Czech and Slovak Identity, anti-Semitism in Austria and France; it draws from the evidence of Pogroms and Revolutionaries in Imperial Russia, and

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explores the exclusion of Jews to the Pale of Settlement. Finally the chapter offers a theoretical perspective of the genesis of exclusion, before moving on to offer some conclusions.

It certainly appears to be the case that in several European countries, Difference, Otherness and Exclusion was a commonplace factor of life for minorities. In Russia, exclusion to the Pale of Settlement, reoccurring pogroms and emigration were a factor of life for the excluded. The central European Empire of Austria-Hungary was a melting pot of ethnicities, in which Czechs, Slovaks, Magyars, Ruthenians, Germans and Serbs were placed in situations of inter-ethnic conflict and exclusion, in order to maintain a status quo. Throughout Europe there was a significant issue concerning the internal exclusion of ‘strangers’, those who often had a generational history of living in a state, but who were defined as not being part of it, and who therefore often existed without rights. They constituted the ‘Others’, those who were considered to be lesser human beings because they were not citizens, and they came to represent the gap between human and citizen ‘which has become the main characteristic of modern law.’ Arguably this is one of those recurring contradictions that still persist today, and, bearing this in mind, I want to begin by exploring some aspects of the complex social and legal entity of Austria-Hungary.

**Empirical Reflections**

*Austria-Hungary, minorities, and exclusion*

Austria-Hungary spanned central Europe, and stretched from what is now Austria, through the Czech Republic to Slovakia, Hungary, and parts of what are now Poland, the Ukraine and Romania, finally extending south to Bosnia and Croatia.

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145 Douzinas, “The End(s) of Human Rights”. 
Austria-Hungary incorporated many different nationalities into its geography, but was not multicultural in the sense of promoting the equal status of everyone who made up the populace.\textsuperscript{146} In fact, by the mid-19\textsuperscript{th} century, the lack of equal status and discriminatory practice targeted at minorities, was slowly being challenged by those who dubbed Austria-Hungary, the "prison of nations".\textsuperscript{147}

Slovak minorities who claimed to be excluded from many parts of social and political life, presented a ‘Memorandum of the Slovak Nation’ to the Hungarian and Austrian Parliaments, claiming that there existed in the Austria-Hungarian Empire only equality in injustice.\textsuperscript{148}

The injustice referred to in the petition had its roots in the fact that the ruling classes in Austria-Hungary differed in language and ethnic origin from the ‘urbanized trading class, whose members in turn, usually differed in language ethnicity and often religion from the peasantry’.\textsuperscript{149} The ruling classes at the top of the pyramid, focused on

\textsuperscript{146}Jerry Z Muller, ‘Us and Them: The Enduring Power of Ethnic Nationalism’ (2008) 87 Foreign Affairs 18.
\textsuperscript{147}Checkel and Katzenstein.
\textsuperscript{149}Muller, ‘Us and Them: The Enduring Power of Ethnic Nationalism’. 
themselves, their language and their culture, excluding anything that disturbed what they regarded as societal harmony.

Czech and Slovak identity and exclusion

In the Northwest of Austria-Hungary the provinces of Bohemia and Moravia were inhabited by Czech speaking citizens. In these provinces there arose a growing Czech aspirationalism aimed at developing a Czech national identity. This idea of identity was largely based on a belief that defined the Czechs as democratic, bourgeois and crypto-protestant, as opposed to the German Habsburgs, who were considered to be authoritarian, aristocratic and Catholic'. Karel Havlíček, a Czech liberal thinker of his day, claimed that the Czechs wanted neither nationality without freedom, nor freedom without nationality. He feared that if an alien language was to be preferred over the Czech language, the Czech nation would be excluded from its share in public affairs, excluded from all education and would inevitably become subservient. Nevertheless, the Germans in the provinces of Bohemia and Moravia resisted moves towards Czech autonomy. Demands by Czech’s for the right to use their language in public life and for the education of their children, were rejected by Parliament, whose response was to establish German as the sole language of administration and education in Lower Austria.

The Slovaks also faced growing marginalisation; and came under attack because they did not satisfy the criteria of being a nation, and their aspirations for a national life had

154 Konirsh. 231-261
no place within the concept of Austria-Hungary. This was a reaction which reflected the varying degrees of suspicion or outright hostility directed against minorities.\textsuperscript{156}

Even in the face of adversity, a clergyman, Ľudovít Štúr, began to create a new Slovak language based on a Slovak dialect, and set out the framework of this language in two books, \textit{Nárečja slovenskue} (The Slovak Tongue) and \textit{Náuka reči slovenskej} (Theory of the Slovak Language). In this way the idea of Slovak identity and nationhood was constructed on the concept of language rather than of history,\textsuperscript{157} whereas for the Czechs, the land and geography was endowed with historical and cultural meaning and played a central role in their nationalism. The division between the Czechs and Slovaks went further, the Czechs promoted their ideology as being a civilising influence on the Slovaks, and suggested that Slovaks should abandon their identity and cultural traditions, and submit to the process of Czechization.

In the South of Austria-Hungary, ethnic minorities were being courted by a different kind of aspirationalism. Minorities in Bosnia Herzegovina had not been granted the status of either Austrian or Hungarian citizenship, rather they enjoyed the legal status of being ‘Members of the land of Bosnia Herzegovina’;\textsuperscript{158} and in Croatia-Slavonia, the Croats, Serbo-Croat speaking Muslims and Serbians, were in a similar situation.

These groups began looking ‘beyond the borders of Austria-Hungary to the independent kingdom of Serbia, as a frame of reference for their own political and cultural identity’.\textsuperscript{159} This was a situation which led to the Serbs, often encouraged by the Kingdom of Serbia,\

\textsuperscript{157}Hudek, Adam, ‘Between Czechs and Hungarians: Constructing the Slovak National Identity from the 19th Century to the Present.’ (2011) 9 History Compass, 257.
\textsuperscript{159}Sarajlic. Sarajlic.
being involved in terrorist activities against Austria-Hungary; a situation which ‘threatened to seriously endanger the delicate equilibrium’\textsuperscript{160} between the minorities.

In the Hungarian part of the empire, and arising from the ‘linguistic and cultural homogenization of the state’,\textsuperscript{161} there was a national mythology that encouraged the belief of a ‘Hungarian Political Nation’. Nevertheless, the Hungarian Constitution of 1867 set out core elements of the rights guaranteed to minority groups, and Article 19 stated:-

\begin{quote}
All the races of the state shall have equal rights, and each race shall have the inviolable right of maintaining and cultivating its nationality and language.

The state recognizes the equality of the various languages in the schools, public offices, and in public life.

In the countries populated by several races, the institutions of public instruction shall be so organized that each race may receive the necessary instruction in its own language, without being obliged to learn a second language.\textsuperscript{162}
\end{quote}

Despite the haughty terms of the declaration, the promise of equality and inclusiveness was in conflict with the conceptual understanding of a Hungarian nation state, which left no room for pluralism or residual loyalties to non-Hungarian cultures. Allegiances to past glories that were not Hungarian, came to be regarded as a threat to the integrity of the developing state.\textsuperscript{163} The inevitable result was that a nationalist elite marginalised non-Hungarian languages and cultures, and excluded those who maintained traditional ethnic loyalties.


\textsuperscript{163} Vörös.
There was a further problem because only about half of the population in areas controlled by Hungary, were Hungarians; the rest of the population was made up of Romanians, Slovaks, Serbs, Croats, Germans, Ruthenians and Jews. Despite this, Hungary saw itself as a nation-state, and from the mid-19th century there was a period of forced Magyarization, in other words forced assimilation. Laws were enacted to magyarize the names of cities and villages and pressure was exerted on people to change their Slavic or German names into Hungarian.

This assimilation was resisted by the Slovaks who, in the face of discrimination by both Czechs and Hungarians, began to re-define their identity through education and cultural movements. However, and despite what appeared to be constitutional guarantees of the equality of language and culture, Slovak speaking primary schools were closed down, and the Hungarian language was made compulsory in all schools. In the 1860’s, the Slovaks had founded a private cultural foundation, the Matica Slovenská, which fostered education and encouraged literature and the arts, but the Hungarian government dissolved the Matica Slovenská and confiscated its assets. By 1907 all teachers employed in Hungarian administered areas, were forced to take an oath making them liable to dismissal if their pupils did not understand Hungarian.

It is an area of conflict that still has echoes in the 21st century; for example in 2009, Slovakia refused permission for President Solyom of Hungary to cross the bridge between Hungary and Slovakia in order to unveil a statue of King Stephen the 1st, erected in what was claimed to be the ethnically Hungarian town, of Komarno.

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164 Hudek.
The Slovakian government sent a note to the Hungarian President saying that he was not welcome in Slovakia, and that his planned visit was a "provocation." The Slovak Prime Minister said that the king, whose statue the Hungarian President was to unveil, ruled during the worst period of assimilation policies against minorities in Hungarian-ruled regions.166

**Pro-Jewish Interlude**

Whilst the Slovaks were fighting to preserve their culture, and reacting against their exclusion, the government of Hungary had turned their attention to the Jews. Having already embarked on the process of Magyarization, it was difficult to ignore the new class of wealthy Jews, and their wish to be accepted into society. It was thought that if the Jews of Hungary could be offered some degree of emancipation, in return, they may well see their futures and loyalties bound to the Hungarian nation. This process opened up far-reaching civic opportunities for the Jews, by inviting them to become part of the nationalist movement, and offering in return the promise of civil rights and the possibility of unprecedented political and social advancement.167 For many Hungarian Jews, the bait was irresistible; but assimilation inevitably meant relinquishing some elements of Jewish tradition and unity.

In anticipation of the Jews of Hungary being offered equal rights, some towns and villages in Hungary saw protests and rioting, and it was not until December 1867 that

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the two Hungarian houses of parliament declared one of the fundamental laws of Hungary to be that:-

*The Israeliite population of the country is declared to hold all the civil and political rights as the Christian population.*

*All legislation, customs and decrees that contradict this law are abrogated.*

This certainly appeared to be an early example of inclusion rather than exclusion, in which citizenship was able to transcend questions of ethnic and religious identity. But such an initial reaction has to be balanced against the influences exerted by the simultaneous rise of the Pan Movements. The Pan Movements grounded their message in the wretchedness of difference and exclusion, but offered, to those who were pejoratively institutionalized by their cultural subordination, the opportunity of a new way forward, based on dignity and self-respect.

**The rise of the ‘Pan Movements’**

During the mid-19th century, many minority groups located within the nation states of Europe began to develop a growing awareness of their own particular cultural identities. This possibly had to do with the emergence of the secular state and the rise of the industrial system, when power shifted from the unity of Church and State to that of Nation and State. The result was that cultural and ethnic loyalties, which often transcended geopolitical boundaries, came to be seen as subversive. As I have just illustrated, the new, largely secular state regarded any loyalty to linguistic or cultural sentiments, other than those of the state, as being unpatriotic. It was a situation that was seen as a dangerous problem in need of suppression, but it also had unexpected consequences insofar as the exclusion of minorities provided the impetus for emerging cultural awareness in the form of the Pan movements.

169 Richmond.
170 Arendt, The Origins of Totalitarianism. 221-223
The Pan movements ‘preached the divine origin of their own people’, and engaged a language of superiority based on some unidentifiable historical quality of worthiness and exclusivity. It is not difficult to see how minority groups across Europe were attracted to these socio-political organisations. They appeared to extend the promise of dignity to those who had hitherto faced ignominy, and presented the opportunity for the demoralised to celebrate their cultural and ethnic origins. The reality of the Pan Movements fell short of their promise, and they often preached a language that was equally exclusionary and divisive. Their appeal was centred on a call to nationhood that cut across geopolitical boundaries, offering the prospect of a different form of unity.

The Pan-German movement for example, arose at a time before the unification of Germany, and promoted the superiority of Germanic culture in opposition to other cultures. Kurt Breysig, a 19th century German historian, considered that the ‘Slavs were entirely aptly called female nations in contrast to perfectly male nations such as the Germanic and Romance.’ Race and nationality were fundamental to the Pan German movement which claimed that ‘French and Danish minorities were of similar Aryan stock, but not the Slavs and Jews who lived across the Eastern borders’, such ‘Eastern ethnicities might be considered alien to the German Race’.

Pan Slavism emerged at about the same time and sought to appeal to those who considered themselves part of the broad Slavic Nation. Pan Slavism came to be inspired by Jan Kollár, and his epic poem Slávy dcera (Slava’s Daughter), in which he invoked the illusion of an idealised Slav past. Kollár promoted the idea that there were many

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Arendt, The Origins of Totalitarianism. pg 232-233
172 Kurt Breysig, ‘Quoted In:’ in Emanuel Moravec (ed), Obrana státu, 5th edn (1937). 177
174 Ibid pg 181-182
Slavic tribes who actually constituted a single race; lending authority to the definition of ‘culture’ as being based on the idea of a continuity of ‘national history and space’.\textsuperscript{175}

These new ideas found converts among minorities in Austria-Hungary who had come to realise that the state encouraged mutual antagonism and mistrust between the ethnic groups.\textsuperscript{176} In his diary, Franz Kafka frequently despaired of the political and cultural struggles between the Czechs, Germans and Jews;\textsuperscript{177} and his portrayal of life in Prague, offers a glimpse into the social reality of the role of identity in the country as a whole. Identity may have been based on some elusively defined historicity, but it played a critical role in the lives of ordinary people in Austria-Hungary, and in the dynamics of power.

\textit{Austrian life and exclusion - anti-Semitism}

This was particularly true for the Jews in the Austrian part of empire, where anti-Semitism had become a firmly established aspect of life.\textsuperscript{178} Having once again mentioned the issue of European Jewry, I need to digress a little in order to contextualise the societal and political role assigned to Jews throughout Europe during the 19\textsuperscript{th} and 20\textsuperscript{th} centuries. Moreover, as the theme of this thesis is Difference, Otherness and Exclusion, there is an inevitability that the thesis will return several times to the historical treatment of European Jewry, who came to epitomise historical exclusion. Sartre captures the quintessence of this when he suggests that although European Jewry occupied a space of suspicion and exclusion, what really developed was that the symbolism surrounding the exclusion of “The Jew” became, in itself, a metonym for otherness. Sartre describes it in this way,

\textsuperscript{175} M Michela, “‘Pripomínanie a Kanonizovanie Minulosti. U Vaša Na Margo Niektory’ch Diskusí’ O Dejina’ch Slovenska’” in J Mervart and J Stepan (eds), C “eské, slovenské a československé dejiny 20. století” (Hradec Kra’love’: OFTIS 2008), 7

\textsuperscript{176} Arendt, \textit{The Origins of Totalitarianism}.

\textsuperscript{177} Franz Kafka, \textit{Briefe, 1902-1924} (Max Brod ed, SFischer:Frankfurt am Main 1958). Letters from Franz Kafka to Max Brod, 337.

\textsuperscript{178} Menaghem Z Rosensaft, ‘Jews and Anti-Semites in Austria at the End of the Nineteenth Century.’ (1976).
“The Jew is thus the other to himself and to the Gentile. He walks with a mask placed on him by the other, which he can never rip off. This increases his "inner dialectic" as he seeks to root out his own undesirable Jewishness".  

The Jewish Other, a menacing and eternal other, was not just the interpretation of hardened anti-Semites, it was a notion that was shared to a greater or lesser extent throughout Europe. This position was typified by Henry Wickham Steed, the anti-Semitic correspondent for the London Times, and later its editor, who, whilst based in Vienna, wrote that 'liberty' and 'freedom' in Austria was an opportunity for the 'clever, quick-witted, indefatigable Jew to prey upon a public and a political world totally unfit for defence against or competition with him.' Wickham Steed believed that without any 'stake in the country' the Jews were reckless and sought only to gratify their insatiable appetite for wealth and power.

In Vienna you could have your hat knocked off for looking Jewish, be abused as a dirty Jew for opening the window in a railway carriage, and Jewish students would have university lectures disrupted because of shouts of 'Jews out'. There were opportunities for some Jews: - the composer Gustav Mahler regarded himself to be first a Bohemian, then an Austrian, a German, and lastly a Jew. Nevertheless, in order to realise his ambition and become the director of the Vienna Court Opera, he had to relinquish his Judaism, and convert to Catholicism.

The social reality of life in Austria-Hungary, and the level of inclusion and exclusion enjoyed by an individual, was largely dependent on the accident of identity and geography. Although constitutional assurances may well have appeared to protect issues of language and culture; reality proved otherwise.

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179 J. Sartre, Réflexions Sur La Question Juive. (Gallimard 1954).
180 Editor of The Times 1919 - 1922.
182 Steed.
183 Edmund De Waal, The Hare with the Amber Eyes (Vintage Books 2010). 129.
Lord Acton, a 19th century political advisor to the British Government, and Professor of Modern History at Cambridge, was an early writer on what we would now call human rights. In 1862 he published an essay on *Nationality* in which he speculated that by making the state and the nation commensurate with each other, it reduced, to a subject condition, all other nationalities that may be within the boundaries of the state. In other words if the state and the nation are synonymous, other nationalities within the state may not enjoy equal status with that of the dominant group. It then depends on the humanity of the group that constitutes the nation, as to whether other nationalities are, to use Acton’s description, reduced to servitude, or outlawed, or put in a condition of dependence.

It is easy to assume Acton is engaging with a certain degree of hyperbole in order to make his point. But the realities of history actually make Acton’s views seem somewhat reserved; and, in moving on to look at the situation in Russia, Sergei Uvarov’s 19th century dogma of Orthodoxy, Autocracy and Nationality as the cannons of belief on which the Russian Empire rested, seems to emphasise Acton’s concerns, leaving, as they did, little room for plurality and difference.

*Imperial Russia. Orthodoxy Autocracy Nationality and Exclusion*

The vast geographical area that was Imperial Russia extended from Europe in the West, to the Pacific in the East, and encompassed a diversity of ethnicities. “Orthodoxy, Autocracy and Nationality”, a mantra created by Sergei Uvarov, were said to represent the 3 pillars of Russia’s putative cultural sovereignty as it extended throughout the empire. In reality the Orthodox Christian Church dominated peasant life, supported the

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185 Lord Acton, ‘Nationality’ [1862] The Home and Foreign Review.
186 Sergei Uvarov was the most influential minister of education and Academy of Sciences in Russian history. As a statesman he was determined that Russia would avoid western European style revolutions and created a special educational system would help avoid such events. He gave his system a slogan, “Orthodoxy, Autocracy, Nationality” (Pravoslavie, Samoderzhavie, Narodnost), a slogan that became the catchphrase for conservative Russia.
monarchy and influenced the notions of Holy Russia, the land of the Tsar and his chosen people. This was an orthodoxy that was reflected in the writings of Pushkin and the poet Fedor Tiutchev, well into the 19th century. Even the growing educated class, who embraced new progressive cultures, still continued to adhere to orthodox Christian morality, and the theories of a natural God-given order.

In this environment the issues of difference, whether arising from language or culture, were a challenge to Holy Russia, and to the notions of Orthodoxy, Autocracy and Nationality. This was particularly true of the Polish speaking areas, where, during the latter half of the 19th century, political and social aspirations looked towards a re-affirmation of identity.

**Poland Nationalism and Exclusion**

The former Kingdom of Poland had been partitioned between Prussia, Russia and Austria-Hungary, and by the early 19th century the only geographical reference to the former Poland was to be found in the small vassal state centered on Warsaw and known as the Congress of Poland. Nevertheless those who identified themselves as ethnically Polish, accounted for the largest non-Russian population in Russia, and the areas in which they lived had become strategically and economically important. From a strategic point of view, Polish speaking territory formed Russia’s westerly frontier, and from an economic perspective the land was fertile, well farmed and was said to be the ‘bread basket’ of Russia.

Although the Kingdom of Poland was not to be found on European maps, a sense of Polish identity and culture was still felt by the populace, and, as with the programme of Magyarization in Austria-Hungary, the **Russification** of ethnic Poles culminated in a

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resurgence of nationalism. Russification was essentially a move towards the cultural assimilation of minorities into an all embracing Russian identity.

One method of achieving these aims took the form of a general anti-Polish exclusion policy that was pursued throughout Russia's Western provinces. This exclusion of Polish culture contributed towards what has become known as the 'Great Emigration', in which many thousands of Poles sought sanctuary and protection in Western Europe and the United States.

Following a Polish uprising in 1863, Russia ‘dedicated itself to a policy of the radical elimination of Polish influence in the so-called western provinces’. The attempt to eradicate a separate Polish national existence involved undermining the authority of the Polish ‘Szlachta’, the gentry, and the economic base from which they drew their positions. But social change was also designed to drive ‘a wedge between the Roman Catholic Church and the Polish nation's largest social class, the peasantry.’ The Imperial government issued a series of 'Ukas', or proclamations, which culminated in 1865 with an Act prohibiting 'politically questionable Poles from possessing land.' Education and culture was also regarded as being a subversive influence, and from 1864, schools were forbidden by law, to teach the Polish language.

In response, there was a rise in Polish chauvinism which saw Roman Dmowski promoting a nationalist idea based on ethnicity, in which a future ethnically supreme Polish population, would exclude minority ethnic groups in the region, particularly the Jews. However, and contradictorily, in the Congress of Poland, there was growing

fraternization between Poles and Jews, which was of concern to the puppet government in Warsaw. This newly found Polish-Jewish fraternité was becoming particularly clear at patriotic demonstrations, partly because the emerging Jewish intelligentsia was developing contacts with the Polish nationalist movement.194

In the normal course of events, Jews were barred from governmental, judicial, military, and educational office. Therefore the political opportunity to join with Poles in the fight for autonomy also held the possibility of Jewish emancipation, an attractive proposition for the new and growing Jewish intelligentsia. Much the same as had happened in Hungary, the puppet Government of the Congress of Poland saw political advantage in offering a degree of emancipation to the Jews in an attempt to undermine the developing relationship between them and the Poles. The plan was, that by offering a degree of Jewish emancipation, the Jewish community would lend its support to government policy, and in so doing they would turn away from their support for Polish nationalism. In 1862 the Warsaw government broadened the civil and political rights of Jews, allowing them to purchase land, and settle in urban districts and cities that had been formerly restricted to them. Henceforth in legal cases, Jews could be witnesses on an equal footing with Christians; hold public office, and practice trades from which they had previously been barred.195 The argument was that Jews could be useful citizens ‘without converting to

194 Blejwas.
195 Blejwas.
Christianity if they made some changes in their way of life, such as abandoning traditional Jewish clothes.  

The objection to the wearing of particular clothes; to the use of certain languages, or to the displaying of any kind of behaviour that indicated ‘ethno-religious affiliations’, actually amounted to a wider societal and legal malaise concerning questions of uncertainty, societal values, and the recurring question of difference and identity. European Jews, regardless of their degree of assimilation, were always thought of as never completely belonging to the countries in which they lived; and sometimes this was in spite of a generational history of residence. One of the problems faced by many European Jews was the question of their clothing, which was perceived as epitomising a gratuitous display of religious belief. The difficulty with these perceptions, particularly as they relate to clothing, is that although society assumed European Jewry to be a single indivisible whole; Yiddish-speaking, Polish/Russian with a few Spanish Jews mixed in for good measure - in reality, there were fierce divisions in Jewry, not only between the Ashkenazim and Sephardim, but between the Litvak's, the Galitsyaners, and the Misnagdim. In any event, the way in which some Jews decided to dress, may have reflected their religious affiliations, or may simply have been influenced by cultural factors. Whichever the case may be, the way in which unassimilated Jews chose to dress

196 I need to make the point that in writing about European Jewry, I want to avoid the inference that a Jew is a member of a separate racial group, or is distinguished genetically. However, I have to use the nomenclature of the times; so, with the caveat that exploring issues of Jewishness are outside the parameters of this discussion, it is sufficient to say that during the 19th and 20th centuries, European Jews represented a group of people whose perceived difference was a source of political and social suspicion throughout Europe. The apparent stubbornness of Jewish communities to become assimilated, and suspicions relating to what was seen as their transnational loyalties, was high on political agendas. The argument was that Jews could be useful citizens ‘without converting to Christianity if they made some changes in their way of life, such as abandoning traditional Jewish clothes; ceasing to use Yiddish and Hebrew in everyday speech and written contracts, and ceasing to be employed in certain occupations.’ see Daniel Stone, ‘Jews and the Urban Question in Late Eighteenth Century Poland’ (1991) 50 Slavic Review 531.

198 Jansen.
199 Jansen.
200 Stone.
became a matter of societal resentment, and questions of the non-assimilation of Jews nearly always involved the issue of clothing.

Dismissing these 19th century attitudes as antediluvian can be a little premature, particularly as case law of the European Court of Human Rights reveals the extent to which societal mistrust still invokes the way in which some minority groups choose to dress, particularly when it is thought to characterised their unwillingness to assimilate. Occasionally, choice of clothing is seen as disloyal to wider societal norms, and this moral quandary reveals itself in cases such as Aktas, Bayrak and others v’s France; Şahin; Begum, and more recently in S.A.S. v’s France.

Exclusion to the Pale, Pogroms and Revolutionaries

The issue of the clothing worn by Jews was fairly low on the agenda of Imperial Russia whose main problem with the Jews was that they were living in Russian Territory. The ‘Jewish Question’ became of particular significance when areas of the former Kingdom of Poland containing a significant Jewish population, were annexed by Russia. From the 14th century onwards, Poland had emerged as the largest centre of Jewish residence in Europe.

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203 R (Begum) v Governors of Denbigh High School [2006] UKHL 15.
204 Case of S.A.S. v. France Application no. 43835/11. 1 July 2014.
partly due to the relative freedoms that were afforded to them. The advent of Russian sovereignty brought to an end the relative freedoms, and the fate of the Jews rested on ‘conflicting whims of petty officials and the daily accidents of incompetence’, all of which were caught up in the chaotic conditions of a vast country. Jews were considered alien to Orthodox Russia, and in the opinion of Catherine the Great, they needed to be kept away from the centre. Consequently Jews were excluded to western provinces where they would be allowed to live; but only in ‘urban settlements and only within these territories’. Under subsequent Russian Tsars, this area, Чертá оседлости, which became known as the ‘Pale of Settlement’, grew to include 15 provinces along the western borders of the Russian Empire, encompassing approximately 1 million sq.km, and extending from the Baltic in the North to the Black sea in the south. The Pale represents some of the ‘most sensitive nerve-endings of Jewish memory’, and it is almost heretical to point out that the popular, engaging, but over sentimentalised portrayal of the Pale of Settlement by writers such as Sholem Aleichem, disguised the depth of physical, social and political hardship that arose from laws designed to exclude.

Identity and law for Jews in Russia was constructed so as to make them ‘outsiders to the administrative and social system’, and in this way it became acceptable to utilise anti-Jewish stereotypical images in the pursuit of government policy, public opinion, and popular imagination.

It would be wrong to imagine that exclusion in Russia was just a passive marginalising of people whose difference irritated the majority. It was not. In 1827 Tsar Nicholas 1st introduced the Rekrutschina law, through which Jewish boys between the ages of

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205 Arendt, The Origins of Totalitarianism. 246.
206 Grosfeld, Rodnyansky and Zhuravskaya.
210 Avrutin.
211 Avrutin. Pg32
212 NICHOLAS I. Statutes Regarding the Military Service of Jews. (August 26, 1827)
I. General Rules applying to the Jewish People.
1. Upon being called to military service, Jews shall fulfil their obligation in a manner identical to that of other citizens who
twelve and twenty-five were drafted into a compulsory 25 years of military service. On the whole, this decree was considered to be an attempt to alienate Jewish youth from their families and their religion; particularly so as once in the army Jews were forbidden to practice Judaism, and had to attend classes in Christianity, and face pressure to convert.\textsuperscript{213}

Imperial decrees imposed many forms of humiliating exclusions on the Russian Jews; Jews were prohibited from voting in local government elections; from owning property; and rabbis possessed no right of residence beyond the Pale of Settlement. In July 1884, Jewish Children were barred from certain schools, and in 1889 restrictions were placed on Jews wishing to practice law.\textsuperscript{214} However converts from Judaism to Christianity were free to leave, and were allowed to settle in the Russian hinterland. A feature which affected the lives of the Russian Jewish Community, and one which returned in the 1930's and 1940's, was the phenomena of the Pogrom.

\begin{itemize}
  \item are members of that class which is required to serve in the armed forces...
  \item Manner of Fulfilling Military Draft Obligations.
  \item 6. If, at the time of the call to service, it is generally permitted a sum of money for a recruit, this privilege shall be extended to Jews under the following conditions: (a) The Jewish community owned no back taxes to the government; (b) The community is not in debt to other communities or individuals...
  \item 8. Jews presents by the community for the purpose of military service must be no younger than twelve and no older than twenty-five years of age...
  \item 13. The Jews of each province must fill their quota of recruits independently of the Gentile population thereof...
  \item 24. The responsibility for fulfilling the military obligations falls upon the Jewish community themselves. They shall follow the dictates of the appropriate provincial authority...
  \item Exemptions:
  \item 58. In addition to merchants, rabbis also are exempt from military service. They must show proper documents proving their title...
  \item 62. Jewish youths who are enrolled in general schools for a minimum of three years and who perform adequately and those apprenticed to Gentile artisans are exempt from military service for the duration of their studies...
  \item 64. Jews who have settled and who work upon the land designated for agricultural purposes are exempt...
  \item X. The Assignment of Jews to Various Branches of the Military
  \item 74. Jewish minors - those under 18 shall be sent to preparatory institutions for military training [i.e., cantonist units].
  \item 75. Jews from the age of eighteen and upward shall be assigned to active military duty according to their physical conditions, as ordered by the military command.
  \item XI. Jews Evading the Draft
  \item 87. Whoever discloses the names of those who hide a Jew escaping the draft, shall receive a reward in the sum of one hundred roubles from the treasury...
  \item 90 For the purpose of release from the draft, only time spent in active duty after the age of eighteen shall be taken into account.
  \item 91. Jews in active military duty are permitted to observe their religious customs during the spare time. This is in accordance with the law of the land concerning accepted religions. Commanding officers shall protect the Jews from disturbances or abuses which may be caused by their religious affiliation.
\end{itemize}


\textsuperscript{214} Lucien Wolf and Professor A.V. Dicey, ‘The Legal Sufferings Of The Jews In Russia. A Survey Of Their Present Situation, and an Appendix of Laws.’ 1.
**Pogroms and Revolutionaries**

The history of exclusion in Eastern Europe and Russia, would be incomplete without reference to the ‘Pogrom’, which played a significant role in the lives of many people already excluded. The word Pogrom is derived from the Russian word for devastation, and implies destruction by the use of violence. In the 19th century it came to mean an organized physical attack on the Jews living in Russia. Pogroms frequently occurred in the Pale of Settlement, and those seeking safety left Russia and headed west for safety, a situation which continued until 1914.

The precise cause of the violence against the Jews remains something of a mystery; it may have some connection with the abolition of serfdom in the mid-19th century, and the liberalisation of economic policy in the 1860’s, both of which may have led to economic depression, and a feeling of resentment against Jewish neighbours. But this does not explain the popular hatred of Jews in terms of modern anti-Semitism, which is a far more complex issue involving Difference and Otherness, and issues of race and identity. As for the pogroms themselves, some scholarship sees them as being attributable to the modernisation of Russia and the development of industrialisation within modernity, in other words they were a response to the challenge ‘that modernity brought to the established order’.

Whether this establishes a causational link between changing economic factors and the targeting of Jewish communities as the recipients of unrestrained rioting, is not in the remit of this thesis. On the other hand, the effects of the pogroms are important because they provide grounds for the cause of migration from Russia; and for the revolutionary activities they inspired.

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216 Arendt, The Origins of Totalitarianism.
The significant pogroms are dated from 1821, followed by those of 1849, 1859 and 1871.²¹⁸ In the aftermath of the assassination of Alexander II in March 1881, a pogrom began in the Ukrainian town of Elizavetgrad, and spread to other villages ²¹⁹ in the Ukraine, continuing until 1884. The pogroms returned with a vengeance nineteen years later in April 1903, when the Kishinev and Gomel pogroms took place, followed by others in Smiela, Rovno and Sosnowiec later that year.²²⁰

This serves to provide the background to some interesting, albeit controversial comparisons I want to make, concerning the emergence of the political, economic and social response of a new generation of Jews, to the perceived restrictions on their lives and on the life of their community. Concealed within the nadir of despair that was the usual Jewish reaction to successive exclusion, a generation of young people were beginning to question both the legitimacy of exclusion, and the passivity with which such laws were accepted by the wider Jewish community. Without wishing to exaggerate the position, many young Jews abandoned the yeshivas (religious schools), preferring to take an active part in the politics of change and revolution. The numbers involved in this rejection of their ‘Otherness’ is not clear, but there was a significant Jewish presence in the political ideology that framed post-revolutionary society and politics; and it is fair to assume that many chose to fight against cultural and religious exclusion. Alexander Solzhenitsyn claims, rather clumsily and not altogether unexpectedly, that almost none of the future Jewish revolutionaries “came to the revolution from poverty and destitution; the majority were from prosperous families”.²²¹

It is probably true that those who saw revolution and attacks on the establishment as being the way forward, were initially influenced by what has become known as the Jewish

Enlightenment, ‘Haskala’. It is also fair to speculate that ‘Haskala’ appealed to a new educated class, and the emerging Jewish Bourgeoisie provided a place in society from which hitherto unimaginable opportunities arose for young Jews. Although these changing circumstances were perhaps only marginal, they provided the opportunity for Jews to begin to question the system and to explore alternatives. The new intelligentsia that questioned political and societal exclusion provided the fertile ground from which the headlong rush into revolutionary movements took place. Young people from poor families who had managed to make their way into institutions of higher learning also began to question the system, and eventually they were joined by many more who desired emancipation. For many young Jews in the Pale of Settlement, becoming politically active and entering the revolutionary movements marked the first stage in acquiring personal dignity, of escaping persecution, and, without them being aware of it, of becoming part of a wider revolutionary struggle.

But ‘Haskala’ was more than just an exercise for the reform of Judaism; Erich Harberer suggests that it also represented the cradle of Jewish Radicalism, and this radicalism created conditions not only for a more self-aware and self-confident intelligentsia but for impoverished Jews too. Perhaps it was this factor that inspired some of the young and excluded to go beyond the political rhetoric of revolution, and take part in actions which may have been an anathema to the wider Jewish community. Nonetheless the activities of some of the young people were a reflection of the frustration of a new generation, no longer willing to tolerate the exclusionary role imposed on them and on previous generations.

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222 ‘Haskala’ refers to a Jewish political and social movement inspired by the Enlightenment which encouraged Jews to study secular subjects, to learn European languages in preference to Yiddish, to train in agriculture, crafts, the arts and science, And to assimilate into European society in dress, language, manners.


224 Ivianski. 137.

225 Ivianski. 137.

Whether this was the route to reform and emancipation in either the Jewish community or wider Russian society is debatable, nevertheless, individuals such as Grigori Goldenberg, the son of an orthodox family, was arrested and exiled to Arkhangelsk in 1878 for revolutionary activities. He subsequently escaped, and assassinated Prince Dmitri Kropotkin, the Governor General of Kharkov. There were others who also joined the revolutionary movements and died for what they believed to be a just cause. Solomon Vitenberg, a working class Jew, was executed for organising the first assassination attempt on Tsar Alexander II. Gesia Helfman was condemned to death for her part in the assassination, and although she was pardoned, she died whilst in custody shortly afterwards. Many extraordinary young Jewish women emerged from the dangerous but fertile ground of discrimination, a place where, to quote Bauman, the ‘frustrated and disillusioned intelligentsia meets the impoverished and humiliated masses’. But some caution is required because many of the Jewish revolutionaries who raised the standard of revolt in the name of human pride and dignity ended up abandoning their own people.

In this way, a wish to be liberated from the perceived humiliations of the past by seeking alternative ways to deal with the present, has consequences for all society, and these are issues which are as relevant today as they were in the past. Only the identity of those seeking alternatives has changed; and this derived issue underpins the question of immigration and asylum in the following chapters.

“Give me your tired your poor your huddled masses.” - The New Colossus by Emma Lazarus

Political turmoil, revolutionary movements and physical danger contributed to the cause of the emigration of significant numbers of Jews from Russia. Various waves of emigration took place until the First World War closed Europe’s borders. Issues related

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227 Zygmunt Bauman, ‘The Unwinnable War: An Interview with Zygmunt Bauman by ŁUKASZ GALECKI 1 December 2005 First Published in Slightly Longer Form in Rzeczpospolita, Translated from Polish by Alex Shannon.’ [2005] Rzeczpospolita.
to immigration in areas of domestic and international law raise many questions apropos
the way in which the international community practised difference and exclusion.
Whether these issues have changed much over the intervening years is explored in other
chapters, but there is at least one hidden continuum which can be illustrated in a vignette
of history contained in the exchange of telegrams between Imperial Russia and the
United States of America.

In February 1891 James Blaine, the US Secretary of State, wrote to Charles Emory
Smith the US First Minister in St. Petersburg, asking him to bring certain matters to the
attention of the Russian authorities. Secretary of State Blaine was concerned that
Russia’s internal policy towards the Jews would impact on the numbers of Jews wishing
to emigrate from Russia to the United States. He cautioned that the "hospitality of a
nation should not be turned into a burden."228 The United States did not want to dictate
the internal policy of other nations or interfere with their internal policies; but nations
should have due regard for the results which its exercise of power effected on the ‘rest
of the world’.229

In response, the Russian Foreign Minister, Nicholas de Giers, told Charles Smith,230 that
he believed the May Laws of 1882, which targeted Jews, were misunderstood. They
were more economic than religious, and were not new; they were more in the nature of
defining and formulating more precisely, provisions already in force. Minister de Giers

228 James G. Blaine Department of State, Washington, February 18 1891, to Charles Emory Smith First Minister Legation
of the United States, St. Petersburg. United States Department of State ‘The executive documents of the House of
Representatives for the first session of the fifty-second Congress. 1891-’92 U.S. Government Printing Office, 1891-1892’. pg 739
229 James G. Blaine Department of State, Washington, February 18 1891, to Charles Emory Smith First Minister Legation
of the United States, St. Petersburg. United States Department of State The executive documents of the House of
Representatives for the first session of the fifty-second Congress. 1891-’92 U.S. Government Printing Office, 1891-1892. pg 739
230 Mr Charles Smith First Minister Legation of the United States letter to Mr James Blain Secretary of State Washington
February 10, 1891 (Received February 25th 1891) The executive documents of the House of Representatives for the first
session of the fifty-second Congress. 1891-’92 U.S. Government Printing Office, 1891-1892. pg 734
believed that although the Jews suffered hardships, such suffering was inevitable because Russia had to protect its own people, especially the peasantry.\footnote{Mr Charles Smith First Minister Legation of the United States letter to Mr James Blain Secretary of State Washington February 10, 1891 (Received February 25th 1891) The executive documents of the House of Representatives for the first session of the fifty-second Congress. 1891-92 U.S. Government Printing Office, 1891-1892. pg 735}{231}

In April 1892, Charles Smith wrote to the Secretary of State, alerting him to the possibility that there may be more Jews leaving Russia than had been originally anticipated, perhaps as many as 400,000. Smith informed the Secretary of State that Germany had closed its frontier with Russia, refusing admission to all Jews, and Austria-Hungary were likely to do the same. Smith also said that England was refusing to accept a certain class of emigrant.\footnote{Mr Charles Smith First Minister Legation of the United States, St Petersburg, letters to Mr James Blain Secretary of State Washington, April 12th 1892 The executive documents of the House of Representatives for the first session of the fifty-second Congress. 1891-92 U.S. Government Printing Office, 1892-1893. Pg 379-380}{232} It was a similar message to that sent later by the American Chargé d'affaires in St Petersburg, who alerted the American State Department that Russian migrants had been forbidden to cross the frontiers of Austria-Hungary and Germany.\footnote{Mr Wurts Chargé d'affaires Legation of the United States to Mr Foster July 23 1892. The executive documents of the House of Representatives for the first session of the fifty-second Congress. 1891-92 U.S. Government Printing Office, 1892-1893. pg 392}{233}

One of the reasons for this concern was that Europe was gossiping about events in the Austrian Reichsrat, where Georg Ritter von Schonerer had tried to impose a ban on the entry of Jews from Russia. Von Schonerer wanted the complete Germanisation of Austria in keeping with the Linz Program of 1882, which included the banning of non-Aryans (Jews and Slavs), from the membership of many professional and social organisations. Whether the borders with Germany or Austria-Hungary were closed, or even how long they were closed for, remains a moot point, but the possibility of European states closing their borders to the growing exodus of Russian Jewry certainly caused consternation in the United States.
New York was the eventual destination for many Jews leaving Russia, and the sight of the Statue of Liberty must have been inspirational for those making the long journey. The inscription on the base of the Statue of Liberty is taken from Emma Lazarus' sonnet, *New Colossus*; and reflected her interest in the plight of Russian-Jewish exiles fleeing the pogroms. The words are familiar,

"Give me Your tired Your poor Your huddled masses, yearning to be free".234

An iconic sentiment, but one which was not entirely reflected by Secretary of State Walter Gresham. Gresham sent a telegram to the US Legation in St Petersburg, demanding to know if new Russian regulations were about to be introduced against the Jews,235 thus forcing on the United States, 'large numbers of degraded and undesirable persons'.236

The not so subtle change from James Blaine’s concerns for the ‘huddled masses’, to Walter Gresham’s disgust at the prospect of welcoming large numbers of undesirable Jews, seems to rest with questions of volume and ethnicity rather than charity. In any event, the journey to the United States was expensive and fraught with difficulties; as a consequence many Jews leaving Russia, chose the less hazardous journey to western European countries, including France. But, and as with the non-too generous remarks of Mr Secretary Gresham, potential immigration to European countries served to fuel the many tensions that arose from the arrival of strangers.

**France and exclusion**

The arrival of 40,000 Jewish immigrants in France during the latter part of the 19th century, was a case in point. France had an ambiguous attitude to the Jews; Napoleon,

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235 Walter Gresham, Secretary of State Telegram to United States Legation in St Petersburg, May 17th 1893. United States Department of State / *Papers relating to the foreign relations of the United States, with the annual message of the president transmitted to Congress December 3, 1894* pg525
236 Walter Gresham, Secretary of State Telegram to United States Legation in St Petersburg, May 17th 1893. United States Department of State / *Papers relating to the foreign relations of the United States, with the annual message of the president transmitted to Congress December 3, 1894* pg 535
for example, had called together what he termed a ‘Sanhedrin’, and offered citizenship to all Jews in France. In return, Napoleon wanted them to abandon their 'Jewishness', relinquish their traditional life and worship, and conform to French culture and behaviour.

The arrival of substantial numbers of Russian Jewish immigrants, raised issues at to their likely post-Napoleonic reception, a matter quickly resolved by the French Socialist movement. In the 1880’s, La Revue Socialiste ran a series of articles entitled *Aryens et Semites: Le Bilan du Christianisme et du Judaïsme*, (Aryans and Semites: the balance of Christianity and Judaism), concerning the purity of the Aryan race, and arguing that the Aryans represented the ideal state of humanity.

**Anti-Semitism.**

The pamphlet claimed that the Aryan Race had been perverted and this process had involved the Jews, who were an inferior combination of human nature. What came to be colloquially known as the Blanquist movement, posited the superiority of the Aryan race, and the author of *Le Molochisme Juif*, pleaded for an Aryan victory over the Jews in order to save Western civilization. Édouard Drumont published *La France Juive*, the French Jew, which sold more than 100,000 copies.

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copies, causing it to become the most widely read book in France.\(^{240}\)

The book fuelled French anti-Semitism, and, with the prospect of further Jewish immigration, anti-Semitism became a popular movement. The term *Juiverie*, or Jewry, came to mean any scandalous behaviour regardless of whether or not it involved French Jews,\(^{241}\) and the term *Juif*, or Jew, came to be interpreted as referring to all foreigners.\(^{242}\) The term ‘*Juif*’, as meaning all foreigners, is somewhat analogous to the term ‘*Paki*’ meaning Pakistani, but used in the United Kingdom to describe, in derogatory terms, anyone from the Indian sub-continent, or anyone who is not white Caucasian.

It was against this background that there occurred an event which has become pivotal to contemporary Franco Jewish history. This was the Dreyfus affair, which was about the wrongful conviction of a French Army Officer for allegedly selling military secrets to the Germans.


The Dreyfus Affair

Captain Alfred Dreyfus was the only Jewish Staff Officer in the French Army; and when a handwritten note was discovered offering secret military information to the Germans, Dreyfus was accused of writing the note. He was subsequently put on trial, found guilty, and sentenced to life imprisonment. At a public ceremony attended by thousands of people, Dreyfus was stripped of his rank and had his army medals ripped off his uniform.

The truth was that Dreyfus was innocent, and the identity of the culprit was a fact known to the French High Command; nevertheless, and in the face of overwhelming evidence as to the innocence of Dreyfus, successive courts upheld the sentence against him.244

But the Dreyfus case was linked to the far wider issue of Jews in France, and soon it became difficult to distinguish between the specifics of the accusations made against Dreyfus as an army officer, and Dreyfus as a Jew, representing Juiverie, the foreign other. It was an issue that split French society; Edgar Degas and Auguste Renoir came out as being strongly anti-Dreyfus and anti-Semites; others, such as Pissarro, Gauguin, Édouard Manet, Claude Monet and Alfred Sisley declared themselves to be pro-Dreyfus. Marcel Proust, probably the greatest French author of the time, actively took up the defence of Captain Dreyfus, and the writer and politician Georges Clemenceau reflected,

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243 England) The Times (London, ‘Monday, Jan 07, 1895; Pg. 9’; Issue 34467.
244 David Drake, French Intellectuals and Politics from the Dreyfus Affair to the Occupation (Palgrave Macmillan 2005).
"What irony is this, that men should have stormed the Bastille, guillotined their king and promoted a major revolution, only to discover, in the end, that it had become impossible to get a man tried in accordance with the law!"\(^{245}\)

In Lyons, Rennes, Nantes, Tours, Bordeaux, Clermont-Ferrant and Marseilles, anti-Jewish riots broke out with the chant of ‘Death to the Jews’. Hannah Arendt notes it was remarkable how popular indignation broke out everywhere on the same day and at precisely the same hour.

The rioting in French Towns and the trial itself drew some unexpected reaction from other countries; Russia accused France of barbarism over its handling of the Dreyfus affair, and in Germany members of the Kaiser’s entourage openly expressed great indignation concerning the events in France.\(^{246}\)

The Dreyfus Affair was never completely resolved and caused many casualties both at the time, and later. Among the victims was the French writer and novelist Émile Zola, who, in *J'Accuse*, an open letter to the President of the French Republic; accused the Minister of War as being a man of mediocre intellect, the Chief of Staff of having yielded to his own religious bigotry, and the Deputy Chief of Staff, of having a conscience that allowed for ‘many accommodations’. Zola concluded his open letter by warning against the “dirty Jew” obsession, which he concluded, was a ‘scourge of our time’.\(^{247}\) An arrest warrant was issued against Zola, and he became a political refugee, fleeing to England for a number of years.

Among the many issues raised by the Dreyfus incident, was the claim by French Jews of their *de jure* entitlement to French citizenship.\(^{248}\) This issue of citizenship and the

\(^{245}\) Hannah Arendt, ’Clemenceau . Contre La Justice (Paris 1900); Article Dated February 5, 1899 in ‘From the Dreyfus Affair to France Today.’ (1972) 1 1 Jewish Social Studies, 195.
\(^{246}\) Hannah Arendt, ‘From the Dreyfus Affair to France Today’: Indiana University Press’ (1972) 1 Jewish Social Studies 195.
\(^{247}\) Émile Zola, ‘Letter to the President of the Republic.’ 13 January 1898.
question of a Jewish or French identity returned, 40 years later, and determined who survived and who did not.

In July 1940 the Vichy government reviewed all naturalizations in France, with the object of removing citizenship from the unfit; and in October of the same year, in the first Statut des Juifs, Jewish identity was defined by race, and Jews were excluded from top positions in the army and civil service. In the same month a further law authorized Prefects to intern foreign Jews. In 1941, a second Statut des Juifs, ordered Jews to be removed from the liberal professions, commerce and industry. The Vichy government conducted a census of Jews, and there followed deportations to the extermination camps in Poland. It is interesting to reflect on the fact that contained within the Vichy government, was a disproportionate number of officers and politicians who had supported the conviction of Dreyfus, and they co-operated with Nazi Germany in the round up and deportation of Jews to the camps.  

But even in situations where there appears to be a desire to overcome bigotry and suspicion, there is a need for caution. Post-revolutionary France claimed that it wanted a new relationship between Jew and Gentile, but this led not to emancipation, but to new and different principles of segregation. The situation was more or less the same in Austria-Hungary, where the young Jews of Prague, lived, thought, wrote and probably even resembled Germans. Nevertheless, outside their neighbourhoods, young Jews were identifiable by their manners and their accents; and their assimilation and emancipation was, in reality, still only applicable to a restricted cultural setting. In other words, 'outside their neighbourhoods no one was deceived'. This experience could be applied to the Czechs, the Slovaks, or the Serbs of Austria-Hungary, and the Poles of Russia.

251 Roberts.
Theoretical Perspectives

One of the objectives of this thesis is to explore the notion that the practice of exclusion, is enrooted in historical interpretations of Difference and Otherness, and these interpretations have provided the stimuli from which the practice of exclusion has evolved into law and a societal norm. Hannah Arendt was also seeking explanations for what she saw as Europe's racial policies, and, albeit controversially, in *Origins of Totalitarianism*, she locates the scramble for Africa, as a distant source of European racial policies.

Arendt raises questions apropos the evolution of European identity as seen against the encounter with the ‘Other’ in the heart of Africa. She uses Joseph Conrad's short story *Heart of Darkness* as the metaphor through which she can explore European race thinking, and posits the idea that the colonizing white nations such as the Belgians and the Dutch, the Germans and the French in their encounters with Africa, 'transgress moral and civil limits abroad that would normally control the exercise of power at home. In their encounter with Africa, civilized white men regressed to levels of inhumanity by plundering, looting, burning, and raping the savages whom they encountered.' Arendt suggests that in this way, the lawlessness, learned and perfected in Africa and elsewhere in the colonial world eventually returned to be practiced in the heart of Europe. It has subsequently become known as the ‘boomerang effect’, and remains largely unexplored theory. Even so, it has become deeply controversial, and its critics have suggested that using the colonial experience in Africa to explain European events, is making more assumptions than is necessary. It is difficult to imagine a situation whereby, as the 19th century progressed, the Imperial experience had anything other than a significant impact on European intellectual and cultural traditions, its self-image and identity. Therefore the idea that colonialism and imperialism played a role in how European society came to

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253 Joseph Conrad's short story *Heart of Darkness* is about a journey up the River Congo and asks if there was a difference between the conquering colonials, and the ‘savages’ they conquered.
evaluate difference, and that the legacy of such thinking maintains a residual effect on the European conscious, is not easily dismissed.\footnote{King and Stone.}

Although this thesis is dependent on aetiological research, insofar as it seeks causational links, it is not possible to explore the boomerang hypothesis to any effect; but if, as Arendt and others seem to suggest, the imperial legacy may have impacted and influenced European intellectual and cultural traditions, then the suggestion that some of this thinking may still influence contemporary attitudes, is not unreasonable. However, one of Arendt’s critics, Margaret Canovan, takes the view that the proliferation of ethnic and ‘racial prejudice in Russia and Austria-Hungary, did not need the reinforcement of the European experience in Africa and Asia\footnote{Margaret Canovan, The Political Thought of Hannah Arendt (Methuen 1977).} to bring about racial prejudice. She appears to suggest that the proliferation of ethnic and racial prejudice in Austria-Hungary and Russia, came about in some kind of organic way, in which case, it seems possible that there would be a commonality of exclusion across Europe. These are issues which are likely to be the subject of continuing research, but looking for truths can be speculative and elusive particularly in situations of shifting norms.

Looking for truths can be an uncomfortable experience, and few issues can be more apposite than the situation of the young Russian Jews who embraced ‘Haskala’, the Jewish enlightenment, and its promises of emancipation through secular learning, politics and revolution. For Jewish youth, revolutionary ideology pointed the way towards escape from the iniquities of the past, and the opportunity for a reaffirmation of their dignity as human beings. Comparisons between event then and now make uncomfortable reading; particularly in respect of the Jewish men and women who took part in a struggle against their Tsarist imposed exclusion, and against the bigotry imposed on them by their own religious orthodoxy. These young revolutionaries
assassinated and bombed their way through Russia in pursuit of their goals, and now history has attributed to them the persona of heroes. The Jewish women involved in all aspects of the revolutionary cause, such as Dora Brilliant, Mariia Shkol'nik, Gesia Helfman and the later Polish Jewish revolutionary Rosa Luxemburg, are viewed as idealistic heroines, who fought bravely against despotic regimes.259 Similarly, the Serbs who committed acts of ‘terrorism’ against Austria-Hungary did so because of a belief that they were excluded from civic life. These are groups for whom contemporary society reserves a special affection, similar to that afforded those escaping the unsound ideologies of the Soviet Bloc in the 20th century. Collectively they have a positive place in European folklore, and most scholars are loath to draw parallels between them and those who are dubbed as the modern-day irrational, amoral fanatics who commit acts of terrorism for an unworthy cause.260

This is a raw and difficult subject, particularly in the context of those who believe that they are the new excluded, and who struggle against what they perceive to be new societal definitions of their difference. In 2005, riots in the French banlieues were described as a ‘revolt of the excluded’,261 and involved French citizens of Arab descent, who were questioning prevailing societal norms. It seems that it was easier to suggest that they may be involved with the dangers of militant Islamism and terrorism, rather than address anti-Muslim prejudices that aim to exclude. Perhaps, having explored the situation of Jews in Imperial Russia, Austria-Hungary and France, a way forward is not to polarise opinion in further societal exclusion, or ban Islam from the French public sphere, but is the bestowing of an honourable status on Islam to help individuals, particularly those ‘young individuals who want to liberate themselves from traditionalist, archaic forms of religious expression.’262

259 Amy Knight, ‘Female Terrorists in the Russian Socialist Revolutionary Party’ (1979) 38 Russian Review 139.
260 Knight.
261 Étienne Balibar, ‘Secularism has become another religion’ – Etienne Balibar, Tehelka, (New Delhi) October 2, 2007
The experience of the Jews in the *Pale*, and the young French Arabs in the banlieues a hundred years later, has a resonance in some lines from *Histoire de Juliette ou les Prospérités* – which points out that when a ‘weak person defends himself, he does wrong, the wrong of stepping outside the character of weakness which nature has impressed on him’; for the young Russian Jews and the young French Arabs, their roles in society had been clearly defined, and refusing to submit to them was wrong。

**Conclusions**

The chapter set out to explore exclusion as a reality in the 19th century by looking at the identity of those who were excluded; and tried to reconcile their exclusion with cannons of belief that were approved by society and legitimised by law. It certainly appears to be the case that exclusion was more of a rule than an exception; as was the unease and intolerance that existed between European society and those it chose to exclude.

The exclusion of the internal Others to a subaltern place in society, and to a legal status designed to reflect their place outside the hegemonic structures of the state, created a paradoxical situation insofar as growing estrangement provided the impetus for the excluded to become more culturally aware, and for a re-evaluation of what it meant to be a Czech or a Pole, a Jew or a Slovak.

This self-awareness developed in many ways, including new nationalist movements, whose promise was the celebration of cultural identities in a positive rather than in a negative way. These movements were perceived as constituting a threat to the state insofar as they were seen as challenging the extent to which the state believed it was entitled to demand and expect exclusive loyalty. During the 19th century, loyalty was


264 Sade.
often measured by the use of language and other cultural indices and by a willingness
to assimilate into the dominant culture and to subscribe to a ‘given’ account of history.

Perhaps not unsurprisingly, the Pan movements of the 19th century that engaged a
language of superiority, and preached exclusivity and worthiness, assumed a popularity
which reflected a wider societal malaise, but which nevertheless gave a degree of dignity
and standing to the excluded. In fact, the reality of the Pan Movements fell short of their
promise, and assumed an equally exclusionary and divisive tone.

But in this chapter there are the beginnings of a genre of exclusion, which happens to
include Czechs, Poles and Slovaks; but which, in its exclusion of European Jewry,
invokes an undefined legitimacy of normalness, unhindered by borders and boundaries.
Exclusion can, and often does result in a societal disjuncture, where the excluded, with
nothing to lose, look either to alternative means of re-instating their identity, or reject
society in its entirety. It is not a unique situation, but it is a situation which is almost
always ignored, usually resisted, and always catastrophic.

The next chapter explores how society continued to polarise, and how the excluded
became the excluders. It looks at how exclusion and the deprivation of rights became
legalised; and it again explores the developing cyclical nature of Difference, Otherness
and Exclusion, ultimately leading to apocalyptic events which brought Europe close to
the abyss.
Chapter Four. Stateless Persons and the Deprivation of Rights 1900 – 1950

Introduction

‘It is strange that the problem of ‘Others’ has never truly disturbed the realists. To the extent that the realist takes everything as given, doubtless it seems to him that the ‘Other’ is given. In the midst of the real, what is more real than the ‘Other’?’ Jean-Paul Sartre.

The aim of the previous chapter was to explore and illustrate exclusionary practice in Europe during the 19th century, and to consider some of the cannons of belief which underpinned its practice. The chapter looked at the empirical evidence of exclusion in various European states, and at the identities of the excluded. Several similarities emerged, and the chapter briefly compared the underlying nature of exclusion in the 19th century, with events in the 21st. The chapter began to establish a genesis, or a causational link between the practice of exclusion, and the identity of the excluded in respect of difference and otherness. It suggested that difference and otherness emerged as a means of social and political control, and how exclusion helped validate the state within clearly delineated boundaries of geography and citizenship.

This chapter goes on to look at how 19th century difference and otherness shaped Europe in the 20th century. The chapter is divided into the empirical and the theoretical, and begins by looking at the social reality of how Czechs and Slovaks came together in a nationalist cause, and, with the approval of the International community, established the Czechoslovak Republic. It notes how the principle of self-determination witnessed the excluded becoming the excluders. The chapter notes how the Polish Republic was re-created in central Europe, and how the international community approved legal changes in the citizenship of more than a million Germans who were living in what became known as the Polish Corridor. The chapter explores how, during the 1930’s, Europe faced a

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growing crisis in relation to refugees, and it looks at the efforts of the League of Nations to implement a legal refugee regime. It explores the Evian conference where meetings of European states steadfastly avoided dealing with the humanitarian crisis of refugees. The principle cause of the refugee crisis was the exercise of Difference, Otherness and Exclusion at its most sinister, and the chapter notes how German law under the Nazis, legitimised exclusion.

The theoretical perspective considers exclusion as a normal function of society; and reflects on the views of Giorgio Agamben who sees the birth of the camp, as an event that decisively signals the political space of modernity itself, and which still defines the political space in which we are living.

**Empirical Reflections**

**Czechoslovakia and Poland**

The difficulty in evaluating the influence of Difference, Otherness and Exclusion on the changing nature of European society law and politics, is problematical, insofar as the interpretation of events are embedded in a tradition from which it is sometimes difficult to determine any objective reality or truth. Friedrich Nietzsche says it far more succinctly:

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\text{“This I have done”, says my memory; “This I cannot have done” says my pride and remains intractable; in the end, memory gives in”.}
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Given the understanding that not everything in the following narrative is always what it claims to be; it is useful to begin with the events of 1917, when the United States of America entered the First World War on the side of Britain, France and Russia. Towards the end of the war, and in preparation for an anticipated peace conference, American President, Woodrow Wilson, addressed a Joint Session of the American Congress,
setting out a fourteen point plan for his vision of a future Europe. An integral part of this plan was, what appeared to be, a growing recognition of the rights of minorities, and in particular the rights of victims of marginalisation and exclusion under former empires.

The Americans were anxious to promote the autonomy of ethnic groups in what had been the Austro Hungarian Empire; and additionally, the future of the Polish nation was under consideration. It was envisaged that an independent Polish state should be created in central Europe; the new state should have free and secure access to the sea; and the political and economic independence of Poland and its territorial integrity should be guaranteed by international covenant. It seemed that there was a genuine desire to correct the injustices of the old Empires, and encourage the self-determination of peoples who had previously been legally and socially excluded.270 Sadly, the Versailles Peace Treaty, whilst aiming to achieve this laudable goal, succeeded only in creating more minorities, located in more hostile environments than had previously been the case.

*Czechoslovak Republic, Self-determination and Freedom*

In December 1918 for example, the British War Cabinet received a memorandum on proposals to create a new Czechoslovak Republic from what had been parts of the Empire of Austria Hungary. This new republic would be home to two nations, the Czechs and the Slovaks. Edvard Beneš prepared the proposals for a Czechoslovak Republic, and despite the best intentions of the Americans, the map, outlining the frontiers of the state, clearly lent itself to matters of race and ethnicity. The map was treated with some scepticism by the British War Cabinet, who noted that it was said to be based on ethnological considerations, which claimed that there were only 1,700,000 Germans living in the Bohemian area of the new Republic, and no Jews. The extraordinary claim of there being no Jews in Czechoslovakia may anticipate the fate of the Jews when the

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new Czechoslovak Government has had the time to exercise its powers, records the minutes of a meeting of the British War Cabinet.

In reality there were already tensions between the Czechs and the Slovaks; and the actual numbers of Germans who would be incorporated into the state exceeded three millions. The existence of more than three million Germans in northern Bohemia came as a surprise to President Wilson who responded with amazement: "Why, Masaryk never told me that!"

The new Czechoslovakia soon divided along ethnic lines, with the German minority becoming more familiarly known, particularly in 1938, as the Sudeten Germans. The relationship between Czechs and Slovaks remained uneasy, and in 1993 the two nations split into the Czech Republic and the Slovak Republic. The Czechs believed that the Slovaks entered into an act of betrayal in 1939, when Slovakia formed a state of its own under Nazi protection, but was never punished for becoming part of the Axis powers.

Mutual distrust, Difference, Otherness and Exclusion was always part of the new Czechoslovakian state, and this was highlighted by the Czechoslovakian President,

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Tomas Masaryk, who believed that the ethnic Germans living in the Sudetenland area, were little more than immigrants and colonists, they were outsiders.\(^{273}\) Although the Czechs did not publicly envision the removal of Sudeten Germans in 1918, the threat of symbolic expulsions became a regular part of popular Czech discourse.\(^{274}\)

**Poland – A New European State**

In 1918 the British War Cabinet received a report from the Secretary of State for Foreign Affairs concerning the intention to re-establish a Polish state.\(^{275}\) The proposed frontiers of the Polish Republic made it a landlocked country, but President Wilson had promised free access to the sea. This was a delicate matter that the British preferred to let the Americans sort out; the Cabinet Minutes propose that the British Government should secure, what the Foreign Secretary described as, an ethnological frontier for Poland in the east, and leave the difficult question of the western frontier to be dealt with when the extent of the German defeat was known.

An extraordinary solution to the problem was eventually arrived at, and this solution created a ‘Polish Corridor’, giving the Republic of Poland access to the sea at the port of Danzig on the Baltic. This land corridor, which was about 45 miles long, varied in width from about 20 to 70 miles; had the effect of cutting through German territory, separating the German province of East Prussia from that of West Prussia and the rest of Germany. In accordance with the terms of the Versailles Treaty, the 10,000 sq. km of land constituting the corridor and the populace of around 1.5 million people, were ceded to the sovereignty of Poland, as were the German districts of Kulmerland and Pomerellen. Nearly a million Germans lived in the corridor and they became subject to Polish

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\(^{275}\) Cabinet Papers. Imperial War Cabinet, ‘War Cabinet (with Prime Ministers of the Dominions) 457. Minutes of a Meeting of the Prime Ministers of the United Kingdom and of the Overseas Dominions and British War Cabinet Held in London at 10, Downing Street, S.W., on Tuesd, Aug 13th 1918, 11.00am
sovereignty overnight. Stanislaw Grabski, the Polish Government’s foreign policy spokesman said that Poland wanted to base its relationship with the Germans in the Polish corridor on love, but he went on to say there is one kind of love for countrymen and another for aliens. ‘Foreign elements will have to see if they will not be better off elsewhere. Polish land for the Poles’.

The British Prime Minister David Lloyd George, in a memorandum on the Polish German situation said:-

“The proposal …that we should place 2,100,000 Germans under the control of a people which is of a different religion and which has never proved its capacity for stable self-government throughout its history must…. lead sooner or later to a new war in the East of Europe.”

The problem with the Polish Corridor, ‘was that one Wilsonian principle; that of re-establishing a viable Poland, appeared to be incompatible with another; that of the self-determination of peoples’. Within ten years, more than half the ethnic German population had migrated from Poland to Germany. Although Poland and Czechoslovakia sought to build nation-states based on a single set of cultural and religious values, the reality was that over a third of the inhabitants of both countries were ‘foreign’. In both Czechoslovakia and Poland, attitudes toward minorities followed a

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familiar pattern which ranged between exclusion and marginalisation. ‘It is not surprising therefore that minorities living in Czechoslovakia and Poland did not always embrace the new nation states.’ In the immediate post war period nearly two million ethnic Poles migrated to Poland; one million ethnic Germans to Germany; 300,000 ethnic Hungarians to Hungary, and there were tens of thousands of refugee movements in the Balkans. This movement of people across Europe, together with the exodus of people from the new Soviet Union in the aftermath of revolution, highlighted the growing problem of what was then referred to as displaced persons.

**Exclusion as Law**

Located next to the new state of Poland, and with borders adjoining those of the new Czechoslovakian state, the post war Republic of Germany was struggling to implement the Weimar constitution of 1919. The constitution was among the world’s most progressive, embracing concepts of universal suffrage, judicial independence, proportional representation, equality before the law and political and religious freedoms. But these same positive attributes made the constitution vulnerable; with critics claiming that it promoted democracy without democrats, leading to some of the clauses and mechanisms being eventually abused by the enemies of democracy. There had been a failed ‘left wing putsch’ organised by Rosa Luxemburg and Karl Liebknecht, and in November 1923, there was a further attempt at a coup d’état, by a right wing group based in Munich which came to be known as the Beer Hall Putsch. Throughout the 1920’s parties from the left and right challenged the authority of the Weimar Government, and following elections in January 1933, the government of Kurt von Schleicher collapsed, and Adolf Hitler, the leader of Nationalsozialistische Deutsche Arbeiterpartei, more often known as the Nazi party, was invited to become the Chancellor of Germany.

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281 Kopstein and Wittenberg.
In February 1933 the Reichstag, the German Parliament Building, was subject to an arson attack, and subsequently President von Hindenburg was persuaded that the burning of the Reichstag was part of a wider but unknown potential threat to the state. The aged German President agreed to an Emergency Decree under Article 48 of the Weimar Constitution, suspending fundamental rights. Shortly afterwards, the German Parliament met in the Kroll Opera House, and agreed to an Enabling Act, the “Law for the Removal of the Distress of People and Reich,” in which Articles 1, 2, and 3 of the Constitution were implemented, formally giving the Reich Chancellor and the Cabinet almost absolute power.

The legal justification for the introduction of the Enabling Act, which transformed Germany into a ‘sovereign dictatorship’, was authored by the German philosopher, and professor of law, Carl Schmitt; who was subsequently rewarded for his efforts by being appointed as President of the "Vereeniging Nationalsozialistischer Juristen", (Union of National-Socialist Jurists). Schmitt demanded that German law be cleansed of the ‘Jewish spirit’, and argued that in the new Germany, Judges should be allowed to reach the right result without the hindrance of abstract and irrelevant precedents. He claimed that the "legal concept

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284 Article 48 of the German Constitution of August 11, 1919: If public safety and order in Germany are materially disturbed or endangered, the President may take the necessary measures to restore public safety and order, and, if necessary, to intervene with the help of the armed forces. To this end he may temporarily suspend, in whole or in part, the fundamental rights established in Articles 114, 115, 117, 118, 123, 124, and 153.

285 restrictions on personal liberty [114], on the right of free expression of opinion, including freedom of the press [118], on the right of assembly and the right of association [124], and violations of the privacy of postal, telegraphic, and telephonic communications [117], and warrants for house-searches [115], orders for confiscation as well as restrictions on property [153].

286 In addition to the procedure for the passage of legislation outlined in the Constitution, the Reich Cabinet is also authorized to enact Laws.

287 The national laws enacted by the Reich Cabinet may deviate from the Constitution provided they do not affect the position of the Reichstag and the Reichsrat.

288 The national laws enacted by the Reich Cabinet shall be prepared by the Chancellor and published in the official gazette. They come into effect, unless otherwise specified, upon the day following their publication.

of man” concealed and falsified the difference between a Citizen of the Reich, a foreigner, and a Jew.  

In April 1933, the German Government enacted the ‘Law for the Restoration of the Professional Civil Service’, excluding from the Civil Service anyone who was not Aryan. Later, a non-Aryan was defined as anyone descended from non-Aryan, especially Jewish parents or grandparents. As a consequence, the city of Berlin forbade Jewish lawyers and notaries to work on legal matters; the Mayor of Munich disallowed Jewish doctors from treating non-Jewish patients, and the Bavarian Interior Ministry denied admission of Jewish students to medical school.

In 1935, at the conclusion of that years Nuremberg rally, the first of what subsequently became known as the Nuremberg Laws were introduced. The first was the ‘Reich Citizenship Law’, which removed German citizenship from Jews; and the second, the ‘Law for the Protection of German Blood and Honour’, outlawed marriage and sexual intercourse between Jews and Aryans.

German lawyers also began to look at principles of international law and ideas of equal rights. At the Berlin Institute for State Research; Professor Reinhardt Höhn promoted the principle of master peoples (Herrenvölker) and slave people, advocating

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290 Boyd.

291 USA Holocaust Memorial Archives, ‘Courtesy Of The Archives’.
the legalisation of terror in pursuit of a greater good. Professor Höhn was subsequently recruited as a lawyer for the SS, eventually becoming an SS Major General.292

Lawyers created a body of German law which defined race and ethnicity, assigning individuals into ethnic groups, and inventing names and categories for such groups. A Geltungsjude was a Jew by legal validity; a Jew could also be a Mischling, a half breed of the first or second degree. The German Government promulgated a Law Regarding Changes of Family Names and Given Names. It required all male Jews to adopt the additional first name of Israel, and required all female Jews to take the additional first name of Sara.293 From 1935, Jews were banned from parks, restaurants and swimming pools; Jews were forbidden to use the German greeting ‘Heil Hitler’; they were no longer allowed electrical/optical equipment, bicycles, typewriters or records; Jews must have a large red ‘J’ stamped on their passports, and they were no longer allowed to keep or use carrier pigeons. Additionally they were no longer permitted to own a car or have a driver’s license. One of the advisors to the Government, Professor Hans Peter Ipsen, a High Court Judge, Legal Theoretician, and Professor of law at the University of Hamburg, promoted an end to the rule of law in its traditional sense. He advocated the non-justiciability of certain sovereign acts, including arrest by the Gestapo, and he promoted the idea of a ‘greater’ Germany, where other nations would be subservient, and the ‘Völkisch’ ideal would prevail.

In October 1938, the German Government decided to expel Jews who had lived most of their lives in Germany but had been born in Poland. On the 28th October, a train carrying

293 Reichsgesetzblatt, I. 1938, Pg 1044.
Second Regulation for the Implementation of the Law Regarding the Changing of Family Names and Given Names, August 17, 1938.
Insofar as Jews have given names other than those which they are permitted to bear according to § 1, they are required as from January 1, 1939, to take an additional given name; males will take the given name Israel, females the given name Sara.
Berlin, August 17, 1938 The Reich Minister of the Interior signed for Dr. Stuckart the Reich Minister of Justice. Dr. Guertner. Law officially published in Reichsgesetzblatt, I, 1938, p. 1044.
between 15,000 and 17,000 expelled Jews headed for Neu Bentschen (now Zbąszynek) on the line connecting Frankfurt (Oder) with Poznan. The passengers were taken to Zbaszyn, on the Polish border, where some were allowed into Poland; but many were left at Zbaszyn in ‘no-man's land’. The Manchester Guardian’s Special Correspondent reported that there were 7,000 Jews in Zbonszyn, some of them living in Brick Stables where the Polish Cavalry had kept their horses.294 Some of the refugees spoke of brutal treatment during their transportation, and how the Gestapo had compelled them to leave their belongings in the fields through which they were being driven in the Direction of Poland.295 Among the passengers on the 28th October train, were the Grynszpan family who had been removed by the police from their home in Hannover. One of the daughters of the Grynszpan family wrote a letter to her brother Hershel, a student living in France, describing what had happened to the family. On the 7th November 1938, Hershel Grynszpan went to the German Consulate in Paris, and shot the German consular aide, Ernst Von Rath. The German government responded unequivocally, and on the night of November 9-10th the Novemberpogrom, or Kristallnacht took place, in which 200 synagogues were destroyed, thousands of Jewish businesses and homes were ransacked, and Jewish males were rounded up and sent to the camps.

A decree issued on September 1st 1941, two years into the Holocaust, required that Jews in Germany over the age of six years, were required to affix a yellow Star of David badge, with the word “Jude” (“Jew”) on to their garments; the badge had to be attached to the left side of the chest, and be visible. Within a few days the Berlin factory of Geitel and Co., which manufactured banners, received an order for a million badges. The Reichsvereinigung der Juden in Deutschland (Reich Association of Jews in Germany), was required to sell the badges to Jews for ten pfennig each. The recipient had to sign that they would ‘take good care of the badges’. Anyone not wearing the badge or attempting to hide it was liable to arrest.

International Response

The League of Nations

The issues raised by refugees leaving Germany and the states which had been occupied by Germany during the prequel to the Second World War was an increasing problem in Europe. The League of Nations had been established in the aftermath of the First World War to provide a forum for resolving international disputes; and by the early 1920’s, one of the functions acquired by the League was to try and deal with the problem of displaced persons.

By 1921 the situation with regard to Russian émigrés had reached a critical level, prompting the International Committee of the Red Cross to appeal to the League of Nations for help. "Russian refugees (were) scattered throughout Europe without legal protection or representation", said the Red Cross in its request for help. The problem had been exacerbated because between 1921 and 1924, the United States had introduced immigration control in the form of a quota system, based on the countries of origin of the potential refugees; the USA preferred to welcome northern European immigrants rather than eastern or southern Europeans.

Later that year, the League created the post of High Commissioner for Refugees, and subsequently appointed Fridtjof Nansen to this position. Nansen’s work was made difficult because as Europe and the United States entered a period of economic downturn, known as the depression, policies on immigration became strikingly more restrictive.

The economic crisis was felt acutely by post war Germany, and served as the catalyst for developing German economic instability; war reparations had also paved the way for the economic difficulties, and together these factors provided a platform for the views of

296 League of Nations, O.J. 2(2) 227 1921 227. 1921.
299 Glynn, ‘Asylum-Seeking in Europe in the 1930s and 2010s Compared’. 
the extreme left and right, who, in turn, chose to apportion the blame for economic 
troubles on Germany’s internal minority groups.

In 1933, and in response to the growing crisis, it was planned to hold an Intergovernmental Conference under the auspices of the League of Nations, the purpose of which would be to draft a convention specifically related to the international status of individuals who were being forced to leave their countries of origin.

The League of Nations Convention Relating to the International Status of Refugees 1933, was duly compiled, and although there was some disagreement concerning the definition of a refugee, the resulting convention included a non-refoulement clause at Article 3. The principle of non-refoulement rested on an agreement by parties to the convention, not to return refugees to the state from which they were escaping. The convention went a little further by also requiring an undertaking by states not to refuse entry to refugees at the frontiers. The Assembly of the League of Nations also gave approval for the creation of the ‘Office of the High Commissioner for Refugees’, and over the years several additional institutions were created to assist the High Commissioner, including the Nansen International Office for Refugees (1931-1938), the Office of the High Commissioner for Refugees coming from Germany (1933-1938), the Office of the High Commissioner of the League of Nations for Refugees (1939-1946) and the Intergovernmental Committee on Refugees (1938-1947). The League noted that German refugees had begun to constitute “an economic, financial and social problem”.

The situation regarding refugees from Germany became more acute as the 1930’s progressed. Early in 1933 the British cabinet were circulated with a copy of a telegram sent by the British Ambassador to Berlin, Sir Horace Rumbold. Rumbold informed the

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301 League of Nations, Report by the Second Committee to the Assembly, League of Nations Doc. 1933.XIII.2 (1933), p.2; (1936) 19(2) O.J. 127. 380 1933.
Cabinet that the ‘Jewish community were faced with a much more serious danger than mere bodily maltreatment or petty persecution.’ He noted that throughout the public services Jews were being dismissed from their livelihoods for ‘no other reason than the accident of race.’ It was clear that Germany’s exclusion of Jews was not done in secrecy, and the deprivation of citizenship rights was implemented according to law.

But, in the International Community the feeling was that, in terms of the normative position of international law, it ‘could not be successfully argued that the German Citizenship Law violated any positive prescription of the laws of nations.’ Whatever the moral interpretation of Germany’s laws might be, they fell into the category of domestic legislation which was within the purview of the legislative competence of an independent state, unless that competence had been limited by treaty engagements with other states.

By 1935, the League of Nations’ High Commissioner for Refugees, James McDonald, believed that neither the League nor the World’s nations, gave him anything better than empty lip service. France was busily avoiding conflict with its neighbour, and expected the United Kingdom to provide leadership in the refugee crisis. The United Kingdom, aware of the precarious situation in the Middle East, and aware of the many implications for Jewish immigration vis-à-vis Palestine, did not want to become involved in the business of refugees. James McDonald resigned in 1935 in protest against the international community’s unwillingness to help with the root of the problem by dealing with Germany itself.
Nevertheless the problems of refugees continued, and in 1936, the League convened a meeting to try and establish a system of international legal protection for those leaving Germany who had lost their citizenship. The meeting agreed that in order to grant refugee status to an individual, that individual needed to show firstly that they had been ‘settled in Germany’, and secondly that, either by de jure or de facto circumstances they had lost their citizenship and the protection of the state. Whilst this route seemed to offer a solution, it omitted anyone who had never been in possession of German nationality, despite the fact that they may have lived in Germany all their lives.

The Netherlands’ reaction to applications for special immigration status from German and Polish Jews, was to send them back to Germany unless they could prove ‘immediate danger to life’, a situation that continued until 1938.

In France Jewish refugees were received with hostility by French Jewish organizations, who perceived them to be more German than Jews. French Jews feared that significant numbers of Jewish refugees entering France could ignite latent anti-Semitism. French Prime Minister Édouard Daladier was worried that large numbers of German Jews in France might provide further ammunition for the extreme political right, which was already accusing the government of being manipulated by Jewish interests. Refugees in France faced a further problem; under French law, they were not regarded as refugees, but as ‘foreign workers’, and as foreign workers they could be expelled if and when it became necessary.

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Permission to remain in France could be revoked if a refugee could not obtain a work permit appertaining to their status as a foreign worker. They then became vulnerable to refoulement. In the case of the United Kingdom, the question of humanitarian protection was secondary to the primary issue of suitable financial guarantees being available to support the refugee, either from the refugees themselves, or from their sponsors. In March 1938, President Roosevelt sent a message to twenty countries inviting them to take part in an International Conference in the French Town of Evian-les-Bains, to discuss refugees fleeing Germany.

**Evian Conference**

The Conference received many personal requests for help, and there were calls for states to take action to help the victims of German Law. Among the representations made to the conference was a letter from Dr Izzat Tannous, a Palestine Arab Delegate to London, who wished to make the conference aware that the Arabs in Palestine, and all over the world, expressed their deep regret for the ill treatment of the Jews. Dr Tannous went on to say that it was the duty of the Arab Nations, along with others, to assist in the relief of the suffering of the persecuted Jews.

It was not a view shared by conference delegates from Romania, Hungary, and Poland, who proposed that the first priority of the conference should be the removal of Jews from their respective countries. Lord Winterton, representing the United Kingdom, told the conference that Britain was not a country of immigration; it was fully populated and highly industrialised. The granting of asylum could only take place within narrow limits. Speaking on behalf of the French Republic, Monsieur Berenger told the Conference that

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313 Burgess.
314 Brustein and King, ‘Anti-Semitism in Europe before the Holocaust’.
France had unfortunately exhausted her own resources, which were not as boundless as her zeal to serve humanity.

However, The United Kingdom’s real attitude towards refugees is revealed in the Cabinet Minutes of the 20th July 1938, which takes a different line from those expressed at the conference; and shows that the official conference communiqué was circumspect in several matters.316

At a Cabinet meeting in July 1938, Lord Winterton, related the events of the Evian-les-Bains conference, and said that the United States had little faith in the ability of the League of Nations to tackle the growing refugee problem. The United States had wanted to establish an International Committee to look at the wider issues of refugees. Happily, the American proposal had been successfully defeated before the conference started. However, there had been an agreement to establish a new London based committee, but its remit was restricted to evaluating the situation in Germany and Austria.

Winterton told the Cabinet that the Americans had wanted the conference minutes to contain words of a ‘denunciatory character towards the German Government’.317 He believed that this request was not unconnected with the fact that the Jewish vote in the

317 Cabinet Papers. Secret., ‘Cabinet 33(38) Held at 10 Downing Street Wednesday 20th July, 1938, at 11.00am – The Evian Conference.’
United States was a large one. However, this American request had been 'successfully resisted'. Another member of the Cabinet, Samuel Hoare, believed that the Inter-Governmental Committee for Refugees was, rather wisely, concentrating on the emigration of young people, leaving the older ones to look after themselves. He warned the Cabinet that there was a good deal of feeling, reflected in Parliament, against the admission of Jews to British territory.

By contrast, the relatively conservative atmosphere of the English Courts did not stop Judges from expressing their views of the social realities of life in Germany. In *Oppenheimer v Louis Rosenthal & Co*; Greer LJ, took the view that if the plaintiff, a German Jew, were to press his case before a court in Germany, then he would not be allowed to be represented by an advocate, and would therefore have to appear in person and conduct his own case before a court. He would be under a real risk of being arrested and put in a concentration camp. This was a view endorsed by Slessor LJ and Scott LJ.

However, whilst the High Court may have been extending an understanding of the situation; Old Street Magistrates did not feel bound to do so. On the 20th August 1938, Old Street Magistrates Court imposed a 6 month custodial sentence with hard labour, followed by deportation, on three Jewish refugees who had avoided immigration procedures. One of the Magistrates, Herbert Metcalf, said that it was:-

“an outrage the way in which stateless Jews were pouring in from every port of this country”.

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318 Cabinet Papers. Secret., ‘Cabinet 33(38) Held at 10 Downing Street Wednesday 20th July, 1938, at 11.00am – The Evian Conference.’
319 Cabinet Papers. Secret., ‘Cabinet 33(38) Held at 10 Downing Street Wednesday 20th July, 1938, at 11.00am – The Evian Conference.’
320 *Oppenheimer v Louis Rosenthal & Co* 1 All ER 23 [1937]
321 *Oppenheimer v Louis Rosenthal & Co* 1 All ER 23 [1937] at 25
322 *Oppenheimer v Louis Rosenthal & Co* 1 All ER 23 [1937] at 26
Many delegates attending the Evian Conference expressed sympathy for the Jews, but offered excuses for why they could not help. The Netherlands were accepting refugees on a transmigratory basis, and in order to prevent Jews being returned to Germany, the ‘Comite voor Joodsche Vluchtelingen’ (CvJV), arranged passages to Shanghai. Despite appalling conditions, Shanghai still had the advantage of being one of the few places that would accept Jewish immigrants without them first securing an entry visa.

The issue of the Sudetenland Germans, the issue of the Polish Corridor, and the Sudeten region of Czechoslovakia being ceded to Germany, caused a further refugee crisis. Switzerland decided that refugees would only be allowed transit through its territory; France, Holland and Belgium tightened their laws against the admission of immigrants, and those facing persecution were left to their own devices. Joachim Von Ribbentrop, the German Foreign Minister mocked the attitudes of other European Nations over the question of Jewish refugees when he remarked to the French that ‘... we all wish to get rid of our Jews, but no country wishes to receive them.

Almost a year after the Evian conference, a report to the British Cabinet on the ‘Refugee Problem’ dated 7th July 1939, stated that 40,000 refugees had been admitted to the United Kingdom, but only on a ‘transmigratory basis.’ They had been admitted on a guarantee that the cost of their maintenance would not fall on public funds, and they would eventually go elsewhere. The British policy towards refugees, says Louise London, almost inevitably revolved around the issue of finance.

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329 Vicki Caron, Uneasy Asylum: France and the Jewish Refugee Crisis, 1933-1942 (Stanford University Press Stanford California 1998 1999).
Aftermath

As the Second World War came to its close, and the consequences of ultimate exclusion became obvious in the camps of Eastern Europe, the House of Commons held a debate over the future of Poland, during which the British Prime Minister explained to the House of Commons why it was necessary to remove German Nationals from a reshaped Poland:

"Expulsion is the method which, in so far as we have been able to see, will be the most satisfactory and lasting. There will be no mixture of populations to cause endless trouble... A clean sweep will be made. I am not alarmed by these transferences, which are more possible in modern conditions …"

In July 1945, representatives of the Allied powers met at Schloss Cecilienhof in Potsdam, 35 km from Berlin, to decide what should happen to Germany following the conclusion of the Second World War. The Conference issued a communiqué which (Article XIII) emphasised the need to remove ethnic Germans from certain countries:

‘The Three Governments, having considered the question in all its aspects, recognize that the transfer to Germany of German populations or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken. They agree that any transfers that take place should be effected in an orderly and humane manner.’

The Potsdam conference agreed to move the western frontier of Poland to the rivers Oder and Neisse; transferring to Polish sovereignty, the territory of Lower and Upper Silesia, East Prussia, Pomerania and parts of Brandenburg. The millions of Germans who lived in these areas were to be expelled and transported to Germany; it was a similar picture for the ethnic Germans in Czechoslovakia and Hungary. Between 500,000 and 600,000 Germans sustained

332 Protocol of Proceeding, ‘Berlin (Potsdam) Conference, July 17th to August 2nd 1945’, XII. ORDERLY TRANSFER OF GERMAN POPULATIONS.
injuries or were killed in the expulsions, and by the end of 1945, Czech soldiers, security forces, and local militias had already expelled over 700,000 Sudeten Germans to occupied Germany and Austria. From January 1946, trains filled with Germans left Czechoslovakia every day and by the end of the year some 2 million Germans had been expelled. A similar picture emerged in Poland where the forcible expulsions continued throughout 1945 and 1946. The majority of ethnic Germans deported to Germany were guiltless; their fate was determined purely by race.

During 1945 Edvard Beneš introduced regulations to limit the freedom of Germans who remained in Czechoslovakia. Germans were forced to wear white armbands marked with 'N' (Nemec is the word for German in Czech). Germans were not permitted to sit on park benches, neither could they use public transport or public telephones, nor go to theatres, restaurants or cinemas.

At the same time as the expulsion of Germans from Poland Czechoslovakia and Hungary was taking place; the ‘International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European Axis,’ was agreeing on its terms of reference. It decided that one of the crimes against humanity to be pursued by the Tribunal, would be that of the forced expulsion of populations, which, and according to Article 6, constituted a crime against humanity.

336 http://avalon.law.yale.edu/imt/imtconst.asp
Finally, and as a further example of what Bauman called apocalypse within normality, the post war fortunes of the leading law professors who shaped Nazi Law, are interesting. Professors Ipsen, Schmitt and Hóhn, promoted an end to the rule of law; the non-justiciability of certain sovereign acts, the legalization of terror, the creation of master peoples (Herrenvölker) and slave people. They survived the war and continued their careers;

Professor Ipsen became ‘the influential founding father of European Law in Germany’, assisting the European Court of Justice to reach a decision in Case 24/62 1963, appearing for the European Economic Community. Ipsen is said to have influenced the European Court of Justice in formulating their approach to the Supremacy of European Law.

Carl Schmitt, who demanded that German law be cleansed of the ‘Jewish spirit’, never expressed any empathy with its victims.

Hóhn, who promoted the legalization of terror in pursuit of a greater good, went on to train West Germany’s future leaders; having establish a management school for the purpose, employing his former SS colleagues.

341 Hueck IJ, ““Sphere of Influence” and “Völkisch” Legal Thought: Reinhardt Höhn’s Notion of Europe.,” in Christian Joerges and Navraj Singh Ghaleigh (eds), Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions (Hart 2003) pg73
Theoretical Perspectives

Normalness and continuity

‘Law is a masterful discourse’, says Derrida, ‘One which dominates, colonizes, and commits countless acts of violence in the very act and fact of its presence.’

Derrida’s views are particularly germane to the issue of the ultimate exclusion of the Jews and Roma by Nazi Germany, and the failure of other European states to do anything about it. As a consequence, European society has developed myths that have shaped contemporary social and legal history, and which have promoted one interpretation of the past, reserving for that interpretation, the power to regulate all other accounts. This factor of erasing unsavoury histories, or of intellectually rationalising the past, creates a sanitised version of history, and a limited opportunity to re-evaluate factors which continue to influence contemporary law and society.

Perhaps this might best be illustrated by the way in which scholarship has tried to resolve the somewhat vacuous question of whether ‘Nazi Law’ was law. Self-indulgently scholars discussed whether the ‘blame’ for the Nazi era could be one of Legal Positivism or of Natural Law. This real or imaginary aporia of the status of law in Germany during the period 1933 to 1945 rests on the notion that Germany was a criminal state. David Fraser says the idea that Hitler’s Germany was a criminal state is a post 1945 reconstruction. When Hitler became Chancellor in 1933, there was no shift from ‘law’ to ‘not law’; nor did Hitler’s defeat in 1945 reinstitute a return to legality. Moreover there is a danger in believing that the 12 years of National Socialism in Germany was an isolated event, a momentary madness, outside the usual course of European history.

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Rather the existence of Difference, Otherness and Exclusion as an inherent factor of German Law between 1933 and 1945, was entirely consistent with canonical beliefs of the 19th century. Moreover, any residual doubts concerning the status of Nazi Law was surely addressed by the House of Lords, who ruled on the status of Nazi law. In *Kahler v The Midland Bank Ltd* [1950]347 their Lordships held, by a majority of three to two, that Nazi Law imposed in Czechoslovakia and temporarily adhered to by the post-war Czechoslovakian Government - was law, and was effective in preventing a former refugee from succeeding in an action against a British Bank for the restoration of assets confiscated under Nazi Law.

Over the years since the end of the Second World War, it has become common to believe that the Nazi period in Germany was a glitch in the development of European society; an historical parenthesis, quite separate from the wider cycle of European exclusionary practice. In this way it follows that the systematic segregation of German society along racial lines, and the events leading to the Holocaust, constitute a separate and specialised topic, isolated from the mainstream of scholarly enquiry.348

But such assumptions need to be challenged because, and however uncomfortable the reality, the Holocaust and the processes leading up to it, were perfectly lawful and legal349 according to German Law. Moreover, the Holocaust is often depicted as a Jewish tragedy, which it was, but it was not just a Jewish tragedy. The legal, social, cultural and political milieu in which the Holocaust happened, had, supposedly, achieved the peak of human cultural and civilizational achievement. Yet within this cultural and civilizational excellence, Difference, Otherness and Exclusion was still an integral feature of the practice of a modern industrialised state. In this respect, the Holocaust, the ultimate act of exclusion, and all the things that made it possible, assumed a normality; not, as

349 Mertens.
Bauman points out, in the sense of the familiar, but, ‘in the sense of being fully in keeping with everything we know about our civilization, its guiding spirit, its priorities, its immanent vision of the world’. This is a theme echoed by Balibar when he comments that the mass killings of the Nazi era, and the marginalisation of communities because of their difference, all took place within the realm and the time of legality and normality.

The Holocaust was the ultimate act in the process of exclusion, and whilst I agree with Derrida’s view that these events influenced our experiences so ubiquitously that the conscious or unconscious memory of the event might be found everywhere in our culture and everywhere in our lives, I wonder if this is more about the guilt of the barbaric side of our nature having being discovered, rather than the remorse for the act. Richard L. Rubenstein also addresses this question from another perspective when he posits that the death camps and the society in which they were able to function, reveal a ‘progressively intensifying night side of Judeo-Christian civilization’. To Rubenstein civilization means slavery, wars, exploitation, and death camps. It also means medical hygiene, elevated religious ideas, beautiful art, and exquisite music. Civilization and savage cruelty are not in antithesis, rather creation and destruction are inseparable aspects of what we call civilization.

The final act in the cycle of Jewish exclusion - the Holocaust and its background, continue to have relevance for contemporary Europe. Giorgio Agamben outlines this relevance when he says that the birth of the camp was an event that decisively signalled the political space of modernity itself; Agamben claims that when society understands this, it becomes possible to see the camps ‘not as a historical fact and an anomaly belonging to the past, (even if still verifiable), but in some way as the hidden matrix and nomos of

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350 Bauman, Modernity and the Holocaust.
354 Agamben.
the political space in which we are still living’. With the conclusion of one cycle of exclusion, the search for new reasons to exclude, new victims began afresh. The suggestions of a hidden order that continues to drive society to exclude, are usually seen as an impudent challenge to beliefs that have, in reality, yielded to post war adjustments. There is a reluctance to acknowledge that the process of exclusion, whether internal or external, remains a part of European life. It has similarities with the societal view that the events of the Holocaust were an exclusive Jewish tragedy, implying that, in some way, these happenings were detached from mainstream European society law and politics. This societal ambivalence to shouldering responsibility was reflected in the Solemn Commemoration Service held in Westminster Abbey in July 2015, to remember the Balkan Tragedy. The term ‘Balkan tragedy’ is a euphemism for the systematic murder of 8,372 Bosnian Muslim men and boys of Srebrenica, in 1995. The offence committed by the men and boys of Srebrenica was that they were different, and they were Muslim. Although their ‘difference’ was a concept which would have been well understood 60 years previously, Europe is still reluctant to acknowledge that it harbours deep seated prejudices, often legitimised by law; often morally ambivalent; and always a subject of repudiation when confronted by the evidence.

**Conclusion**

The first part of the 20th century witnessed the end of the great dynastic Empires, the creation of new ideological empires, and the proliferation of new states. But, from whichever end of the political spectrum the new states emerged, my hypothesis is that there remained a constant influence which sometimes occupied the background, whilst at other times it was overt and central to political and societal aims. I refer to the concepts of Difference, Otherness and Exclusion.

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355 Giorgio Agamben Homo Sacer Sovereign Power and Bare Life Translated by Daniel Heller-Roazen .Stanford University Press Stanford California 1998  The Camp as the ‘Nomos’ of the Modern pg95
Europe’s minorities who had been excluded and discriminated against, bathed in the new found freedom of statehood; but the manumission of the Czechs, Slovaks, Poles and others also contributed to the creation of new minorities, and developed exclusionary practices germane to the developing situation.

Geopolitical changes in Europe exacerbated a potentially unwelcome encounter with the foreign other, the refugee; an encounter which was to be resisted. Throughout Europe states began to restrict the entry of refugees, a situation made more profound because of the decisions by the United States to introduced controls which favoured those from northern European backgrounds, rather than eastern or southern European backgrounds.

But in public, and in the earnest and meaningful language of law and diplomacy, the refugee was to be embraced by the International Community, and their protection embodied in the 1933 Convention relating to the International Status of Refugees. In reality, the League of Nations, often ridiculed for its naivety, played a significant part in trying to alleviate a unique and growing refugee crisis in European history; but European states steadfastly refused to co-operate. The consequences do not need rehearsing. The pursuit of difference and otherness eventually reach a climax in the late 1930, but not before Europe failed to apply humanitarian principles in respect of those who had been excluded, and by this omission, lost the opportunity to redeem itself.

The destructive influences that arose from 19th century canons of belief in identity, difference and otherness, wreaked a terrible harvest of humanity, and Agamben is right to suggest that the camps are not just historical fact, neither are they an anomaly, rather they are integral to the political, legal and societal milieu in which we still live. Should there be any doubts, it is a matter of fact that, strikingly, even in the immediate post Holocaust era, the victors continued the practices of exclusion, and the vanquished were
invited to peddle their ideologies in the new progressive and enlightened European Court of Justice.

There is a need to deconstruct historic wisdom that divides societies on the grounds of difference, but there is also a need to develop our understanding of the normalness of exclusion, and our perception of the stranger. In the next chapter I want to continue looking at some of these themes by firstly exploring the actions and policies of the United Kingdom from the early 20\textsuperscript{th} century to the present times; and then consider the deconstructionists views of hospitality, and ask if there is a philosophical signpost pointing to the way forward.
Chapter Five. Locating immigration policies and the law within a moral maze

Introduction

‘Must we ask the foreigner to understand us, to speak our language, in all the senses of this term, in all its possible extensions, before being able and so as to be able to welcome him into our country?’

Jacques Derrida.356

The last chapter began in the early years of the 20th century, and explored how Difference, Otherness and Exclusion remained a fundamental concept on which the process of assigning identities could be founded, and through which decisions on who should be excluded came to assume a legal norm. The chapter explored the realities of exclusion in central and eastern Europe in the inter war years, it looked at the issue of refugees, and, despite apocalyptical events, the chapter briefly considered whether, in reality, anything had changed in the immediate post war period.

In this chapter I want to explore the realities of internal and external exclusion a little further. As the 20th century progressed it became evident that there were significant numbers of non-European people who were in Europe by invitation, or who wished, either through immigration or asylum processes, to enter and settle in Europe. This was a situation which had to be reconciled by European states whose history was redolent with refining and expanding the application of internal exclusion. Therefore this chapter begins to explore the extent to which previous internal norms of Difference, Otherness and Exclusion began to adopt an external dimension, insofar as they were applied to those who wished to enter European states through immigration or asylum, and to non-Europeans already in Europe, who had begun to establish settled immigrant communities.

More specifically, the first part of this chapter focuses on the United Kingdom and explores early legislative decisions which effectively stopped the free movement of people; it explores the social, constitutional and legal realities of immigration control, and probes different understandings of the concepts of transnational identities.

The second part of the chapter explores some theoretical and controversial concepts of hospitality. These abstract views of hospitality are loosely drawn from the Ethics of Deconstruction, and pose the question of whether hospitality should be conditional or unconditional. They borrow from Lévinas who explains that the question of extending any kind of hospitality to the stranger rests on the premise that ‘I am responsible for the Other’, because to be human is to be responsible for the Other. Not unconnected with the concept of having responsibility for the other, is the post war development of human rights, and the chapter poses the question of whether human rights create an environment that helps the production of difference.

But first, the story of the 20th century has its roots in the 19th, where nation states were confronted by increasing numbers of immigrants arriving at national borders seeking settlement and work. Although there had been relatively free movement of people across Europe, states had generally adopted the typical Westphalian model of sovereignty which included hard outer borders, ‘central authority, roughly homogeneous cultural identity and its coinciding administrative, economic and military regime’.

Sovereign statehood, and the right to control admittance into sovereign territory was a principle exercised by the Government of the United Kingdom at the fin de siècle of the 19th century, and this section opens by exploring how, in the face of an international

357 Emanuel Lévinas. Ethique et infini Paris: Le livre de poche 94-5
358 Zygmunt Bauman. The Great War of Recognition Theory Culture Society 2001 18: 137
situation concerning refugees, and over which it had no control, the United Kingdom legislated to control entry into its territory.

Empirical Reflections

The United Kingdom

International situations which precipitate people seeking safety outside their countries of origin are nothing new, and neither is the consternation felt by states whose borders those seeking safety wish to cross. This was the situation at the turn of the 19th century when the Kishinev Pogrom of 1903 in Russia, and the consequential influx of Jewish immigrants, contributed to the enactment of the United Kingdom’s Aliens Act of 1905.

Kishinev.

On the 28th July 1903, the British Consul-General in Odessa, sent a report to the British Foreign Secretary, concerning rioting in Kishinev.360 Unbeknown to the writer of the report, he was drawing attention to the first pogrom of the 20th century, which had begun on Easter Sunday in the town of Kishinev, and resulted in death, injury, homelessness and damage estimated in the region of 2.5 million roubles.

A report from the Consul-General in Odessa, as reprinted in the Times, described the outbreak of violence in the small Jewish area of Kishinev. Rioting took place all day and into the next morning, spreading to the New Bazaar and the town centre, eventually engulfing the whole of the northeast and southern quarters of Kishinev. The Consul-General noted that local feelings against the Jews had been inflamed by the notoriously anti-Semitic newspaper ‘Бессарабец’, Bessarabetz, which claimed that a Christian boy had been ritually murdered by the Jewish community at Dubosari. The pogrom which began at Easter, spread, and eventually included a further twenty-five pogroms localised to the Kishinev region, and following the Kishinev example, pogroms continued across Russia for the next three years.

The scale of the Kishinev pogrom and its aftermath was substantial; but there was other unrest too. A poor harvest in 1902-3, may have contributed to the looting of the homes of the nobility in the provinces of Kharkov and Poltava. Industrialisation was also having an effect on urban areas where unemployment was rising, and workers, looking for employment, wandered from town to town in search of work and food. It was estimated that in 1905 alone, there were 3,228 agrarian disorders causing damage to the extent of 28 million roubles.

Laws that restricted Jews to the Pale of Settlement and restricted the trades in which they could be engaged, served to reinforce negative stereotypical images, and emphasized their Otherness. The declining economic situation, rather than unite Jew

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361 The Times (London England), 'Thursday, Aug 13, 1903; Pg. 2; Issue 37158'.
and Gentile through shared hardships, simply intensified animosity. Fears of further pogroms and the wish to escape poverty, caused a new wave of Jewish migration to the West, peaking around 100,000 migrants a year in 1906. For the British, the anticipated influx of Jews was a matter of widespread concern, and moves were being made to draft legislation restricting the right of certain categories of foreigners to land in The United Kingdom.

**The Aliens Act.**

The Government of the United Kingdom was under pressure to stop Jewish immigration, and a Bill had been drafted to restrict the right of entry to certain categories of foreigners. The Bill was the first of its kind in Europe to propose the use of state sovereignty to regulate the effects of migration, and it eventually became law, under the title of the Aliens Act (1905).

By limiting or refusing entry to certain categories of people, the Government had formulated a legal response to what was, arguably, a humanitarian situation, and in so doing they had introduced a new dimension to the relatively free movement of people in Europe. The legislation drew authority from an old but classic view of International Law, found in the writings of Emer de Vattel and other early authorities on the law of nations. These ideas advanced the theory that in matters relating to the entry of people into a state, the state enjoys an absolute sovereign discretion unrestrained by international law. The same view was taken many years later by Lord Denning, who, in respect of English law, remarked in *obiter,*

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“...at common law, no alien has any right to enter this country except by leave of the Crown; and the Crown can refuse leave without giving any reason.”

It is a view reinforced by the European Court of Human Rights in Abdulaziz. In Huang, Lord Bingham pointed out that the ECtHR had repeatedly acknowledged that the European Convention on Human Rights confers no right on individuals or families to choose where they prefer to live.

In enacting the legislation, perhaps the United Kingdom was demonstrating a wider political awareness, which was not just about immigration per se, but about reconciling the consequences of immigration with the rapidly changing political and social environment that was emerging both in the United Kingdom and in Europe.

For example, the Aliens Act largely arose from the findings of a Royal Commission on Alien Immigration. The call for a Royal Commission had been made by, among others, the Conservative Member of Parliament for Stepney, Major Sir William Eden Evans-Gordon. Evans-Gordon was a leading member of the ‘British Brothers League’, a pseudo-military style group actively opposed to immigration. Under pressure from the British Brothers League, and some Parliamentarians, the Government had agreed to establish a Royal Commission to take evidence and make recommendations on the wider question of immigration. Evans-Gordon was appointed Chair of the Commission which took evidence from several hundred people. Although the Commission was looking at the wider question of alien Immigration, in reality it focused almost exclusively on Russian and Polish Jewish émigrés.

During the course of the hearings it became clear that Jewish immigration to the United Kingdom had many opponents. The 1892 report of the Trades Union Congress for example, said that the ‘door must be shut against the enormous immigration of destitute

366 R v. Governor of Pentonville Prison, Ex parte Azam; R v. Secretary of State for the Home Department, Ex parte Khera; R v. Secretary of State for the Home Department, Ex parote Sidhu, [1973] 2 All ER 741
367 Abdulaziz, Cabales and Balkandali v UK (1985) 7 EHRR 471
368 Huang (FC) (Respondent) v. Secretary of State for the Home Department (Appellant) and Kashmiri (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals) [2007] UKHL 11
369 Convention for the Protection of Human Rights and Fundamental Freedoms
aliens’, and went on to say that the labour movement must ‘protect its own starving work people by refusing to be the asylum for the paupers of Europe.’

This was a sentiment often repeated in the evidence presented to the Royal Commission. The General Secretary of the Lancashire Miners Association, David Gilmore, thought that aliens were a source of danger, and stated that in many cases they had been banned from (working) in collieries. Owen Connellan, the Secretary of Leeds Trades and Labour Council, gave evidence that the Council had passed a resolution protesting against the pernicious and continual influx of aliens. The East End of London, and the area of what is now roughly Tower Hamlets, was the focus of much hostility; these neighbourhoods were said to feature men with long hair and beards who wore black hats and erected signs above shops in Yiddish. The Rector of Spitalfields told the Commission that whole streets were passing out of English ownership and into Jewish hands. The exclusive behaviour of the Jews meant that many English shops had disappeared.

The Rector’s observations seem to resonate with those of Nicholas Budgen MP, who claimed that “The indigenous population often feel themselves to be strangers in their own land; they see their pubs, their shops, and their streets taken over. Then if they complain they are called racist.” Budgen’s remarks, of course, were not made in 1904, but in March 1997, and seem to indicate that few things change. The presence of the Jews in the East End acted as a catalyst for discontent across political and social classes. Thus the term Alien and Jew became synonymous, and the Aliens Act was specifically designed to focus on that problem.
One of the interesting features of the Act was that it did not apply to Citizens of the British Empire, whether they be from the Indian Sub-continent, or Africa, or the Far East. Imperial Citizens had the right to travel and enter the United Kingdom unhindered.

The Aliens Act introduced the concept of ‘Carrier Sanctions’, and although they are now a familiar principle, in 1905, sanctions of this kind were quite new to both domestic and international law. The Manchester Guardian reported that Captain Paul Richter of the German Steamship Ophelia was fined by the Thames Police Court under Section 5(1), for allowing two Aliens, illegal immigrants, to escape from his vessel. In each case the Captain was fined £5.00 with £5.5s.0d, costs, (Roughly £1,000).377

The Act also introduced the idea of ‘Ports of Entry’; no vessel could land or disembark immigrants, other than at the ports of Cardiff, Dover, Folkestone, Grangemouth, Grimsby, Hull, Leith, Liverpool, London, Newhaven, Southampton and the Tyne. Steerage passengers, usually the poorest of travellers, had to undergo a medical examination before they could land, but ‘Cabin Passengers’, those travelling first class, were exempt.378 Potential immigrants who were refused permission to land, could challenge the decision by appealing to a series of quasi-judicial committees. These early committees were the forerunner of a later more sophisticated network of immigration tribunals and courts, which, even today, are not generally familiar to the public. On the eve of the Act being introduced, the Observer newspaper asked if it would stop the influx of undesirable aliens;

ˈwould it stop the foreign tailor from monopolising the tailoring industry in England; would it keep out the foreign barbers and the waiters now working

378 The Times (London England), ‘The Aliens Act. From Our Special Correspondent. Apr 26, 1906; Pg. 4’;
in London, whilst the Englishman adjoins the unemployed processions, or
sells matches.\textsuperscript{379}

The criticism of immigration policies made by the Observer newspaper is not entirely
unfamiliar; in December 2013, the Sun Newspaper called on the Prime Minister to ‘Draw
a red line on immigration, or else!’\textsuperscript{380}

It is possible that the government probably welcomed the report of the Royal Commission,
not because of its fairly crude anti-Jewish immigration rhetoric, but because of other
concerns related to the emergence of a political movement among Jewish workers in
Poland and Russia, aimed at securing workers’ rights and emancipation. It was thought
that Jewish immigrants might bring with them ideas which could upset the status quo.

In the previous chapter I mentioned \textit{Haskala}, often
spoken of as the Jewish
Enlightenment. \textit{Haskala}’s
critique of traditional cultural
patterns gave rise to a new
movement known as the Bund.

Susan Glenn says that if the
\textit{Haskala} had initiated an ideological confrontation with traditional cultural and religious
norms, the emergence of the Jewish socialist intellectuals who founded the Bund,
challenged the old order with new ideas and pressed on with the demand for social
change.\textsuperscript{381}

The Bund, or to give its full Yiddish title the:

\begin{figure}[h]
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\includegraphics[width=\textwidth]{Figure_17_Meeting_of_the_Bund}
\caption{Meeting of the Bund (www.sztetl.org.pl)}
\end{figure}

\textsuperscript{379} The Observer, ‘Sunday Dec 31, 1905’ [1905
\textsuperscript{380} Sun Newspaper Headlines, “Draw a Red Line on Immigration or Else!” “The British People and The Sun Today Issue
This Red Line Demand to David Cameron: Win Back Our Power to Halt Immigration from the EU.” The Sun (November
2013).
\textsuperscript{381} Susan A Glenn, Daughters of the Shtetl: Life and Labor in the Immigrant Generation. (Cornell University Press 1990).}
Algemeyner Yidisher Arbiter Bund in Lite, Poyln un Rusland", (General Union of Jewish Workers in Lithuania, Poland, and Russia), developed a reputation for political activism. It promoted secular and socialist perspectives, opposing what it saw as the reactionary nature of traditional Jewish life in Russia. The Bund was opposed to Zionism; it brought together tens of thousands of Jewish workers, and encouraged them to fight for an era of socialism in Europe. It is a matter of fact that the British Government were monitoring the activities of the Bund, the Jewish intellectuals involved with the Bund, and the wider revolutionary activities in Russia. Even as late as 1917 the Government were receiving intelligence reports on the Bund, and those involved in its activities. 382

These worries were well understood by the settled Jewish community in the United Kingdom, who, by the turn of the century had become well established. Old communities, and some of the leading Sephardic families had almost evolved into dynasties. On the face of it, Jews had become accepted by British society, and in 1847 Lionel de Rothschild had been elected to the House of Commons, and Samuel Montagu, later the 1st Barron Swaythling, sat as a member of the House of Commons from 1885 to 1900. The Jewish establishment may have also harboured some reservations arising from the arrival of large numbers of uneducated Ashkenazy Jews.

But eventually there seems to be a general consensus that the Act was an unsuccessful way of dealing with the issues of those fleeing from Eastern Europe. In fact it failed to prevent the arrival and settlement of ‘undesirable aliens’, who remained in the United Kingdom.

Kingdom largely as a consequence of the reluctance of Courts\textsuperscript{383} to recommend their expulsion.\textsuperscript{384}

The 1905 Act was superseded by the wartime 1914 Aliens Registration Act, which made the registration of all aliens with the police mandatory. In a memorandum to the Cabinet in March 1919, the Home Secretary advised of the necessity to replace the 1905 legislation with something more comprehensive, because the only powers which the Home Office possessed, were essentially designed to control the arrival of immigrant ships, chiefly from Eastern Europe.

Consequently the Aliens Restriction Act 1919 firstly extended the wartime emergency powers as contained in the 1914 Act; it then consolidated the power of the Home Secretary to deport aliens; made it a criminal offence for an alien to ‘promote industrial unrest’, and introduced new restrictions to the rights of aliens already resident in Britain.

Scrutinising Cabinet minutes of the day, highlights some interesting parallels with the present time; the minutes reveal something of an obsession with the possibility that aliens were a security risk, that they might promote industrial unrest or play a part in the development of revolutionary organisations. For instance, the minutes show a degree of nervousness arising from the existence of organisations promoting socialism, and the minutes indicate that these organisations were being closely monitored.\textsuperscript{385} One fear was that the socialist principles espoused by the Bund and other organisations, might be imported into the United Kingdom by aliens, and the Directorate of Intelligence made regular reports to Cabinet concerning these issues.

\textsuperscript{383} It would be presumptuous to conclude that the courts were acting under some moral or ethical motivation. The Home Secretary’s powers of expulsion of an alien were limited and required a court recommendation, which could only be given (a) the Alien’s conviction for a criminal offence (including prostitution), or (b) where the alien had been found wandering without ostensible means of support, or was living under unsanitary conditions the result of overcrowding, or had entered the country having been sentenced abroad for an extraditable crime.

\textsuperscript{384} Cabinet Papers CAB/24/76 ALIENS BILL. (Circulated by the Home Secretary). 12th March, 1919 Courtesy of the National Archive.

\textsuperscript{385} Cabinet Papers. British Intelligence Bureau (Secret).
One rather interesting report to Cabinet in 1920 addressed the issues of revolutionary organisations in the United Kingdom, their supporters, and the meetings held by these revolutionaries. The Report says,

_Not more than 300 people, the majority as usual of Alien extraction, assembled in the Liverpool Stadium to hear John S. Clarke, editor of The Worker, on 21st November. The Stewards were heard lamenting the poor attendance, and saying that nothing like the amount required to pay for the hall (£7.7s.0d) would be raised._

In the face of a perceived threat to the fabric of society, it is somehow rather engaging to think of hardened British and alien revolutionaries being worried about who would pay the bill for the hire of the hall.

**The Irish**

There was another significant immigrant community who had settled in the United Kingdom, and who could lay claim to be discriminated against by successive governments on account of their alleged race. They were the Irish; and the London Times, in its analysis of the Irish Question, used the concept of race in order to clearly distinguish the difference between the Irish and the British.

Irish immigrants had troubled successive governments, and in 1928 the Home Secretary and the Secretary of State for Scotland, circulated the British Cabinet with the minutes of an Interdepartmental Conference they had called to look at the possibility of controlling Irish immigration to Scotland. The conference noted that the United States had reduced

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388 The Times (London, England), Tuesday, Dec 17, 1867; pg. 6; Issue 25996. (1818 words)

its quotas of Irish immigrants, and ministers believed that this reduction would result in the flow of the least desirable class of Irish immigrants coming to the United Kingdom. There were significant numbers of Irish immigrants who had settled in Scotland, but had become a charge on the rates. There was a suggestion that legislation should be introduced prohibiting the employment of certain categories of Irish, and penalties should be imposed on anyone knowingly employing any Irish person who did not have a work permit. A year later the Home Secretary told the Cabinet that the influx of ‘natives’ from the Irish Free State, was not as had been expected. However, Scottish employers should still give preference to Scottish rather than Irish labour, and ‘there should be a scheme of repatriation for Irish immigrants who had become a charge on the Poor Law’.  

subjects and citizens

For the United Kingdom, defining who was an immigrant, and then applying to them appropriate legal and social responses, was fluid and complex. Part of the complexity is related to some curious features which have complicated immigration issues in the United Kingdom, and which have distinguished it from its continental neighbours. Perhaps this complexity may be illustrated in terms of the fact that until legislation was introduced between the years 1948 and 1981 the United Kingdom had only what Joppke calls, ‘subjectship’, an allegiance to the Crown which included both ‘Borneo cannibals and noble lords’. Even in the declining years of Empire, some 800 million individuals located all over the world were ‘subjects’, and in principle they all enjoyed full rights in the United Kingdom.

Throughout the Empire, being a British subject was the principal status acquired solely according to law of the United Kingdom and the principle of *jus soli*. Being a British subject indicated a common status, and the possession of identical rights and privileges in common with all British subjects in the Empire. This equality referred to legal rather than socio-political equality. Goodwin-Gill, emphasises this point when he says that for those steeped in the tradition of a single, simple, citizen-state relationship, the 'manner in which the British Crown and Parliament treated their peoples, must appear strange, at times even devious and divisive'. It was, in reality, a mix of 'laudable aspects, historical ideals, half remembered principles, post-colonial debts (not always honoured) and regrettable tendencies'. Being a subject under colonial law held a common duty of obedience to the crown and the performance of military service. On the other hand, subjects of the Crown had a 'common right to the crown's protection regardless of their country of origin or the colour of their skin'. Although it would be naïve to confuse the notions of a common status with those of equality in its contemporary sense, there could be no confusion regarding the status of non-British subjects seeking entry in to the United Kingdom.

With the end of Empire and the conclusion of the Second World War, there appeared to be a new approach to the wider question of subjectship, and this was set out in an Act of Parliament of 1948, which focused specifically on Nationality. The 1948 Nationality Act has been described as a generous piece of legislation which recognised the right of Commonwealth people to freely enter and work in the United Kingdom.

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396 Guy S. Goodwin Gill.
However, as with many issues concerning immigration, it would be premature to interpret the Act as being one of benevolence towards the Commonwealth. The actual issue of setting out the right of commonwealth people to freely enter and work in the United Kingdom was secondary to the purpose of the 1948 Act; or, as Hansen says, it was very much ‘tangential to the constitutional issues’ of the time which were a cause of concern for the British Government, and which were the actual reason for the drafting of the Act.

The Act was drafted in response to a constitutional issue concerning the Canadian Government’s decision to establish Canadian citizenship laws; seen by the United Kingdom as challenging the [theoretical] position by which all British Subjects enjoyed identical rights and privileges within the Commonwealth.

For the first time, the Act drew a distinction between British subjects who were citizens of the United Kingdom and its colonies, and those who were Commonwealth citizens. The notion of citizenship was a fairly strange concept to the British, and even though it had no ‘rights’ attached to it, it was a principle that caused problems in its interpretation, because the United Kingdom had never completely established a national citizenship with rights and obligations granted only to its holders.

Although the 1948 British Nationality Act made a distinction between subjects who were citizens of the United Kingdom and its Colonies, and those who were Commonwealth Citizens, it nevertheless confirmed the right of the majority of British subjects from the colonies and dominions, to enter and settle in Britain.

It is possible that those who drafted the Act did not realise its implications, largely because at that time, they are likely to have assumed that there would be an outflow of people from the United Kingdom, rather than an inflow of people from the Commonwealth.

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400 Rieko Karatani, Defining British Citizenship: Empire, Commonwealth and Modern Britain. (Frank Cass 2003).
The reality of the time was that it was the Irish who constituted the largest immigrant minority in Britain, a matter noted in Cabinet discussions during the 1960’s, and it was also true that immigration to the United Kingdom tended to be from Europe, rather than from the colonies. However in June 1948, 417 British subjects arrived in the United Kingdom from Jamaica, causing shock and dismay. The Government immediately sought means by which "coloured British subjects" might be deprived of their right of entry into the United Kingdom. The Colonial Secretary was attacked for allowing the entry of British Jamaican subjects, but in his defence he noted that there was a difficulty in keeping them out because there were no legal powers to prevent the entry of British subjects into the United Kingdom. He gave assurances that 'every possible step has been taken by the Colonial Office and by the Jamaican Government to discourage these influxes'. The following year a report by the Royal Commission concluded:

"Immigration into Britain ...could only be welcomed without reserve if the immigrants were of good human stock and were not prevented by their religion or race from intermarrying with the host population and becoming merged in it ".

The Royal Commission on Population was beginning to articulate concerns, the specificity of which was carefully avoided, but which could be understood in the comparative context of other events.

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402 Miles, R. ‘Nationality, Citizenship, and Migration to Britain, 1945-1951’ Journal of Law and Society, Vol. 16, No. 4 (winter, 1989), Published by: Blackwell Publishing on behalf of Cardiff University. pg 435
403 Winston James and Clive Harris, Inside Babylon The Caribbean Diaspora in Britain (Verso 1993).pg24
The issues of Difference, Otherness and Exclusion entered a new cycle; those who had previously been the excluded were welcomed as friends and in preference to the identities of the new excluded. For example, the Polish Resettlement Act of 1947 allowed for the resettlement of more than 130,000 former members of the Polish armed forces and their families; and the European Voluntary Workers Scheme, including the Blue Danube scheme, recruited German, Austrian, Italian and Belgian nationals to work in Britain. This was said to be a positive immigration policy which, in the spirit of the time, circumvented any objections to the entry into the United Kingdom of non-British subjects, and introduced state sponsored recruitment schemes.

But the matter of West Indian immigrants arriving in the United Kingdom continued to be a matter for the attention of the Cabinet. During 1954, the Cabinet were advised that there was no legal means of limiting the numbers of Commonwealth Citizens who might choose to settle in the United Kingdom, and they were asked whether they wished to change this policy. The Cabinet were reminded that any legislation restricting the entry of British subjects into the United Kingdom would be open to criticism, and there was a lobby which aimed to protect the rights of British subjects who wished to settle in the ‘mother country’. This lobby saw any form of control as being inspired by racial prejudice. It was suggested furthermore that future immigration restrictions should not include citizens of the Irish Republic. The unrestricted entry of British subjects to the United Kingdom finally underwent a review in 1956, and a committee of ministers was tasked with looking at the issues. The specific terms of reference were,

*To consider what form legislation should take, if it were to be decided that legislation to control the entry into the United Kingdom of British subjects from overseas should be introduced.*

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Ministers made clear that their review specifically concerned the unrestricted entry of British subjects who were coloured people from the African and Asiatic territories of the Commonwealth and from the West Indies. The report eventually compiled by ministers estimated that the total ‘coloured population’ in the UK was about 100,000. The coloured population had been making a useful contribution to the labour force, and some public authorities were taking steps to recruit more West Indians to work in the United Kingdom. However, the report said that there was some reason to think that the proportion of unemployment among West Indians already in this country may be increasing. The presence of coloured immigrants was not thought to present any problems regarding either housing or employment, but the situation was fluid.

By 1961 the Cabinet were being advised that the numbers of West Indian, Pakistani and Indian immigrants could rise to 2 million within 15 years, and therefore immigration controls were needed, and in the following year the Commonwealth Immigrants Bill of 1962 began to make its way through the Parliamentary processes.

The 1962 Commonwealth Immigrants Act was intended to introduce controls that would curtail the historic right of Commonwealth Citizens to freely enter and stay in the United Kingdom. It was accepted that however carefully the legislation was drafted, it would be represented as a measure of discrimination against coloured people.

Cabinet papers reveal that discrimination against coloured people was exactly the purpose of the Act; and this had been made clear when, in 1961, the Cabinet considered a memorandum by the Home Secretary recommending the introduction of legislation to control immigration into the United Kingdom from other parts of the Commonwealth. The Cabinet conclusions noted that on the face of it, the Bill applied to all Commonwealth

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408 Cabinet Papers (C. (61) 153)
citizens, irrespective of colour; but it would be evident in its operation that control was being applied only to coloured people.\footnote{Cabinet Papers. Secret., ‘CC. (61) 55(h Conclusions Copy No, I G CABINET CONCLUSIONS of a Meeting of the Cabinet Held at Admiralty House, S.W.1, on Tuesday, 10th October, 1961, at 1130 A.m.’}

For immigrants who were already in the United Kingdom, the impending Commonwealth Immigrants legislation raised an immediate question of family reunification, particularly as many immigrants believed the new legislation would prevent wives and children from coming to the UK. As a consequence, in the months before the Bill became law, there was an inflow of dependant women and children, mainly from India. There was also the resurgence of the Irish Question, with the government making clear that they did not intend to restrict Irish entry into the United Kingdom. History had been adjusted to reveal that Britain and Ireland had apparently enjoyed an especially close relationship born of historical, racial and geographical factors. However the Government would authorise possible random examinations of Irish passengers at some ports.

In the House of Commons, Labour MP, Patrick Gordon-Walker, described this nominal check on Irish immigrants, proposed by Home Secretary Butler as a,

“...fig leaf to preserve his reputation for liberalism. Now he stands revealed before us in his nakedness. He is an advocate now of a Bill which contains bare faced open race discrimination”\footnote{Hansard.16 November 1961 Commonwealth Immigrants Bill. HC Deb 16 November 1961 vol:649 cc687-819 Order for Second Reading read. 3.58 p.m.}.

The main provisions the Commonwealth Immigrants Act was the authorized deportation of certain Commonwealth citizens convicted of offences punishable by imprisonment; the citizenship qualifications required by Commonwealth citizens applying under the British Nationality Act 1948; and, most significantly, the decision that the categories of Commonwealth citizens able to enter the United Kingdom would be limited to holders of employment vouchers issued by the Ministry of Labour.
In 1964, the Labour Party won the general election, having previously stated that they did not contest the need to control immigration.

However, Patrick Gordon Walker, a significant figure in the Labour Party, was unexpectedly defeated in his safe Smethwick seat by the Conservative candidate. Deep controversy surrounded the political campaign that had taken place in Smethwick, where slogans had appeared saying: “If you want a Nigger for a Neighbour vote Liberal or Labour.” 411 No one claimed authorship for the slogan, but it had an impact on the election, and the winning candidate Peter Griffiths refused to disown it; “I would not condemn any man who said that,” he told the Times during his election campaign. “I regard it as a manifestation of popular feeling”. 412 The black activist Malcolm X visited Smethwick following the election because he claimed that he was disturbed by reports that coloured people were being treated as the Jews under Hitler. 413

The political and social dimensions of immigration were exacerbated by events in Africa, where post-Colonial countries began introducing policies of Africanisation. In Kenya, for example, the Government removed Asians from any positions of influence they held; and in the period 1965-7, 23,000 Kenyan Asians decided to leave Africa for the United

413 The Guardian Newspaper Stewart Jeffries.
Kingdom. The situation in Tanzania and Uganda developed much along the same lines, resulting in significant numbers of East African Asians leaving for the United Kingdom.

In 1965 Home Secretary Frank Soskice, drew the attention of the British Cabinet, to the existence of considerable numbers of people who had no connection with the United Kingdom, who were of Indian or Pakistan origin, but who were defined, in their passports as being citizens of the United Kingdom and its colonies. Soskice advised the Cabinet that if these passport holders chose to migrate to the United Kingdom they could do so without restriction.\(^{414}\) This was followed in 1967 by a report to members of the Cabinet from Cabinet Secretary Burk Trend, which pondered the question of the United Kingdom’s entry in to the Common Market, and the principle of the free movement of people.\(^{415}\) The report noted that not unconnected with possible entry into the Common Market was the matter of the Government’s Commonwealth policy, which had been to control immigration from both the Old and the New Commonwealth. Controlled immigration from the Old and New Commonwealth had been introduced to disguise the Government’s wish, for sound reasons, to limit the numbers entering from the New Commonwealth. The Old Commonwealth generally referred to Australia, New Zealand, and Canada; the New Commonwealth referred to countries which had achieved self-government within the Commonwealth since 1945.

Burk Trend advised that if the government’s policy was maintained, it would result in restricting the number of people from commonwealth countries who would be allowed into the UK. On the other hand, joining the Common Market would permit nationals of countries in the Common Market, to move to the UK for the purposes of employment. However, the Government could modify its policy and removed the quota restrictions on immigration from the Old Commonwealth, whilst at the same time continuing to regulate

\(^{414}\) Cabinet Papers. C (65) 9 3. Immigration of Asians from East Africa. Memorandum by the Secretary of State for the Home Department. 6th July 1965.

\(^{415}\) Cabinet Papers CAB/129/129 C(67) 58. 24th April 1967. Cabinet. Europe; Further Implications for Mobility of Labour and Immigration Policy. Note by the Cabinet Secretary. Explications of entry into Europe for mobility of Labour and Immigration Policy. Supplementary Report by Officials
the inflow of immigrants from the New Commonwealth, in which case the Government could meet the objectives it had set for itself.

In February 1968, James Callaghan, the Secretary of State for the Home Department, drafted a memorandum for Cabinet in which he advised the need, as a matter of urgency, to introduce a bill extending immigration control to,

*Citizens of the United Kingdom and Colonies who did not belong to the United Kingdom.*

*Restricting the right of entry of dependent children.*

*Dealing with clandestine immigration and a number of other minor loopholes.*

The Home Secretary suggested that should there be any criticism of this proposed policy, attention should be drawn to the forthcoming Race Relations Bill, which would demonstrate the Government’s desire to achieve a fair balance all round. But, in an appendix to his memorandum, the Home Secretary wanted to make the Cabinet aware that his proposed Bill constituted breaches in International law. These breaches arose from Article 13(2) of the Universal Declaration of Human Rights 1948; Article 5(b) (ii) of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 12(4) of the International Covenant on Civil and Political Rights 1966, and Article 3(2) of the Fourth Protocol of the European Convention of Human Rights.

The Home Secretary informed the Cabinet, that the Universal Declaration of Human Rights did not impose legal obligations on the United Kingdom, it was ‘advisory’. However, the United Kingdom had signed, but not ratified, the International Convention on the Elimination of All Forms of Racial Discrimination. In the event of the United

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417 International Convention on the Elimination of All Forms of Racial Discrimination 1969

Kingdom ratifying the Convention, then its proposed restriction on immigration could be challenged, and might have to be justified before the United Nations. In such a scenario, the United Kingdom would have to prove that the Commonwealth Immigrants Act was not discriminating on grounds of race, colour or national or ethnic origin. The Cabinet were also told that the International Covenant on Civil and Political Rights presented a problem insofar as the Covenant expressly stated that, "No one shall be arbitrarily deprived of the right to enter his own country". The Home Secretary also drew the attention of the Cabinet to the European Convention on Human Rights, which presented a significant problem because the various articles of the ECHR were tightly written and specific. He suggested that the Government should be concerned about contravening Article 3(2) of the Fourth Protocol, which stated that 'no one shall be deprived of the right to enter the territory of the state of which he is a national.' A way of avoiding a breach of this article would be to argue that the persons to be excluded from entry, although technically United Kingdom nationals, were not so closely connected with the United Kingdom so as to belong to it.

The Home Secretary thought that the Immigrants Act may have to be defended against other parts of the ECHR, but, a redeeming situation arose from the fact that although the United Kingdom had signed the Fourth Protocol, it had not ratified it.

The Commonwealth Immigrants Act 1968, was rushed through Parliament in three days. It made all holders of UK passports subject to immigration controls, unless they, their parents, or a grandparent had been born, adopted, or naturalised in the United Kingdom. James Callaghan was correct in thinking that the Act would be the subject of criticism. The Modern Law Review published an article claiming that the Act authorised the violation of the duty imposed on the United Kingdom by international law to admit its own

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419 International Covenant on Civil and Political Rights 1976
420 European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms)
citizens; 'it conferred new discretionary powers on immigration officers without subjecting their decisions to the system of appeals proposed by the Wilson Committee, and it obliges persons who may have no intent to evade the immigration laws to prove their innocence in certain circumstances.'

The Government were right to be concerned about legal challenges to the Commonwealth Immigrants Act. Anthony Lester, now Lord Lester of Herne Hill QC, acting on behalf of a number of East African Asians, launched a case in the European Court of Human Rights, and challenged the compatibility of section 1 of the Commonwealth Immigrants Act 1968 with the European Convention on Human Rights. This challenge was especially significant because it involved a European judicial review of legislation recently enacted by the Westminster Parliament. The case was heard by the European Commission on Human Rights (the body charged with first hearing individual petitions), who, in a report adopted by the Commission on the 14th December 1973, pursuant to Article 31 of the Convention, and in the opinion of the commission, found as follows.

That the 1968 Act, by subjecting to immigration control citizens of the United Kingdom and Colonies in East Africa who were of Asian origin, discriminated against this group of people on grounds of their colour or race;

That the racial discrimination to which the applicants have been publicly subjected by the application of the immigration legislation constitutes an interference with their human dignity which, in the special circumstances described [in 42], amounted to "degrading treatment" in the sense of Article 3 of the Convention.

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422 B.A.Hepple. Modern Law Review 310 (1968) at 320
That certain petitioners suffered an interference with family life contrary to Article 14, read in conjunction with Article 8 of the Convention, in that it discriminated against male immigrants on the ground of their sex.\footnote{East African Asians v UK – 4403/70 [1973] ECHR 2, 14 December 1973 Report adopted by the Commission on 14 December 1973 pursuant to Article 31 of the Convention PART IV OPINION OF THE COMMISSION}

The case did not actually reach the European Court of Human Rights because the United Kingdom did not challenge the findings of the European Commission on Human Rights. The United Kingdom has consistently claimed that Articles 2 and 3 of the Fourth Protocol could be taken, respectively, to confer rights in relation to passports, and confer a right of abode on categories of British nationals who do not currently have that right. It was a point raised in the seventeenth report of the Parliamentary Joint Committee on Human Rights in 2005.\footnote{Joint Committee On Human Rights Seventeenth Report Item 3 Instruments and Protocols not yet ratified. Prepared 31 March 2005}

As a postscript, nearly 50 years have elapsed since the introduction of the Commonwealth Immigrants Act, and the United Kingdom has still not ratified the Fourth Protocol of the ECHR. In respect of the United Nations Convention on Racial Discrimination, The United Kingdom ratified the convention in March 1969; but entered a reservation;

\textit{The United Kingdom does not regard the Commonwealth Immigrants Acts, 1962 and 1968, or their application, as involving any racial discrimination within the meaning of paragraph 1 of article 1, or any other provision of the Convention, and fully reserves its right to continue to apply those Acts.}

Gallop Polls between the years 1965-1978, asked whether, on the whole, the United Kingdom had benefited or been harmed through immigrants coming from the Commonwealth? In 1967 polls specifically addressed the issue of ‘coloured people immigrating to this country’, resulting in the view that 60% of those polled believed that
non-white immigration had harmed the country.\textsuperscript{427} The issue of immigration became the source of many tensions and in April 1968 a Conservative Member of Parliament, Enoch Powell, made a speech in which he referred specifically to problems arising from uncontrolled immigration. The speech became known as the 'rivers of blood', because of its references to "the River Tiber foaming with much blood". Its content was not as provocative as society wishes to remember, but it brought the immigration issue to the fore, and witnessed the extraordinary spectacle of building workers, meat porters and London Dockers holding a one-day strike and demonstration in support of Conservative Member of Parliament Enoch Powell. The Gallup Organisation took an opinion poll at the end of April and found that 74\% of the British electorate agreed with Powell's sentiments as expressed in the speech. The poll also found he was the favoured candidate to become the next Conservative leader.\textsuperscript{428} Nevertheless Powell was forced to resign from the shadow cabinet.

1968 proved to be a year of contradiction. Given Powell's speech and the 'apparent' denouncement of his views in Parliamentary circles; and only a few months after the Cabinet had discussed options for defending the terms of the Immigrants Act, aimed at restricting the entry of Commonwealth citizens into the United Kingdom, the Soviet Union invaded Czechoslovakia, and as many Czechs tried to escape to the west, a different

\textsuperscript{427} For more information see COLLINS, M., 2016. Immigration and opinion polls in post-war Britain. Modern History Review, 18(4), pp. 8-13.
\textsuperscript{428} See Ciarán J. Burke "LIKE THE ROMAN": ENOCH POWELL AND ENGLISH IMMIGRATION LAW. University of Amsterdam Law Forum, Vol 1, No 1 (2008)
set of criteria seemed apply to them as European immigrants. As I noted in chapter two, the British Government instructed its embassy in Prague to issue ‘on the spot’ visas for Czechs wishing to travel to the UK.429

Successive British Governments continued to seek ways of regulating immigration and in 1971, a new bill was introduced the purpose of which was to introduce a single system of control, which would prevent a resurgence of ‘New Commonwealth’ immigration.430 Since then, successive governments’ have, with a degree of regularity, introduced legislation to curb immigration; there has been the British Nationality Act 1981; The Immigration Acts of 1986 and 1988; The British Nationality (Hong Kong) Act 1990; The Asylum and Immigration Act 1996; The Special Immigration Appeals Commission Act 1997; The Immigration and Asylum Act 1999; The Nationality, Immigration and Asylum Act 2002; The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004; the Immigration, Asylum and Nationality Act 2006; the Borders, Citizenship and Immigration Act 2009, and the Immigration Act 2014.

I have made the point that this thesis is not intended to be a detailed analysis of immigration and asylum law; but it would be remiss of me not to offer a brief example of what emerged as legal and technical barriers to immigration, and the reflections of the judiciary. In the Statement of Changes laid before Parliament on 13th June 2012 pursuant to section 3(2) of the 1971 Act, new financial requirements determine that an applicant who wishes to bring their spouse to the United Kingdom, must provide specified evidence, from the sources listed in paragraph E-ECP.3.2., of-

(a) a specified gross annual income of at least-

(i) £18,600;

(ii) an additional £3,800 for the first child; and

429 Smith, ‘Britain eases the visa rules for Czech refugees.’
430 Cabinet Papers. CAB/128/49/1 CM (71) 1st Conclusions. CONCLUSIONS of a Meeting of the Cabinet held at 10 Downing Street, S.W.1, on Tuesday, 5 January, 1971, at 10.30 a.m. Item 3 Immigration Bill.
(iii) an additional £2,400 for each additional child; alone or in combination with

(b) specified savings of-

(i) £16,000; and

(ii) Additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income from the sources listed in paragraph EEC.3.2.(a)-(d) and the total amount required under paragraph E-EC.3.1.(a).

Although the immigration rules were eventually challenged in the Court of Appeal, the appeal failed.\textsuperscript{431} Lord Justice Aikens, quoting Maurice Kay LJ in Bibi, said all immigration law is inherently discriminatory.\textsuperscript{432} But went on to say,

"The question is whether the fact that the new MIR has the effect of treating different national, ethnic, racial or sexual groups differently has a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. There can be no doubt that the aims of new MIR, viz. to reduce the burden on the state and to encourage integration, are legitimate.\textsuperscript{433}

The Immigration Act 2014 removes rights of appeal and replaces them with a right to seek an administrative review of Home Office decisions. It impacts on anyone who is renting out private accommodation. Originally it was intended to require all landlords to confirm a tenant's right to remain in the UK before agreeing to rent property to them. The Act allows for temporary migrants to be charged for using some NHS facilities. The

\textsuperscript{431} The Queen on the application of (1) MM (Lebanon), (2) AM (Pakistan) & (3) SJ (Pakistan) Respondents - and - The Secretary of State for the Home Department. Neutral Citation Number [2014] EWCA Civ 985 at 155.

\textsuperscript{432} The Queen on the application of (1) MM (Lebanon), (2) AM (Pakistan) & (3) SJ (Pakistan) Respondents - and - The Secretary of State for the Home Department. Neutral Citation Number [2014] EWCA Civ 985 at 155.

\textsuperscript{433} On the application of MM (Lebanon), AM (Pakistan) & SJ (Pakistan) Respondents - and - The Secretary of State for the Home Department Appellant. [2014] EWCA Civ 985 at 155
Government will be able to add a "health surcharge" to the cost of applications for entry clearance or leave to remain. There are provisions to deprive naturalised British citizens of their passport where their conduct was considered to be "seriously prejudicial" to the interests of the UK. This power would essentially allow the Home Office to make some people stateless.

There is a suggestion that in order to understand the rich multiculturalism which exists in the United Kingdom, it is also necessary to accept the seemingly paradoxical situation whereby, for example, 'diversity is celebrated, but the source of diversity that is immigration, is feared;"\(^{434}\) perhaps this is no more obvious than in the chronology of exclusion that has underpinned immigration law in the United Kingdom.

**Theoretical Perspectives**

The second part of this chapter looks more closely at immigration as a source of diversity, and begins by using the allegorical figure of the stranger to explore the deconstructionist’s idea of hospitality. The deconstructionist’s vision of the stranger and of hospitality is important because, although there is scepticism of the way abstract idealism is used to consider these issues, actually addressing the notion of the stranger and hospitality constitutes a real response to reality\(^{435}\) that has so often been demanded of deconstruction. Approaching the stranger and hospitality as a conceptual ideal, allows for the creation of a figure through which philosophical discussions of the ‘Other’ ‘can be made real and contemporaneous.'\(^{436}\)

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\(^{434}\) Joanna Fomina, ‘Immigration Policy Debates and Their Significance for Multiculturalism in Britain’ (2009) 2 Polish Academy of Sciences Institute of Philosophy and Sociology European Studies Unit.


The Stranger, Hospitality and Deconstruction

Therefore it is helpful to begin by noting how Lévinas sees societal reactions to the stranger, l’étranger, the ‘Other’ who disturbs ‘being at home with oneself, le chez soi.’

The relation of singularity to singularity forms ‘a society of me and you. We are just among ourselves. Third parties are excluded. A third man essentially disturbs this intimacy’. So, the stranger who disturbs the intimacy of our community or family can be personified in the figure of the foreign other, to be avoided and excluded. But there is also a need to think of the stranger in a less traditional way. For instance it is helpful to consider the idea of a variable proximity in which the stranger or the ‘foreign other’ could be a neighbour, but might be something more intimate as in Kristeva’s phenomenological perspective, in which she says that the ‘foreigner comes in when the consciousness of my difference arises, and disappears when we acknowledge ourselves as foreigners unamenable to bonds and communities.’

Kristeva’s view is a reminder that for each one of us there comes a time when perhaps due to the transient nature of societal norms, or changing familial settings, we become aware of our own difference; conscious of our own otherness, and we too become the stranger, the Other.

Therefore, although it is better not to assume too literal a geography when thinking of the stranger; the concept of hospitality and the stranger, lends itself to exploring the real life context of immigration and asylum. Whatever its application, the notion of the stranger and foreignness is another way of articulating difference and otherness, and is all a part of our subjective understanding of identity. In other words it is all part of the complex relationship between identity and difference, self and other, which develops in spatialized ways, ‘around tropes of inclusion and exclusion’.

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438 Quoted in John Drabinski The possibility of an ethical Politics From peace to liturgy... Philosophy Social Criticism 2000 26: 49
the essentialist view, which sees identity as a stable, natural, and unchanging phenomena; identities are flexible and are constructed in relation to other identities.

These ideas need to be explored just a little further because when identity is constructed in relation to other identities, it will almost certainly lend itself to excluding those who do not fit into some subjective profile. Nevertheless, and almost contradictorily, the ‘Others’ play a critical role in society. Their presence and their difference, highlights our sameness, and re-enforces the values which we believe are distinctive to ‘us’. The ‘Others’ have the function of posing a challenge to the identity of the community, and in so doing provide the rationale for the community to unite in common cause to protect its identity. Therefore the process of identity-formation also establishes boundaries which need to be controlled and policed in order to maintain the integrity of communities of the likeminded.

**Hospitality**

These boundaries mark the place where the subject of hospitality really begins, and with it the question of whether hospitality should be conditional or unconditional. Lévinas explains that the question of extending any kind of hospitality to the stranger, rests on the premise that ‘I am responsible for the Other’, and whether or not Others reciprocate, is their affair, not mine, because to be human is to be responsible for the Other. Derrida also considers the question of welcoming the stranger, and asks if unconditional hospitality should be extended “to all who might come, without question or without their even having to identify who they are, or whence they came?”

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443 Emanuel Lévinas. Ethique et infini Paris: Le livre de poche 94–5
To extend an unconditional welcome to the stranger implies that it is not important whether she is a foreigner or a neighbour; an immigrant or an invited guest, even a citizen of another country; because unconditional hospitality is located above the juridical, outside the administration of the law, unconnected with right, with debt, or with duty. Unconditional hospitality requires us to give all we have to another, without asking any questions, without imposing any restrictions, or requiring any compensation; in this sense hospitality is absolute.

Unconditional hospitality represents that special moment when we feel bound to the Other; when we have a desire for contact and togetherness; the point before we check each other's credentials, and begin to calculate the pros and cons of entering into a relationship with the Other. 'It constitutes the un-conditionality of a welcome, an act of friendship or giving or forgiving or any generous gesture which goes forth without immediate consideration of how it will come back to the one who performs it.'

It is a moment we have all experienced in life; it trumps regulations and the juridical, and it occupies a unique ethical and moral position in our consciousness. It is a longing for the other, or what Lévinas describes as a metaphysical desire for the absolute other.

In much the same way that we may regard justice as transcending law in a way that can never be reduced to the rules that condition law; so too hospitality transcends any juridical, political, or economic calculation. Of course, the metaphor of hospitality is illustrative of an irresolvable contradiction, which is both "inconceivable and

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446 Westmoreland.
448 Dike, C, Clark and Barnett.
incomprehensible", but which also serves as a point of idealism against which the practice of inclusion and exclusion can be evaluated and judged.  

Exploring the theoretical is a way of understanding the formulation of the real laws of hospitality, because it becomes possible to see how conditionality is introduced, and how heady idealism makes way for state imperatives. But the “irresolvable contradiction” that arises from unconditional hospitality hints also at a darker side, because if hospitality is absolute in that it requires us to give all we have to another, without asking any questions or imposing any restrictions, then the ‘host is welcoming into his home the very thing that can overturn his dominion’.  

This is a situation described by Derrida, in which the host gives up security and authority, extends benevolence to the stranger, and where, eventually, the guest becomes the host. Explaining how the guest becomes the host’s host; Derrida uses the Torah, and the story of Lot. It is a story in which Lot welcomed two angels (who looked like humans) into his home, and in doing so placed the laws of hospitality before his obligation to protect his own family. As Lot prepared a meal for the strangers, the Sodomites, hearing that there were strangers in town, went to Lot’s house and demanded that he offer up his guests to them. Lot refused, and instead of relinquishing his guests to the mob, he offered his two virgin daughters. In this way the authority of the host is diminished, and the host becomes a hostage; the guest becomes the host’s host. 

In order to avoid such a situation, the host will eventually exercise discretion, and will filter the visitors in order to maintain his integrity; he will try to distinguish between a guest

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453 Westmoreland.
and what Derrida calls, a parasite. In principle, distinguishing between the two is straightforward, but if it involves limiting the welcome afforded to one category in preference to another, then that is likely to need rules and laws, and this is the point where hospitality, the welcome offered, has to be submitted to a basic and limiting jurisdiction. Any kind of limiting jurisdiction will, in principle, violate the concept of unconditional hospitality.

Discussing the theory of hospitality may seem to be pointless, particularly as even the authors concede that it gives rise to an insoluble antinomy. Moreover it is easy to dismiss unconditional hospitality as a chimera, a philosophical illusion harboured by the disaffected. Nevertheless, and for all its failings, perhaps this philosophical approach to hospitality should be evaluated against its alternatives, which holds that the stranger always remains part of another world. This is a chilling view in a world where we are neither all alike nor all implacably different, and where otherness is a necessary precondition of being human. Of course, the host, or the state, could create a rational political order that welcomes the stranger, offering freedom and protection; but the reality is that the state, “with its realpolitik, comes from another universe, sealed off from sensibility or protest by ‘beautiful souls’ or tears shed by an ‘unhappy unconsciousness’.”

This is the point where ideology meets reality, and the inevitable questions arise as to whether unconditional hospitality ‘would be able to found a law and politics beyond the familial dwelling, within a society, nation or nation state.’

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458 Jacques Derrida, Adieu to Emmanuel Lévinas, translated by Pascale-Anne Brault and Michael Naas (Stanford University Press) 1999 pp 21-25
It is worth pausing a moment to consider the extent to which this abstract theoretical position is actually relevant, and the extent to which it constitutes a genuine response to reality.\textsuperscript{459} Perhaps a way of answering this rhetorical position is to avoid over analysis of immigration laws – which are, after all – the final product of a process. Rather and in order to avoid being uni-dimensional, to recognise that the question of strangers, hospitality and belonging, also exists in another parallel and contemporaneous reality internal to the functioning of settled immigrant communities.

For example, during the 1990’s a British politician raised issues germane to the identity and the loyalty of new Asian immigrant communities. Norman Tebbit, a former British Cabinet Minister, devised the ‘cricket test’ as an indicator of loyalty. Taking the sport of cricket, a popular sport in which England regularly competes in matches against various countries from the Indian sub-continent; Mr Tebbit asked which side Britain’s Asian population supported during cricket matches between England and Pakistan/India; were they still harking back to where they came from, or where they were? \textsuperscript{460}

Tebbit was clearly referring to the idea of transnational or multiple citizenships which had developed in the United Kingdom, and which did not necessarily endear itself to the largely homogeneous community. Transnational citizenship was seen, and probably still is seen, as challenging the accepted paradigms of identity, and as being associated with dubious loyalties to the state, and to fellow-citizens.\textsuperscript{461} Questions of loyalty, an image of semi-detached commitment both to the state and the wider community and a continuing affinity with the past rather than the present, are the accusations levelled at the notion of transnationalism.

\textsuperscript{459} Politics and Friendship A Discussion with Jacques Derrida. Centre for Modern French Thought, University of Sussex, 1\textsuperscript{st} December 1997 Geoffrey Bennington: \url{http://hydra.humanities.ucl.ac.uk/derrida/pol+fr.html}


\textsuperscript{461} Etienne Balibar, Europe as Borderland., The Alexander von Humbolt Lecture in Human Geography, University of Nijmegen November 1004 (2004).
Triadafilos Triadafilopoulos suggests that within the United Kingdom, questions of identity among Muslim immigrants cannot be separated from broader political issues, and this is the milieu in which questions of identity have to be seen in the broader geopolitical context of British foreign policy. Triadafilopoulos suggests that perhaps the state may no longer be viewed in terms of being the domestically exclusive arena in which to settle claims to identity. Rather the state may now be seen only as part of a broader geopolitical sphere in which issues raised within a domestic context, ‘may also reference debates and discourses that emerge within the broader context of a transnational Muslim public sphere.’ More recently, the threat of terrorism has been mapped onto these new identities; and the religious and cultural differences of immigrant communities are now seen as nurturing the malevolence of home-grown terrorism.

It is true that in the United Kingdom for example, there is a minority that encourages British Muslims to reject liberalism, and reject any participation or engagement with institutionalised British politics. It is also the case that even if immigrants have acquired citizenship of the receiving state, immigrant communities may not always be content with enjoying what the receiving state regards as equal rights. Of course, the real challenge is actually rooted in the issues of whether western liberal democracies have a desire to accommodate, within their secular perspectives and liberal principles, competing principles and sources of authority; conversely it is equally important to ask whether those who look towards enjoying competing principles and sources of authority that guide their lives and communities, are willing to accommodate their beliefs within secular

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464 Adamson, Triadafilopoulos and Zolberg.
society. Although this thesis centres on the subject of European exclusion, it would be remiss not to acknowledge, in passing, that many of the same criticisms that are, properly, levelled against insular European attitudes towards the ‘others’, are also applicable to some elements of closed immigrant societies.

Be that as it may, the question of hospitality and the stranger is about the wider ethical considerations that demonstrate societal values, which, in turn raise the question of whether “the image of a peaceful Europe, open to other cultures and capable of dialogue” is myth or reality. It also poses the issues of whether Europe has made its choice, and is comfortable with the normalness of exclusion.

Whatever the answer might be, the fact is that difference and exclusion points to a disjuncture in society, the antithesis of what Lévinas calls the proximity that entails contact and intimacy; ‘a gulf which no mere opening of a border post, or a door, or a pair of embracing arms, can ever fully overcome’. It is similar to what Smith termed, the invisible background, the reality that inclusion and exclusion bind our societies together; it is part of a cultural preference for the same, ‘and a preference for those who fit the profile, over those who don’t’. The desire to extend hospitality to the stranger is limited, and it partly answers the question of why the lessons of contemporary history appear to have gone unheeded.

The stranger, Muslim or Jew, Roma or refugee may never enjoy the belonging reserved for ‘authentic’ people, and although they may indeed enjoy a transient visceral freedom, history appears to demonstrate that it will not last. Difference, Otherness and Exclusion

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466 Jurgen Habermas and Jacques Derrida. February 15, or what binds Europeans together: A plea for a common foreign policy, beginning in the core of Europe. Constellations Volume 10 Number 3 2003
467 Lévinas
have not been shamed into oblivion, rather they continue to be integral to the body politic, clearly enjoying some legal normality, and fulfilling a wider societal function. For example, a report by the House of Commons Home Affairs Committee into anti-Semitism in the United Kingdom, ordered by the House of Commons to be printed on the 13th October 2016,\(^470\) says that between the years 2013-14 and 2014-15 police recorded anti-Semitic crime increased by 97% compared with 26% across all hate crime categories. The report looked at what it calls Campus ant-Semitism, particularly at Oxford University Labour Club; it considered the current situation in the National Union of Students, and the controversial role of the national president Malia Bouattia. The Home Affairs Committee also criticised the British Labour Party and expressed some concern regarding the number of Labour M.P.’s making anti-Semitic references.

The plight of Roma was the subject of a joint paper by Nils Muižnieks and Michael George, the Commissioner and the Director of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) on the 29th June 2016.\(^471\) In ‘Open Democracy’ the authors called on states to break the cycle of discrimination against Roma and start treating them as equal European citizens by facilitating Roma access to housing, suggesting that lack of proper housing only reinforces Roma marginalisation. The authors claim that recently in Milan and Rome, some 600 hundred Roma, half of whom were children, were evicted, and either moved to remote, substandard temporary accommodation or were left homeless. They say that in Sweden about 200 Roma were evicted in the Sorgenfri district of Malmö last November, with many of these becoming homeless as a result. The report claims that in the Bulgarian city of Varna, more than 400 Roma people were left homeless after their forced eviction and the demolition of their homes, in August 2015. In France, the report claims more than 100 forced evictions in 2015, affecting thousands of people, many of whom were not provided with alternative accommodation. It is also claimed that in the Hungarian city of Miskolc, around 450


\(^{471}\) https://www.opendemocracy.net/can-europe-make-it/nils-mui-nieks-michael-georg/roma-evictions-europes-silent-scandal
Roma have been evicted and not provided alternative housing solutions, and another 450 are threatened with the same fate.

In October 2016, Nils Muižnieks, the Council of Europe's Commissioner for human rights published a further report in which he says “Europeans ignore the evidence of rising anti-Semitic hate speech, violence and Holocaust denial at their peril. The hate that begins with Jews never ends with Jews. Antisemitism is a threat to our European continent built on freedom and the rule of law.”

In their defence, states claim an anonymous foundation to law; or, and in order to justify exclusionary practices, claim a foundation ‘grounded in a generic communal identity’.

Therefore this is a useful point to remember that the post war antidote to arbitrary exclusion, and to mitigating the culpability of a conscience stricken Europe in respect of the Jews and the Roma, was the emergence of the practice of human rights, reputed to have been created in order to challenge unacceptable state behaviour toward the individual. One might have supposed that human rights, with all of their contemporary expectations, would have unleashed a powerful regime of rights on a world unable to defend itself against the challenges to the darker side of hospitality, the reception of the stranger, Difference, Otherness and Exclusion, and in the context of these contemporary reports this is an opportune moment to consider the theoretical notion of human rights, and reflect on their influence in a society where Difference, Otherness and Exclusion appears to continue as the norm.

A Human Rights Conundrum

The new world order that emerged at the end of the Second World War, sought to redeem a position of moral integrity, and located its warrant in an account of Difference, Otherness and Exclusion. The expression of this warrant was to be an integral part in

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the construction of new post war liberal societies, and was to be known as human rights. Theoretically, human rights embraced an ethical, legal and intellectual framework through which post-war society could establish a mechanism to protect individuals from the excesses of the state.

For a world emerging from one of its darker periods these were heady ideals. However, Bauman poses an interesting question. He wonders whether, in circumstances where human rights replace the idea of a good society and social justice as a “last-resort attempt to find a guiding principle of human coexistence”; do human rights create an environment that is receptive to the production of ideas of difference. In other words is it possible that in some situations human rights have the contrary effect of creating perceptions of difference where previously no perception of difference existed?

It is an interesting thought which challenges the assumption that history represents an account of society moving forwards towards the aim of human liberation. But questioning the role and importance of human rights is not popular in a contemporary world enamoured by the idea of rights, particularly as they have been elevated to an unassailable position in the juridical hierarchy.

**Defining rights**

However the real problem is trying to define what is actually meant by human rights. The popular post enlightenment view is based on the abstract characterization of human rights as moral rights that we have “simply by virtue of being human.” This distinguishes them from rights that are the result of some accomplishment on behalf of the right holder, or from some rights that arise because of institutions they are part of.

Critics claim that the Enlightenment’s focus on free will, autonomy, and reason, disconnected the ideas of rights from its rich ethical base, which drew inspiration from the commandment to care for one’s neighbour, for the widow and for the orphan. Lévinas was anxious to distinguish human rights from natural rights, despite the fact that the early modern rights tradition used the adjective ‘natural’ ‘to validate the a priori character of human rights.’

However there is a view which suggests that without others to guarantee rights, all rights are meaningless. Arendt and Habermas both hint at a need to belong to a particular legal community in order to have rights that are sustainable. Arendt says that the ‘World found nothing sacred in the abstract nakedness of being human,’ recalling Edmund Burke’s premonition that the abstract nakedness of ‘being nothing but human’, was humanity’s greatest danger. She went on to claim that the concept of human rights, based upon the assumed existence of a human being as such, broke down when those who claimed to believe in the concept of human rights, ‘were confronted, for the first time, with people who had lost all other qualities, other than the fact they were still human’.

Consequently there has emerged a view of rights that holds them to be inalienable, and to be enjoyed by individuals by virtue of their being human; whereas the opposing view sees rights as a pragmatic consequence arising from membership of a state, and from the protection and security offered by the state to its citizens. The issue arising from these positions pose the question that if the state is the body that implements human rights law, and, if the state protects the rights of its citizens in its jurisdiction according to

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478 Habermas, ‘Remarks on Legitimation through Human Rights.’  
479 Arendt, The Origins of Totalitarianism. 299  
481 Arendt, The Origins of Totalitarianism. 299
the laws it has formulated; then where is the alternative body that protects those rights which have arisen simply from the status of being human.\footnote{Engin Isin, ‘Two Regimes of Rights?’ in Guillaume Xavier and Huysmans, Jeff (eds), In Citizenship and Security: The Constitution of Political Being. (London: Routledge 2013).}

Addressing this issue was difficult for the new world order, particularly as it sought to redeem some moral integrity and wanted to drape the abstract nakedness of being human with a veil of humanity. What eventually became clear was that even if it could be argued that human beings were endowed with ‘human rights’, but with nothing more, for example no institutionally entrenched mechanisms to realise these rights; then the inalienable rights of man, would inevitably prove to be unenforceable. \footnote{Arendt, The Origins of Totalitarianism.}

The issue of the enforceability of human rights significantly undermines their validity because whilst the ethical and moral aims of human rights may not be in dispute, being unable to apply them neutralises their value. This is what James Hathaway refers to as, the realpolitik of international human rights law, where no accredited mechanism exists whereby states may presently be forced to accept universally binding standards. \footnote{James C Hathaway, The Rights of Refugees Under International Law. (Cambridge University Press 2005).}

These are serious obstacles to the fulfilment of human rights as a deliverable ideal that could mitigate the excesses of Difference, Otherness and Exclusion. Therefore it seems that whereas the project of a good society delivering social justice\footnote{Zygmunt Bauman. The Great War of Recognition Theory Culture Society 2001 18: 137} has probably failed; it is equally doubtful whether human rights have filled the resulting lacuna by providing a set of guiding principle to enhance human coexistence. \footnote{Zygmunt Bauman. The Great War of Recognition Theory Culture Society 2001 18: 137}

Nevertheless Bauman’s proposition is compelling because it provides the opportunity to briefly scrutinize what might be the nature of a good society, how human rights fits into this idea, how it might reconcile its responsibility for the Other; and how it discharges its
responsibilities towards all its neighbours and all the Others. It is an opportunity to consider the realities of the moral and ethical obligation to respect the singular and unique existence of the Other; but it also highlights the dichotomy that was familiar to Paluatus and Hobbes, who had reached their own views on man’s relationship with his neighbour: “lupus est homo homini”.

The issue of rights are fundamental to the nature of society, but only within a cultural context. Colin Harvey puts it succinctly when he talks of the old dilemmas of human rights, in which each person may be born equal in dignity and rights, but the reality is complicated insofar and such rights may be context dependent.

Moreover those things which are often claimed to be the permanent truths of society, are actually shown by history to be no more than transient notions; and even then not all societies embrace ethics or morality in the same way, and perhaps it is imperious to believe they should.

For instance, from a cultural perspective, one society may elevate a concept of human rights to a special place, and uphold the status of this place by creating a corpus of law to emphasise its uniqueness within that society. In a different society, the ethics and morality of the same human rights principles may be viewed entirely differently; but neither society is wrong. It simply points to an incommensurability of values, or in other words a demonstration of their inherent pluralism. Accepting the principle that ethics and values have a pluralistic nature, helps in understanding the evolving problems of human rights since the Universal Declaration of Human Rights by the United Nations in December 1948. Although the morality and ethical content of the declaration sounds

488 ‘man is a wolf to his fellow man’
appealing, Isaiah Berlin questioned whether there could be any universal set of principles by which all should live. He believed that all attempts to discover a unique solution to all the moral and ethical questions that faced mankind were based on a profound mistake about the nature of human values.  

When critics dismiss the notion that the Universal Declaration, or parts thereof, is not universally applicable, they embark on a journey of superficiality and misunderstanding. Human values are plural, in other words many human values existed before the Universal Declaration; they were and are all perfectly sound and genuine, but many of these values cannot be re-interpreted in a way that shows they are all expressions of one super universal-value. Moral values and norms vary between societies and the empirical evidence of diversity indicates that there can be no universally valid moral norm, because norms derive their validity from acceptance within particular cultures or societies. Thus, there is a question as to whether values derived from particular cultures can ever be universal or transcultural; rather it is more than likely they become conceptually incoherent. Therefore arguably, International Human Rights fail to capture any transcultural legitimacy because they cannot be relocated into cultures different from those of their origin.

Berlin believed that these different values are, at times, incommensurable. There is a strong temptation, according to Raz, to think of incommensurability as an imperfection, an incompleteness, but perhaps it should be seen as a positive recognition of cultural pluralism.

In any event, Berlin’s view is controversial; but, by looking at the way in which western liberal democracies instituted the idea of universal human rights, and how they constructed a general idea of man through which the characteristics of universality and set of fundamental values could be promoted, vindicates Berlin’s caution. Paradoxically, establishing a universal and archetypal representation of man, led, almost inevitably to

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490 Henry Hardy, Isaiah Berlin’s Key Idea. Philosophers’ Magazine 11 (Summer 2000), pp. 15–16 (as ‘Berlin’s Big Idea’), and in Romulus (the magazine of Wolfson College, Oxford) NS 4 No 1 (Trinity 2000), pp. 4–5

the fundamental principles of human rights being based on discrimination and exclusion.492

This is not to say that human rights are morally impoverished; but almost inevitably what occurred was a wide gap between the promises of human rights on the one hand, and the misfortune of their implementation on the other. This may have occurred because of the uncertain base on which human rights were constructed; but, be that as it may, human rights stand accused of ‘creating the subject, but of ensuring subjection; they are said to function within oppression and bloodshed while promising utopia’; 493 and ultimately, human rights are said to repackage and reaffirm the ethics of exclusion and superiority.494

In more recent times, human rights have succumbed to a contemporary determination which aims to achieve mediocrity in all things. Human rights have yielded to a creeping banality, and the vernacular of human rights is now used to provide the justification for any current and fashionable interest group; from those pursuing the ‘pension rights of Mr Godwin, to the ‘human’ rights of powerful companies’. 495

It is difficult to be convinced, intellectually, that human rights are a guiding principle of human coexistence”; on the other hand it is possible to believe that human rights create an environment ripe for emphasising difference496 because they created an idea of man based on a singular conception of humanity. This conception almost inevitably amounted to an ‘imaginary identity of universal wholeness, designed simply to invoke a sense of utopian harmony’. 497

497 Douzinas, The End of Human Rights: Critical Legal Thought at the Turn of the Century.
In reality, and despite the intellectual argument, laws have emerged which lay claim to protect human rights, but they tend to be guarded so as not to disturb the equilibrium between state power and the individual. Human rights, particularly in the West, have emerged as a common currency, and are to be found in many judicial systems. Even so, there remains something of a dichotomy between the universality vs. particularity debate, and I want to illustrate this briefly by reference to the English Judiciary.

For example, Lord Hoffmann, a British Lord of Appeal in Ordinary, addresses the dilemma of human rights by suggesting that human rights are universal at the level of abstraction, but are national at the level of application. For instance, in Brown v Stott, Lord Bingham, takes a pragmatic approach to the jurisdictional protection of rights insofar as he suggests that rights protect individual persons only insofar as the latter belongs to a particular legal community. He explains that parties to a treaty,

"...include the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree."\(^{500}\)

The European Convention on Human Rights is an example, says Lord Bingham, where,

"the express terms of the Convention, simply define the rights and freedoms which the contracting parties have undertaken to secure."\(^{501}\)

His view seems to substantiate Lord Hoffmann’s earlier position that in the abstract, in other words, at a level of theory, human rights can be seen to have a universal significance; but at the point where they have to be applied by a domestic jurisdiction universal human rights take on a more national or parochial character.\(^{502}\) The connection between the concept of human rights and the protection of immigrants and refugees is

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502 Lord Hoffmann.
the claim that the whole notion of refugee protection has its origins in the general principles of human rights.\footnote{\textsuperscript{503} Erika Feller, ‘International Refugee Protection 50 Years on: The Protection Challenges of the Past, Present and Future’ (2001) 24 Intl Rev. Red Cross 582.}


By way of illustration, a person whose claim to enter a country is constructed in terms of a causational link between the violation of her human rights and the urgency of her need to seek admittance to a country where she may be safe and protected; is, in human rights terms, a more privileged applicant and, as a potential refugee, more human than someone whose claim is seen as being based entirely on economic benefit.\footnote{\textsuperscript{507} Costas Douzinas, ‘The Many Faces of Humanitarianism’ (2007) 2 Parrhesia 1.} Lord Steyn in Islam\footnote{\textsuperscript{508} ISLAM (A.P.) (APPELLANT) v. SECRETARY OF STATE FOR THE HOME DEPARTMENT (RESPONDENT) and REGINA v. IMMIGRATION APPEAL TRIBUNAL AND ANOTHER (RESPONDENTS) EX PARTE SHAH (A.P.) (CONJOINED APPEALS) [1999] UKHL 20; [1999] Imm AR 283; [1999] 2 AC 629} makes the point that the preamble to the Refugee Convention expressly demonstrates that it is aimed at securing fundamental rights and freedoms, and Lord Hoffmann notes that the Convention is concerned with those acts of discrimination which are inconsistent with principles of human rights; a view that is reflected in the decision of
the United States Board of Immigration Appeals in *Acosta*. Kirby J. in *A v Minister for Immigration & Ethnic Affairs* took the view that the definition of a refugee in terms of the Convention, is to be understood as written against the background of international human rights law. It sounds perfectly straightforward, and it appears to give credence to the debate that human rights are, to use Ronald Dworkin’s metaphor, trumps over state interests.

It is true that sometimes human rights are interpreted generously, but when the moral and ethical rights that they promote are transformed into law, they become more of a technical problem concerned with the meaning of rules. The next stage is to interpret these rules, because, such is the nature of the law that there can be no contradictory definitions of meaning. Consequently, although human rights may represent a general moral claim, this moral claim can potentially be in conflict with their legal status. In reality, and despite legally binding conventions, the protection of human rights relies on political good will, without which, and despite assurances to the contrary, the protection of human rights, through law, cannot take place.

But human rights, their meaning and legal interpretations can be redundant if society comes to see the stranger not in terms of the abstract, but as a real person – in other words such a reification consists of endowing the abstract other with agency, which has the effect of immediately divesting the Other of their Otherness. Although the stranger then becomes real, and because of the new relationship, their difference can cease to be the threat it was once thought to be; nevertheless the stranger is still an enigma, presenting a challenge to how we see ourselves.

509 United states Board of Immigration Appeals, re Acosta (1985) 191 & N.211
512 Douzinas, *What Are Human Rights?*
514 James Mensch. Professor of the Faculty of Humanities, Charles University, Prague. Lecture on Levinas’ Totality and Infinity. https://www.academia.edu/1738226/Lectures_on_Levinas_Totality_and_Infinity
Conclusions

Against the controversial background of immigration and asylum law, and the societal divisions such law highlights, I also looked at the idealistic concept of hospitality and the deconstructionists' perspectives of how the stranger should be welcomed. I have suggested that Difference, Otherness and Exclusion is a societal norm, and although this is not a situation unique to Europe, it is Europe that has promoted the notion of its legal and cultural superiority, and has embarked on an evangelical mission to convert other cultures to a European standard.

The irony appertaining to the issues of immigrants and refugees wishing to come and settle in Europe, is that hidden behind the façade of economic and cultural advantage, exclusion, based on difference, continues unabated. Whilst some scholars would jealously protect the reputation of Europe and question whether difference continues unabated; it is salutary to note that only by looking behind obvious, and interrogating claims of equalities and human rights as contained in grand documents and conventions of intent that some semblance of the reality emerges. I suggest that this reality is still located in an unchanged ideological approach to those who are different, and perhaps this is because Europe and Europeans feel that they are losing their identity and need reconnect with their historical community and own sense of distinctiveness. Crossing the Rubicon of human condition to engage with strangers is not an option, because we are the prisoners of our prejudices, and entering into a relationship with the 'Other' ameliorates their difference. More importantly, it also means that the belief in our cultural superiority, nurtured over generations, becomes redundant. Society is then deprived of its collective enemy, and confused as to the identity of those who should occupy the symbolic space of exclusion. But there is also need to remember that insofar as we largely see societal divisions as rejecting the lesser other; the society of the others may also draw strength from their rejection insofar as it provides an excuse to maintain the
status quo, and encourages sections of the community to preach of the need to maintain an unchanging and insular approach to the world.

In the space of a hundred years the United Kingdom has identified the Jews, the Irish, Africans, and Asians to be the principle recipients of exclusionary practice. In the 21st century the cycle has moved on, and now the identity of the excluded has taken on what is perhaps a more nebulous characteristic, identifying Islam, generally, as the new common enemy.

In the next chapter I want to explore how this may have come about, and consider whether the European Union has somehow contributed to what is a wider European disaffection with Islam.
Chapter Six.

Cycles of exclusion the European Union, Immigration and Asylum

Introduction

‘Immigrants are increasingly seen as a potential security threat to the state and to society, and are often associated with criminal acts and terrorist activities.’

Chapter five began by looking at the issue of immigration in the United Kingdom arising from International developments at the turn of the 20th century, and went on to explore a 30 year period following the end of the Second World War, during which controls and restrictions were introduced into what had otherwise been a lightly regulated area. The 1970’s marked the entry of the United Kingdom into what was then called the European Common Market, and although the United Kingdom continued to introduce legislation restricting immigration after this period; entry into the common market placed the immigration question in a new contextual setting. Chapter five went on to consider the concept of the stranger and hospitality, and sought to rationalise these philosophical concepts with the reality of immigration and asylum control. Finally the chapter considered the issue of human rights and posed the question of whether 'rights' were a mitigating influence on the excesses of exclusion.

This chapter will bring together the different threads of Europe’s history of exclusion, and will explore the proposition that historical factors remain the motivating factor in contemporary attitudes to immigration and asylum. The chapter will explore conflicting attitudes towards post war immigration and asylum issues; it will look, in passing, at the struggle between the desire of Member States to block unwanted immigration and asylum; and the determination of Brussels Eurocrats to take, what appears to be a pro-

immigrant line. The chapter will also review the early attempts to incorporate immigration and asylum into the legal structure of the union. In a scenario reminiscent of the 1930’s and the reluctance of European states to accept refugees, the chapter explores how the issue of those seeking asylum in the European Union is again the focus of antagonism, only this time the argument is centred on the proposition that immigration may place Europe in grave danger and threaten its continued stability. Finally the chapter raises the question of who are the new excluded, who does not belong and who has been nominated to occupy the symbolic space of exclusion. But first the chapter opens by contextually defining some of the legal and political interpretations of immigration and asylum, before going on to locate them within the milieu of the European Union’s structural framework.

**Defining the concept of asylum and refugee protection**

Following the conclusion of the Second World War, and perhaps as an act of contrition in response to the Holocaust, the international community again revisited the issue of refugees; and drew from some of the principles first mooted by the League of Nations.

The act of seeking asylum, a precursor to seeking refugee status, usually involves leaving, or being outside a country of nationality, owing to a well-founded fear of persecution. Persons seeking asylum from persecution and who wish to acquire refugee status, enjoy the legal protection of an international refugee regime. This regime consists of a collection of conventions and treaties, implemented by intergovernmental and non-governmental agencies, whose purpose is to protect and support those displaced from their country by persecution. At the heart of this regime is the 1951 Convention Relating to the Status of Refugees, and its 1967 Protocol. The Convention and its Protocol are grounded in Article

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517 Luedtke.
519 Convention relating to the Status of Refugees. Chapter I GENERAL PROVISIONS Article 1 - Definition of the term “refugee”
14 of the Universal Declaration of Human Rights 1948, which recognised the right of persons to seek asylum from persecution. The cornerstone of international refugee protection rests in the principle of non-refoulement (Article 33) and specifically Article 33(1)

“No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”

Even if those seeking asylum have entered a state unlawfully, it does not exclude them from the scope of the application of the non-refoulement principle. Such is the significance of this principle that scholars continue to debate whether it has become a peremptory norm of international law – jus cogens.

Whilst the definition of a refugee per se, is now reasonably understood, in the early years of the Convention there were a number of caveats. Until the 1960’s, the Convention had a 'temporal limit'; that is to say its original terms of reference were restricted to events occurring in Europe before January 1st 1951. The travaux préparatoires, the record of the negotiations which were held to determine the terms of the Convention; records that a delegate rejected the idea of extending protection to non-Europeans, because they did not need legal protection. Subsequently, because of the Convention’s geographic and temporal limits, refugees from Korea, India, China and the Middle East, were excluded from the framework of the Convention. It was not until the coming into force of the 1965 Protocol that the convention began to assume an international dimension.

524 See article 53 Vienna Convention on the law of treaties1969. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.
Critique

Critics have claimed that the Refugee Convention is a compromise between the ‘sovereign prerogative of states to control immigration, and the reality of coerced movements of persons at risk’. Critics have also claimed that the purpose of the Convention has been to ‘govern disruptions of regulated international migration in accordance with the interests of states’. Moreover, the actual protection of refugees was only incidental to these broader hidden aims, as was the derived worthiness which became associated with the Convention, its protection of refugees, and its moves to address the vulnerability of those seeking asylum.

More importantly, the influence of international law in relation to the act of asylum seeking has come to be seen by many Western European states as being too liberal. Excessive liberalism has been blamed for providing economic migrants with an unfair opportunity to claim that they are asylum seekers, enabling them to ‘bypass the immigration restrictions that would otherwise bar their entry’.

It may be that this cynicism is rooted in the politics of the Cold war, particularly because in the early post war years the United States saw the protection of refugees as fulfilling an obligation towards what President Truman described as, ‘innocent and unhappy victims of communist oppression’. Consequently asylum issues became caught up in the Cold War between the ideologies of the East, as personified by the Soviet Bloc, and the ideologies of the West encapsulated by the United States and Western Europe. Beyond doubt, Western European States reserved a special and unconditional welcome for those who succeeded in leaving the communist east, or for those who arrived in

527 Hathaway, ‘A Reconsideration of the Underlying Premise of Refugee Law’.
Europe having been affected by the ‘proxy wars sponsored and supported by the great powers of the East and West.’ From a Western perspective refugees from the East, represented all the alleged violations of political and civil rights taking place in the Soviet bloc. Escape to the West served to emphasise the powerful ideological superiority of Western societies, and whilst Cold War politics still ruled, someone who wished to leave the Soviet East was clearly a refugee, with the right political mentality, and a certain familiarity with western societal norms. It was indicative of a bond which saw immigration from the East as the return of one group of Europeans to another, and which demonstrated to the world the superiority of western culture and politics. Hungarians, Czechs and Poles who managed to leave their countries and head to the west, received wide international media coverage in line with the logic of the cold war; in this way the real status and objective of many leaving the Soviet Bloc was conveniently avoided. Immigrants from the East and communism were welcomed by the granting of permanent residents rights, or citizenship. ‘Otherwise, the consensus held that national borders should limit the flow of populations and serve as vessels within which, national cultures were contained and cultivated’.  

But there was another refugee issue that occurred after the Second World War, and at a time when the Refugee Convention was being compiled. This issue involved the forcible repatriation of nearly 15 million ‘ethnic’ Germans to the German Federal Republic and the German Democratic Republic. The inflow of ethnic-Germans to the new German Federal Republic accounted for 16 to 20 per cent of the West German population; and in the German Democratic Republic the figure was higher; amounting to approximately 25 per cent of the population. Their status was ambiguous; the Federal Republic described them as Vertriebene, ‘expelled persons’, or Heimatvertriebene, ‘persons

530 Keely.  
531 Christina Boswell, ‘European Values and the Asylum Crisis’ (2000) 76 International Affairs 537.  
532 Wimmer and Glick Schiller  
expelled from home’, indicating an automatic ethnic and cultural belonging to the wider German national community. In reality their ethnic and cultural belonging may have been tenuous, but eventually the term *Heimatvertriebene*, was used in order to demonstrate the difference between their status and that of the *Gastarbeiter*, who became known as *Auslander*, foreigners, indicating their cultural non-belonging.534

By the 1970’s, the societal impact of the forced repatriation of German nationals remained an issue, and the term “*Auslander*” or foreigners, became more frequently used to describe refugees and immigrants. This may have been partly to indicate their cultural differences, but more importantly, it signalled an increasing disapproval of their presence.535

The fact was that Western states never intended to provide non-Europeans, especially those from non-communist regimes, with the privileges granted to communist defectors from Soviet Europe.536 Not only was Western Europe shocked at the arrival of non-European refugees, there was a growing concern that it was impossible to get rid of them.537 Their arrival consequently caused confusion and anxiety, and in order to address these developments, states began to set up the first signs of a recognisable asylum system, in order to decide who was entitled to refugee status and all the rights that came with it.538 It is claimed that non-European refugees were marginalised, and well into the 1980s, refugees from the African Continent were said never to have received the same publicity as refugees from Eastern Europe.539 Once a flow of non-European refugees

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535 Bauder.
536 Glynn, ‘Asylum-Seeking in Europe in the 1930s and 2010s Compared’.
537 Arendt, The Origins of Totalitarianism. 281
538 Glynn, ‘Asylum-Seeking in Europe in the 1930s and 2010s Compared’.
began to arrive, receiving nations often labelled them economic migrants,\textsuperscript{540} casting doubt on whether they deserved the tag of refugees.\textsuperscript{541}

On one occasion Poul Hartling, the UN High Commissioner for Refugees, described these new arrivals as “jet-age refugees” because of their method of arrival. Societal attitudes towards the reception of immigrants and refugees began to change from the avuncular to one of social and political hostility, and Immigration and asylum became portrayed as presenting a challenge to the protection of national identity, of welfare provisions and of security.\textsuperscript{542}

The change in attitude towards the reception of those non-Europeans seeking asylum was also reflected in issues relating to the broad question of immigration, and to the developing phenomena of new immigrant communities. But in order to understand how new immigrant communities came to imply a challenge to national identity and security; it is necessary to understand how, in the post war period, Europe was eager to welcome potential workers, always providing that they left when their work of reconstruction was completed. The question of what was supposed to happen when the temporary workers completed their work was clear in the minds of European Governments, but it was also clear in the minds of the immigrant workers too, the problem was that both envisaged a different scenario. Consequently, I want to explore what are said to be the beginnings of post war immigration, and what may therefore constitute the genesis of post war immigration law..

\textsuperscript{541} Glynn, ‘Asylum-Seeking in Europe in the 1930s and 2010s Compared’.
\textsuperscript{542} Jef Huysmans \textit{The European Union and the Securitization of Migration}
A view of immigration

*Early Immigration in the Post War period*

Arendt, advises prudence in trying to define historical trends, and notes that some events which have laid claim to being keys to history, often prove to be little more than an attempt to escape historical and contemporary responsibilities.\textsuperscript{543} Such caution is also applicable when exploring the development of early immigration law. Therefore and bearing Arendt’s counsel in mind, a useful starting point is the generally accepted proposition that labour shortages were endemic in the immediate post war period, and, given the pressing need for European reconstruction, these shortages were satisfied by recruiting foreign labour.

Between 1946 and 1951 the United Kingdom, France, Germany and the Netherlands\textsuperscript{544} took the decision to recruit labour from other European countries and beyond. As previously mentioned, Germany responded to its expanding economy by creating the idea of *Gastarbeiter*, or guest worker; foreign workers who would live and work in Germany for a temporary period, before returning to their countries of origin. Germany initially experimented by recruiting labour from southern Europe, reaching agreements with Greece and Spain, based on the rationale that migrant workers from Southern Europe could be more readily assimilated into the labour market.\textsuperscript{545} Although the vanguard of *Gastarbeiter* began arriving in Germany in 1955, there continued to be a shortage of labour, and the scheme was subsequently extended to Turkey in 1961, Morocco in 1963, and Tunisia in 1965.

Central to the process of recruiting foreign labour, was an assumption of the temporary nature of such arrangements. Germany envisaged a rolling programme of workers whereby, after a limited period, a *Gastarbeiter* would return to his or her country of origin, and be replaced by other temporary workers. But by 1973 there were about 14 million


guest workers in Germany, and it became clear that a majority of them intended to remain on a permanent basis. Although the *Gastarbeiter* programs ended in 1973/4, those foreign workers who had decided to remain in Germany permanently, encouraged their families to join them. This process of family reunion, and the birth of a second and third generation,\(^{546}\) saw the numbers of settled *Gastarbeiter* continuing to rise.

A parallel situation developed in France. During 1945, France modified its immigration law with an Ordinance of November 1945,\(^ {547}\) which was designed to facilitate the recruitment of foreign labour. By the 1960’s, ‘legal and illegal’ entry into France had spiralled out of control, and in 1968 an estimated 82 percent of foreign workers had entered illegally.\(^ {548}\) France, in common with other Western European States, had adopted a relatively liberal approach to the wider question of immigration and, perhaps aware of issues germane to its former colonial past, had developed a tolerant approach to ‘illegality’ as a mode of migration.\(^ {549}\)

But, as with Germany and the United Kingdom, there was a change of policy in 1972. A document which has come to be known as the *Marcellin-Fontanet* circular, issued jointly by the French Minister for Employment and the Home Minister, began to take a harder line on the issues of those who came to France as temporary workers and chose to remain.\(^ {550}\) The *Marcellin-Fontanet* decision effectively stopped the retrospective legalising of the status of irregular immigrants, and Margo DeLay suggests that it singled out black African immigrants for special restrictions. In 1974 further measures were

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\(^{547}\) Ordonnance n°45-2658 du 2 novembre 1945 RELATIVE A L'ENTREE ET AU SEJOUR DES ETRANGERS EN FRANCE ET PORTANT CREATION DE L'OFFICE NATIONAL D'IMMIGRATION.


\(^{550}\) In 1972, the Marcellin–Fontanet circular made the acquisition of a visa dependent on proof of permanent employment and ‘decent housing’. Thousands of people who had been in the country legally for many years could not furnish the proper documents and were stripped of their legal right to reside in the country. In 1974, the circular was followed up by the suspension of all labour and family migration to the country.
introduced to curtail the entry of migrant workers, and on July 5th of the same year, France closed its borders to immigrants.\textsuperscript{551} The irrevocable breakdown in the relationship between European states who needed labour, and nationals of third world countries who wanted to work, is said to be as a consequence of the oil crisis of the 1970’s; a situation that soured mutuality and opened the way for tension and misunderstanding.

In many ways this is presented as a clean cut narrative promoting an acceptable paradigm of how early post war immigration to Europe evolved, and how it became a victim of forces beyond European control. In this scenario, immigration restrictions were a sad but inevitable consequence of the changing economic fortunes of Europe, brought about by external forces.

This is a version which is not without its truths, but it may avoid the wider authenticity of the failed rapprochement between societal preferences for those who fit a cultural and ethnic profile, over those who don’t.\textsuperscript{552} Like many subjects, facts and truths are open to interpretation, and there is no clear cut narrative which definitively explains what happened during this period.

For example, and perhaps a little irritatingly for scholars who seek to establish a definitive account, rather than concede to the twists, turns, and contradictions of social reality; the 1970’s were full of paradoxical situations vis a vis immigration. Bearing in mind the decision to curb primary non-European immigration, a relatively enlightened approach was also being adopted towards the issues of family reunification.

\textsuperscript{551} DeLay.
\textsuperscript{552} Goldberg, ‘Racial Europeanization’.
In France between 1975 and 1977, the numbers of immigrants entering the country through the process of family reunification, doubled that of the entry of immigrant workers.\textsuperscript{553} France took a positive attitude towards family reunification; and in April 1976 a \textit{Décret}\textsuperscript{554} granted immigrants the right to reunification with their immediate family members (subject to certain conditions). In 1977 an attempt to revise the \textit{Décret} in order to stop the reunification of family members whose purpose was only to seek employment in France; was overturned by the \textit{Conseil d’Etat}. Broad principles relating to the reunification of the families of migrant workers, with workers who had settled in countries of economic choice, developed an international dimension in 1973.\textsuperscript{555} A preliminary report entitled ‘\textit{Migrant Workers}’ was published by the International Labour Organisation. It proposed that the reunification of migrant workers with their families should be recognised as essential for the migrants’ well-being and their social adaptation to the receiving country.\textsuperscript{556}

The issues of immigrant workers, their families, and their future role in society were touched upon in 1974 in a European Communities information memo,\textsuperscript{557} and in The Commission of the European Communities Action Programme in favour of Migrant Workers and their Families.\textsuperscript{558} The Commission noted that after more than a decade of benefitting from immigrant labour, the Community found itself with a large unassimilated group of foreign workers. The report said that foreign workers shared almost all the obligations of the society in which they lived and worked but, more often than not, had a less than equal share in its benefits and rights.

\textsuperscript{554} Décret n°76-383 du 29 avril 1976 RELATIF AUX CONDITIONS D’ENTREE ET DE SEJOUR EN FRANCE DES MEMBRES DES FAMILLES DES ETRANGERS AUTORISES A RESIDER EN FRANCE.
\textsuperscript{555} 59th Session International Labour Conference, ‘Report VII(I), Migrant Workers’ (1973).
\textsuperscript{556} International Labour Conference.
\textsuperscript{558} Council of the European Communities, ‘Action Programme in Favour of Migrant Workers and Their Families COM(74) 2250’ (1974).
Family reunification was thought of as a socially just and practical solution that would enable the integration of long-term labour immigrants. In 1976, the European Convention on the Legal Status of Migrant Workers also addressed the question of family reunification. The terms of the Convention were limited, and applied only to migrants whose country of nationality were state signatories to the Convention. In other words, Turkish migrants were safeguarded by the terms of the Convention by virtue of the fact that Turkey was a signatory; immigrants originating from the Indian sub-continent were not covered by the terms of the convention because their countries of origin were not state signatories.

But in 1975 the European Commission of Human Rights held that foreigners may be expected to establish their family life in their home country, and rejected the claim that the denial of family reunification in the host country amounted to an interference with Article 8 of the European Convention on Human Rights. In X and Y vs The United Kingdom, the Human Rights Commission found that states were not obliged to grant a foreign citizen entry to its territory for the purposes of establishing new family relationships. Perhaps this decision and perceptions that immigration was a growing and uncontrollable phenomena, added fuel to a long term public disaffection with issues of immigration.

**The Immigration debate**

The immigration debate that arose from all these circumstances began to generate a lot of bitterness, and continues to be at the forefront of political vitriol throughout Europe. The persona of the immigrant and the immigration debate are largely inseparable

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560 The Council of Europe.
561 From 1954 to the entry into force of Protocol 11 in 1998 individuals did not have direct access to the European Court of Human Rights; individuals had to apply to the Commission, who, if they found the case to be well-founded, would, on behalf of the individual take the case to the EcHR.
563 X and Y v’s United Kingdom App no.7229 /75, D R 12 p. 32 (33-34). 15 December 1977
because much of the immigration into Europe is said to be unwanted in the sense that ‘receiving countries would prefer to be without it’.\(^{564}\) This unwanted immigration includes several categories of *arrivée* who enter Europe and, regardless of the eventual determination of their status, cannot be returned to their countries of origin; it involves those who, despite the growing reluctance of European states, are admitted for family reasons.

Realistically, immigration is not and never has been as simple as political adversaries would like to make out. This is largely because in the immediate post war years, and more recently, there has been the need to recruit skilled immigrants, prompting former French President Nicolas Sarkozy to describe European immigration as consisting of the ‘suffered and the chosen’.\(^{565}\) It is a cynical comment, but immigration has often been seen in terms of a cost/benefit calculus;\(^{566}\) a sort of reconciliation of the political salience of a need for immigrants, balanced against the level of ‘domestic constraints material to that issue at any one time’.\(^{567}\) This weighing of the utility of the immigrant to the labour force, sends a ‘signal which feeds an attitude whereby aliens are regarded in utilitarian terms, like foreign investment or imported energy’.\(^{568}\) But, and in terms of international law, the broad question of immigration has tended to rest on the traditional premise that entry into state territory for the purposes of immigration is an essentially domestic matter. However, and with the advent of the European Union, some of these boundaries have become fudged, and the issues of Immigration and Asylum, a reoccurring but manageable issue under domestic jurisdictions, have taken on a new persona which during the 21st century, appears to have become unmanageable in terms of the European Union.

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566 Luedtke.
567 Luedtke.
**Immigration and Asylum in the context of the European Union**

In order to begin to look at immigration and asylum in the context of the European Union, it is helpful to look at an early view, as set out in the 'Single European Act' of 1986, which placed the issue of immigration explicitly within the remit of the domestic policies of member states:

"Nothing in these provisions shall affect the right of member states to take measures as they consider necessary for the purpose of controlling immigration from third countries."\(^{569}\)

European Union regulations and treaties may have subsequently tried to modify this position, but, in the context of early approaches, the issue of immigration and asylum was located in a part of the European Unions' structure oriented towards addressing issues of crime and illegality. It is possible that this location owed more to appeasing domestic pressures in member states; alternatively, it may have been because the European Union was focused on other matters. Whatever the case may be, it is open to speculation whether the placing of immigration and asylum under the general heading of crime and illegality, demonstrated how post war immigration had moved from the optimism of the 1950's and 60's; to a position where it became the subject of suspicion and unease. The debate began to link immigration with the rise in unemployment, and was said to pose a challenge to the cultural composition of European states. Immigration was a danger to domestic society, and there were grounds for believing that Europe was being threatened by a presence considered as culturally exogenous.\(^{570}\)

This was the backdrop to the introduction of the issues of immigration and asylum into the Maastricht Treaty.\(^{571}\) Until then, the European Union's strategy to deal with the issues of immigration and asylum was a fairly piecemeal and a largely ad-hoc approach, and

\(^{569}\) Single European Act. General Declaration on Articles 13 to 19..., 17th February 1986.

\(^{570}\) Huysmans, 'The European Union and the Securitization of Migration'.

\(^{571}\) Treaty on European Union.
this led immigration issues to become structurally conflated with those of asylum.\textsuperscript{572} Such a muddled approach casts some doubts on whether, in the early days of policy making, there was a desire to properly deal with these issues in a discrete, distinctly separate way. Catherine Dauvergne claims that this fudging of the understanding between immigrant and asylum seeker, led to the preferred treatment of one group before the other.\textsuperscript{573} She may well be right, and it may be that contemporary fudging of these two genres has left both impoverished. But the real question is whether the confusion between the boundaries of immigration law and asylum law were due to happenstance, or to a general suspicion of foreigners.

A starting point in the process of addressing this question begins with the Maastricht Treaty, in which immigration and asylum became an explicit subject of intergovernmental regulation,\textsuperscript{574} located under the auspices of a new third pillar. Located within the remit of the third pillar was a new objective. This objective was to provide European citizens with a high level of protection in an area of freedom, security and justice. Various measures were to be introduced in order to realise this objective, and in a section of the Treaty known as “Title VI”, (or Chapter Six), at Article K1, there were a number of issues listed as needing to be resolved in order to achieve the aim of creating an area of freedom, security and justice, they included:

- Preventing and combating terrorism.
- Immigration and asylum.
- Combating unauthorized immigration.
- Combating drug addiction.
- Combating fraud on an international scale.
- Judicial cooperation in criminal matters.


• **Unlawful drug trafficking and other serious forms of international crime.**

There is a maxim common to many European cultures; in France they say, “Dis-moi qui tu hantes, et je te dirai qui tu es”; in Germany “Willst du erkennen den Mann, So schau seine Gesellschaft as,” and in English, “A man is known by the company he keeps.”

Locating issues of immigration and asylum within a part of the European Union’s institutional framework aimed at combatting international crime and drug trafficking, pointed to a thematic change in the way immigration and asylum were viewed. The implication was that immigration and asylum was too sensitive an issue to be dealt with by the normal European bureaucracy; and something in the nature of immigration and asylum pointed to a commonality with security and defence issues. The argument is more plausible because of the fact that the decision-making process in this area was restricted to the Council alone. Just to re-emphasise the point, the serious nature of all issues dealt with under the third pillar, meant that neither the decisions of the Council, nor the recommendations of the intergovernmental working parties reporting back to the Council, were open to scrutiny by the Commission or the European Parliament or the European Court of Justice.

It is reasonable to suppose that the general perception of immigration may have become indistinguishable from that of asylum, at least from the standpoint of the public, and possibly even from that of the bureaucracy itself. It is equally reasonable to see immigration and asylum as a barometer for assessing the degree of change taking place in Europe; particularly in respect of whether the ideologies associated with the old Europe were giving way to a more receptive and enlightened community, with an open philosophy towards its frontiers.

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577 Joppke, “Asylum and State Sovereignty:A Comparison of the United States, Germany, and Britain”.
578 See Jacques Derrida – “Other Headings”
Under the terms of the later Treaty of Amsterdam, asylum and immigration matters were transferred from the third to the first pillar, and all became part of the Treaty of Amsterdam - Title IV; Visa, Asylum, Immigration. The Treaty required the Council to adopt measures aimed at ensuring free movement in accordance with Article 14, in conjunction with directly related measures in respect of external border controls, asylum and immigration. Although the issues of immigration and asylum became, theoretically, subject to parliamentary and judicial scrutiny, the involvement of the Commission, the European Parliament and the European Court, was limited for at least five years after ratification of the Treaty.

The forging of a European Union immigration policy has presented many hurdles, and successive European Council meetings have set targets for the harmonisation of immigration policies, but member states prefer the notion of cooperation to that of harmonisation. In Tampere, a five-year programme to harmonize policies around common immigration practices was agreed; but the decision has to be seen in the context of what Martin Schain describes as a considerable gap between policy statements and commitments, and the reality of practice. Since the Tampere summit, the European Commission has made the case for common immigration practices; but lack of progress seems to be indicative of a struggle between, on the one hand, the Commission and the European Parliament and on the other – the Council. Nevertheless the Hague Programme mandated the Commission to present a policy plan on legal migration and admission procedures before the end of 2005.

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579 George Papagianni, ‘EU Migration Policy’ in Anna Triandafyllidou and Ruby Gropas (eds), European Immigration: a sourcebook. (Ashgate 2014).
This plan was finally presented by the Commission in June 2008. Commenting on the plan José Manuel Barroso, President of the European Commission, said: "The Migration Package adopted today shows that we need to take a new approach to dealing with Immigration and Asylum. Immigration contributes to European economic performance."

Only months after this plan was presented, and after the President of the European Commission had offered his advice, the 2008 European Pact on Immigration and Asylum made clear that it was for each member state to determine its legal immigration needs; on page 4 of the document, it ‘recalls that it is for each Member State to decide on the conditions of admission of legal migrants to its territory, and, where necessary, to set their number.’

In 2013 work progressed on the assessment of the implementation of the Employers Sanctions Directive, prohibiting the employment of irregular migrants, and punishing employers through financial and criminal sanctions. It is all reminiscent of the carrier sanctions introduced in the 1905 Aliens Act, and the recommendations of the British Home Secretary in 1928 regarding the penalties to be imposed on anyone knowingly employing an Irish immigrant without a permit to work.

There is little doubt that the European Union is engaged in the principle that the EU must establish a 'common immigration policy', including rules on the admission, residence, and rights of third-country nationals legally migrating to the EU, and it is equally true that QMV may assist this objective. It is also true that that many of the policy drivers on the European Union are committed to such a development. However, it would be astonishing if states relinquished their sovereignty over the issues of legal migration.

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581 IP 08/948: Taking forward the common immigration and asylum policy for Europe.
Taken as a whole, the broad question of immigration enjoys the same ambivalence within the framework of the European Union as it does within individual European states. This raises the question of the accuracy of Habermas's claim that given growing ethnic, linguistic, and religious pluralism, European peoples no longer conceive of themselves as being culturally homogenous. Perhaps Professor Habermas is mistaken, and perhaps it has taken current events in Europe to highlight this error. But before looking at current issues regarding asylum and immigration, an understanding of the contextual framework in which asylum and immigration matters are located, and which have become the subject of intense scrutiny, is crucial. Fundamental to these matters are questions arising from the principle of the free movement of people in the European Union, the Schengen Area, and the Dublin Arrangements.

**Free Movement, Schengen and Dublin**

In more recent times, the free movement of people - the legal entitlement of nationals of member states of the Union to choose to live and work in other member states has been described as immigration. The term 'immigrant' is no more than a party political label given to the entitlement of nationals of member states of the Union to live and work in other member states, which arises from the doctrine of the free movement of people. The free movement of people was not a reflection of a societal desire for rapprochement between the past and the present; neither was it the embodiment of a new supranational equality between states of the Union and the peoples thereof. It was, quite simply, an economic facilitator, an important element in the market economy along with the free movement of goods services and capital; a cornerstones in the economic foundation of the early European Union. Although the process of people moving to live and work in

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586 The Treaty of Rome in 1957  
ARTICLE 2 The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.
different states of the European Union should not be confused with those from outside the Union, who wish to enter for immigration purposes, these issues are often conflated for political expediency, but they remain linked to each other.

Therefore it is important to establish that the background to the entitlement of nationals of member states to freely move and work within the Union, rests in the original Treaty of Rome, where the emphasis of the time was on economic prosperity. But achieving the goal of the free movement of people within the European Union was hindered by the fact that border controls remained in place. Although movement through the borders was relatively straightforward, they were said to hamper the developing principle of free movement of labour as a factor of production. In 1985 a radical development took place when five of the ten member states signed a treaty proposing the gradual abolition of checks at their common borders; the treaty was the Schengen Agreement, and in 1990 a Convention was signed implementing the Agreement between the Governments of the Benelux Countries, the Federal Republic of Germany and the French Republic.

![Figure 21. Early Schengen Area.](www.katiejurek.com)
The free movement of persons is a fundamental right guaranteed by the European Union to its citizens, and according to the European Commission, this freedom was enhanced by the Schengen Agreement which enabled citizens to cross internal borders without being subjected to border checks. In other words, Schengen sought the abolition of all internal state borders between the contracting parties, and envisaged a single shared border which would surround the Schengen area. It was a radical idea which inevitably had the effect of transforming the area of geographical sovereignty among the contracting States. Cynically, there are those who suggest that far from being a radical idea, it was simply a cost cutting exercise between the contracting states.

The significance of Schengen was that the contracting states came together outside the legal framework of the European Union; in other words they concluded an international treaty between themselves, which was not open to scrutiny by the Union or its institutions. In 1997, and not unexpectedly, this International Treaty was incorporated, by a protocol, into the Treaty of Amsterdam, and therefore into the legal and institutional framework of the European Union. Since that time the Schengen area has grown to include 26 European Countries, although not all contracting countries are members of the European Union.

Denmark signed the Schengen Agreement, but reserved the right to choose whether or not to apply new measures. The United Kingdom and Ireland are not signatories to Schengen; but they take part in some of the Schengen arrangements. In 1999 for instance, the United Kingdom asked to cooperate in some aspects of Schengen activity,

The Schengen arrangements may have enhanced the free movement of labour, but, and as a later statement of policy makes clear,\footnote{Council Regulation 1612/68.} the free movement of labour within the European Union, applied only to citizens of member states. For instance, those residing in the Union and who were third country nationals, did not have the right of free movement, and were excluded from benefitting from any social and economic rights arising therefrom. This strategy of exclusion had been established at the Paris summit of 1973 and was validated by the European Court of Justice some 12 years later in \textit{Caisse d'allocations familiales v Meade}.\footnote{C-238/83 - Caisse d'allocations familiales v Meade [1984] ECR 2631}

But as internal borders dissolve, there arises the question of how to manage the external borders,\footnote{Jane McAdam Regionalising International Refugee Law in the European Union: Democratic Revision or Revisionist Democracy. Victoria University Law Review 38. 2007} and it was obvious that there had to be a solution to the question of external borders, and to the issues of what was to happen to those who wished, either for the purposes of immigration or asylum, to cross the external border of the Schengen area, and enter the European Union.

The Schengen Convention aimed at harmonising a legal response to non-EU citizens who crossed the borders into Schengen territory. It was agreed that the country in the Schengen area where an asylum seeker made their first claim for asylum, would take responsibility for processing that claim, and would do so on behalf of all the other states in the Schengen area. The decision made by the state processing the application would
be binding on all the other Schengen States. The Schengen arrangements also envisaged the exchange of information between member states relevant to those seeking asylum.

The convention addressed the question of ‘carrier sanctions’, and determined that if an alien, the term ‘alien’ is that used in the Convention, were to be refused entry into the territory of one of the contracting states; the carrier that brought the alien to the border of that state would have to assume responsibility for them. Moreover, the Contracting Parties decided to impose penalties on those carriers who transported aliens from a third state to Schengen territory, knowing that the alien was not in possession of the necessary entry documents. These arrangements became heavily criticised for their lack of transparency, and the absence of any democratic or judicial control. Nevertheless, the Convention Implementing the Schengen Agreement was signed in June 1990.

**The Dublin Regulations**

At the same time as the Schengen arrangements were being agreed, a number of European Union member states, again working outside the legal framework of the European Union, were in the process of holding talks concerning asylum applications. These states were looking at the development of the new phenomenon of asylum shopping, whereby it was claimed that those seeking asylum sometimes made multiple applications in different European states. Although the discussion and the eventual outcomes seemed a little like a *déjà vu* version of the Schengen arrangements, they came to be known as the Dublin Convention.594

The Dublin Convention, like the Schengen Convention’s provisions on asylum, was not aimed at harmonising substantive or procedural rules of asylum, rather its aim was to fix

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594 Guild, ‘The Europeanisation of Europe’s Asylum Policy’. 
a uniform criteria vis a vis the allocation of responsibility for the examination of an asylum application. In other words this was not about the merit of an application – just the processes.

It was clear that issues relating to those seeking asylum had begun to worry member states, and even whilst the finer details of the Schengen and Dublin arrangements were being negotiated, justice and interior ministers were also holding talks regarding the question of asylum. The outcome of these talks came to be known as the London Resolutions; but both the talks and the eventual conclusions were of unclear legal status, not being European Union law, nor an international treaty nor any other obvious form of international agreement. The London Resolutions actually consisted of two resolutions and one conclusion, all aimed at the issue of ‘safe third countries’, and all of which impacted on future asylum policy.

**London Resolutions**

*Manifestly unfounded application for Asylum & Safe Third Countries.*

The first resolution was concerned with defining a manifestly unfounded application for asylum, and focused on individuals who passed through a safe third country on the way to the European Union. This issue is revisited in the Dublin III regulations and Article 3 of Chapter II, General Principles and Safeguards states that any Member State shall retain the right not to assess the substance of an application for international protection, particularly where the applicant has a sufficient connection to a third country, and it could

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be reasonably assumed that the applicant could seek the protection of the third country, and be re-admitted to that country.

This has particular relevance to states in Europe, who are not members of the European Union, but who are deemed as safe third countries, and whose borders are adjacent to those of European Union states. Moreover, subject to the rules and safeguards laid down in Directive 2013/32/EU, member states could refuse to assess the substance of a claim for asylum made by a person seeking to enter the Union from an adjacent safe third country.

The UNHCR has expressed some reservations regarding the use of the Dublin processes, with the UN Commissioner noting that the Dublin Convention allows for removal of an asylum seeker to a third country by the responsible State; but only providing that the principle of non-refoulement is respected. The Commissioner says that there are concerns, in the absence of appropriate guidance for the evaluation of safety conditions in the third country; that the application of this Article could result in chain deportations and, ultimately, instances of refoulement. The latest procedure, Dublin III is applied in 32 countries: the 28 EU member states plus Norway, Switzerland, Iceland and Liechtenstein.

**Safe third countries**

The second of the London resolutions dealt with the concepts and definitions of a safe third country, and Article 39 (of Directive 2013/32/EU), helped define the concept of a European safe third country as

- one which has ratified and observes the provisions of the Geneva Convention without any geographical limitations;

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has in place an asylum procedure prescribed by law;

has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms, and observes its provisions, including the standards relating to effective remedies.

But the notion of safe third countries also had an internal dimension; under the Dublin system, all European Union member states recognise each other as ‘safe third countries’. Consequently if a person seeking asylum crosses into the European Union by way of Greece, and then makes their way to France where they make an asylum claim, France will ask Greece to process the application for asylum. The European Court of Human Rights have not necessarily taken a consistent line on the matter. In the early days, the ECtHR found claims by appellants against their return to the state through which they first entered the European Union to be inadmissible. For instance, *T.I. vs United Kingdom* 599 concerned an appeal by a failed asylum seeker against being returned to Germany from the United Kingdom; his appeal was judged inadmissible. In *K.R.S. vs United Kingdom*, 600 the applicant, an Iranian national, had made his way to the United Kingdom after entering the European Union through Greece. In compliance with the Dublin II Regulation, the British authorities requested that Greece accept responsibility for his asylum request and Greece agreed. The applicant appealed to the European Court of Human Rights under Article 3 of the European Convention, but his case was declared inadmissible. Samsam Mohammed Hussein 601 claimed that she and her two young children would be subjected to ill-treatment if transferred from the Netherlands to Italy. The European Court of Human Rights declared the application inadmissible. However the court considered that the application of the Dublin regulations between the European Union member states, did not absolve them of their obligations under the European Convention on Human Rights.

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599 European Court of Human Rights, ‘European Court of Human Rights, Third Section, Decision as to the Admissibility of Application No. 43844/98 by T.I. against the United Kingdom. 7th March 2000’.
600 European Court of Human Rights, ‘European Court of Human Rights Fourth Section. Decision as to the Admissability of Application No. 32733/08. K.R.S. against the United Kingdom. 2 December 2008’.
601 European Court of Human Rights, ‘European Court of Human Rights. Third Section Decision Application No. 27725/10 Samsam Mohammed Hussein and Others against the Netherlands and Italy. 2 April 2013’.
Safe countries of origin

The final part of the London Resolution addressed the slightly different question of safe countries of origin. A person seeking asylum, who came from a country which, in the opinion of the European Union or one of its member states, fulfilled a legal and human rights criteria of being a safe country, would have her application dealt with summarily. In other words there would not be a thorough investigation into the applicants claim for protection, and there would be no subsequent right to appeal.

According to the Asylum Procedure Directive, the latest of which came into effect on the 21 July 2015,\(^{602}\) the definition of safe countries of origin\(^{603}\) is one in which, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances; it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU. Moreover it should be shown that there is no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict. In making this assessment, account shall be taken, \textit{inter alia}, of the extent to which protection is provided against persecution or mistreatment by:

(a) The relevant laws and regulations of the country and the manner in which they are applied;

(b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the United Nations Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;

\(^{602}\) DIRECTIVE 2013/32/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ

\(^{603}\) Article 37(1) (DIRECTIVE 2013/32/EU)
(c) Respect for the non-refoulement principle in accordance with the Geneva Convention;

(d) Provision for a system of effective remedies against violations of those rights and freedoms.

The Commission issued a Directive inviting member states to compile a list of ‘safe countries of origin’, but, the exercise ended in stalemate when no agreement could be reached on which countries should be on the list. It was therefore decided that the subject would be re-visited at a future time, in the hope that an agreement might be possible. But then the European Parliament decided they also wanted to be part of the procedure of deciding which countries should be on the safe list, and launched a challenge to the Commission and the Council in the European Court of Justice.

In May 2008,604 the Court found in favour of the European Parliament, and ruled that the Council of the European Union had exceeded its powers insofar as a list of safe countries of origin would have to arise from a mutual decision of both the Council and Parliament. It was not until September 2015,605 that the European Union seemed to be making progress when the Commission issued a ‘Proposal for a Regulation of the European Parliament and of The Council’. This document proposed a common EU list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council, and set out common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU. The Commission took the view that on the basis of all relevant information at its disposal, in particular the reporting from the European External Action Service (EEAS) and the information from Member States, the European Asylum Support Office (EASO), the Council of Europe, the United Nations High Commissioner for Refugees (UNHCR); Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey

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604 European Court of Justice, C-133/06 Parliament v Council, judgment of 6 May 2008
605 COM (2015) 452 final 2015/0211 (COD) European Commission
were safe countries of origin within the meaning of Directive 2013/32/EU, and should be included in the EU common list of safe countries of origin.

But in October 2015 the European Council on Refugees and Exiles questioned the compatibility of the safe country of origin concept with international refugee law. The ECRE claimed that the concept was at odds with the obligations contained in the Refugee Convention *vis a vis*, that refugees should be treated without discrimination based on their country of origin. Moreover applying the presumption of safety, although rebuttable under European Union law, could place an insurmountable burden of proof on the asylum seeker, which could be exacerbated by the lack of access to quality legal assistance in many Member States.606

James Hathaway reflects that the European Union's Dublin regime does not mandate states to conduct an assessment of the needs of an asylum seeker.607 Member states continued to practice only what they believe to be their obligations under refugee law, and the Dublin regime opts for efficiency within the European Union at 'the cost of wilful blindness to international law'.608 But refugee law makes no provision for a person seeking refugee status to be ‘transferred’ to another state on the simplistic basis that the other country is a site of first arrival or a safe third country. This also raises the question as to whether a safe third country can be relied upon not to send the refugee back to their country of origin.609 Goodwin Gill and McAdam argue that the return of refugees or asylum seekers to a safe third country is permitted by international law, always providing that there is evidence of permission to enter the third country, and of a substantive human rights guarantee in that country.610

608 Hathaway, ‘E.U. Accountability To International Law: The Case of Asylum.’
609 Hathaway, ‘E.U. Accountability To International Law: The Case of Asylum.’
In the current refugee crisis, the Dublin system is under pressure because countries which form the external borders of the Union, have become inundated with asylum applications. In some instances states have closed their borders and refuse any further asylum seekers. Other countries, notably Germany, made use of the sovereignty clause in the Dublin Regulation, when Angela Merkel opened Germany’s borders to refugees, she did so via the Dublin regulation, forfeiting Germany’s right to send hundreds of thousands of Syrians who flowed into the country back to Italy or Greece.

The wider issues of developing some sustainable European Union asylum policy have proved to be a protracted and tedious affair; the Union began working on the creation of a Common European Asylum System (CEAS) immediately after the entry into force of the Treaty of Amsterdam in May 1999, and proceeded on the basis of the guidelines established at Tampere. During the first phase of the Common European Asylum System (1999-2005), the goal was to harmonise the legal framework under which member states approached the question of asylum, based on a common minimum standard. But, the European Union was faced with a conflict between what was desirable and the reality of what was deliverable. In this instance it is possible that in applying the Dublin processes, member states of the European Union relied on the Refugee Convention’s proviso that allows states to depart from the presumption of a responsibility of protection towards a person seeking asylum, (but) only when and if the rights of the person seeking asylum are not compromised.

Therefore and taken as a whole, the broad question of immigration and asylum enjoy the same ambivalence within the framework of the European Union as they do in individual European states. The volume of directives, qualification directives, working parties and emergency resolutions on the subject of refugees has come to be the hallmark of the European Union’s approach to refugee protection. The Commission takes the view that

along with the need to respond to crisis situations, the European Union continues to be confronted with the challenge of ensuring economic recovery and growth. It says that the European Neighbourhood Policy and the Global Approach to Migration and Mobility provides a framework for dialogue aimed at addressing the root causes of irregular and forced migration, and preventing dramatic incidents.

**Failure of the Dublin Rules**

But dramatic incidents continue to arise, and the European Unions’ ability to deal with them is in question. In January 2016 the European Commission President, Jean-Claude Juncker said that changing the Dublin rules was a necessity because the existing system was clearly not working in all respects.

Jean-Claude Juncker was referring to the autumn of 2015, and the situation regarding Syrian asylum seekers. It was a situation that cast some doubt on whether the European Union’s carefully constructed procedures, and its desire to prevent dramatic incidents, was more of a wish than a reality. The realpolitik of what had been happening at the European Union’s southern borders presented a real challenge to the Union’s policies, including the ongoing events on the islands of Lampedusa and Kos.

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613 (ENP)
614 (GAMM)
During the course of 2015, large numbers of Syrian nationals began arriving at the southern borders of the European Union seeking asylum. It was reported that some of them had decided they wished to settle in Germany. The journey undertaken by those seeking asylum was arduous, and involved crossing into Turkey, Greece or Bulgaria, and traveling through the Balkan States in order to reach the Hungarian and Slovenian borders of the European Union. Arguably, and according to the European Union’s own rules, the Syrian asylum seekers could have found protection in one of the countries they passed through on their journey to the external borders of the European Union. Consequently a subsequent application for protection in the European Union would have proved to be manifestly unfounded.\textsuperscript{616}

Germany ceased applying the Dublin rules to the Syrian refugees, and in the first 11 months of 2015, 964,574 new asylum seekers were registered. But when the refugees entered Germany by the tens of thousands, the German Chancellor decided to temporarily suspend the free crossing of borders under the Schengen agreement.

On the 23\textsuperscript{rd} September 2015, the leaders of the European Union agreed to a proposal from the European Commission, to introduce a quota system to re-settle refugees. Hungary, the Czech Republic, Romania and Slovakia voted against the proposal, and Finland abstained. The Czech government argued that quotas deny states their

\textsuperscript{616} Guild, ‘The Europeanisation of Europe’s Asylum Policy’.
sovereign right to decide their own asylum policies, encourage more people to come, and could not be enforced since refugees would just move around anyway. The fallout from these incidents demonstrates the many tensions which arise between the domestic demands made on governments of member states, and the often conflicting demands made on them by virtue of their membership of the European Union. It does lead to a feeling that the European Commission and Parliament exist in a parallel Europe that is at variance with the reality of what is happening. Such an analogy is an anathema to many European Union scholars, who may prefer to see the notion of a parallel Europe as the difference between ‘exclusionist v’s humanists’ traditions. But looking at the issue in terms of these strict confines is to rather miss the point, and pays homage to an emerging European Union custom in which every query is viewed as a challenge to be assiduously disregarded, and every alternative position is seen as being symptomatic of the English disease. Rather the inference of a parallel Europe is suggestive of a situation in which the Commission tends to favour technocratic solutions to non-technocratic problems, and in which, as Wolfgang Kowalsky points out,617 most of the European (regulatory) agencies work without any clear democratic control or supervision, and the technocratic methods favoured by the Commission involve so called experts chosen by itself. Moreover the European Parliament has a habit of adopting European legislation in a single reading, behind closed doors – without taking into account comments from outside the European institutions which has to be is a setback for democracy.

For instance on the 23rd June 2015, the Commission issued a statement saying that the Common European Asylum System was underpinned by three theoretical pillars, the Union is fond of describing its structures in terms of pillars. The first pillar of the common asylum system brought more harmonisation to standards of protection by further aligning European Union States’ asylum legislation; the second pillar was constructed around

effective and well-supported practical cooperation; and the last pillar was based on the increased solidarity and sense of responsibility among European Union states, and between the European Union and non-EU countries.\textsuperscript{618}

However, and on the same day as the Commissions’ statement, the reality was that the EU’s Office of Immigration and Nationality (OIN) informed the departments of government in member states that deal with the Dublin Regulations, that Hungary was suspending, for an indefinite period, the acceptance of asylum seekers transferred back from other countries under the Dublin procedures.

This statement came at the same time as Hungary announced plans to build a fence on the Hungarian-Serbian border, to prevent further arrivals into the country.\textsuperscript{619} A month later, on the 23rd July 2015, Hungary announced that it had adopted a list of safe third countries which included all the EEA Member States, Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro and Serbia.

AIDA, the Asylum Information Database project of the European Council on Refugees and Exiles, says that the designation of Serbia, as a safe third country is highly alarming because Serbia has been the state from which most of those seeking asylum in Hungary have crossed directly into the European Union. Therefore this new designation effectively enables Hungary to refuse to examine almost all applications for international protection made on its territory, on the presumption that applicants transiting through an adjacent

safe third country, have had genuine opportunities of seeking and obtaining protection in that country.\textsuperscript{620}

The Hungarian Prime Minister Viktor Orbán, claimed that Europe was in the grip of madness over immigration and refugees, and argued that his reaction to the Syrian asylum seekers should be seen as defending European Christianity against a Muslim influx.\textsuperscript{621}

In August 2015, Slovakia’s Interior Ministry spokesman Ivan Metik said Slovakia would accept 200 Christian migrants from camps in Turkey, Italy and Greece - Muslim migrants would not integrate as easily into Slovakia’s predominantly Christian population.\textsuperscript{622} Cyprus said it was willing to take up to 300 Middle East refugees to help ease the crisis facing the European Union, but preferred them to be Christians. Czech Republic President, Milos Zeman, said he did not want to take immigrants who were not close to Czech culture. Poland accepted 50 Christian Syrian families, but the head of the Polish foundation arranging the asylum suggested that Muslim refugees were a “huge threat” to Poles. Miriam Shaded explained that Islam was “not a religion” but a totalitarian system full of “criminals.” She added that asylum seekers were “a great way for (Islamic State) to locate their troops…all around Europe.”\textsuperscript{623}
Bulgarian Prime Minister Boyko Borissov took the view that he had nothing against Muslims, but if other Muslims came from abroad it would radically change the country’s demography. Estonia was not happy to accept Muslims; social affairs minister Margus Tsahkna explained that, “After all, we are a country belonging to Christian culture.” In September 2015, former Archbishop of Canterbury George Carey, in an article written for the Daily Telegraph, said that in recent years there had been too much Muslim mass immigration to Europe. “It would be a mistake to give way to bullying calls to immediately open our doors to tens of thousands of refugees. We are a small island and recent immigration figures are highly disturbing. Last year, a net figure of 330,000 people settled among us – more than the population of Sunderland." Lord Carey suggested that we should imagine this happening year after year. He believed that Britain should make Syrian Christians a priority because they were a particularly vulnerable group, pointing out that Britain is a Christian nation with an established Church, so Syrian Christians would not find it a challenge to integrate. In September 2015, and in response to the movement of Syrian refugees, Slovakia closed its borders with Austria and Hungary, and other European countries followed suit.

624 The Times of Israel Staff Reporters, ‘Growing Number of EU States Say They Prefer Non-Muslim Refugees Cyprus Joins Bulgaria, Czech Republic and Others Who Claim Cultural Incompatibility, Not Discrimination, Is behind Such Statements.’ The Times of Israel (September ).
625 The Telegraph, ‘Lord Carey: Britain Has a Duty to Rescue Syria’s Christians’ The Telegraph (September 2015).
626 These comments are not implied to be representative of the whole European Union, and refer specifically to the issues of Syrian refugees/migrants. Moreover, although I am looking at exclusionary practices in The European Union, it would be remiss not to mention that in relation to the Syrian refugee migrant issue, there has been no explicit policy from Gulf States to house refugees arriving en masse without sponsors or work permits. The BBC claim that this may be due to fears into Gulf States regarding political stability within their own borders, and the larger questions of civic identity and the notion of what being a citizen of a Gulf state means. (BBC News 7th September 2015). Gulf countries are not signatories to the international conventions on refugee rights; and Amnesty International says that More than 4 million refugees from Syria (95%) are in just five countries Turkey, Lebanon, Jordan, Iraq and Egypt; and they claim that Gulf countries including Qatar, United Arab Emirates, Saudi Arabia, Kuwait, and Bahrain have offered zero resettlement places to Syrian refugees. [Amnesty International 4th September 2015].
Hungary has called an anti-immigration referendum aimed at stopping Brussels and Berlin forcing it to take refugees under quota schemes. The question on the ballot paper asks Hungarians whether they are ‘in favour of the EU being allowed to make the settlement of non-Hungarians obligatory in Hungary even if the parliament does not agree’.

On the face of it, this represents little more than the views of a handful of people who speak more to the past than to the present; but perhaps it is a mistake to dismiss them too quickly because lingering beneath the liberal veneer of an enlightened Europe, factors of Difference, Otherness and Exclusion still appear to enjoy a hitherto repressed popularity which finds expression in issues of immigration. Consequently, ‘immigration’ has become a metonym which incorporates meanings far beyond those which describe the flow of persons entering European states. The dialectics of immigration give voice to hidden feelings which speak the language of ethnic divide, suspicion and unease, and connect easily with nationalism and xenophobia. On the whole, the hidden language associated with immigration seems to resonate with a European public who, although indifferent to the evolution of the European polity, continue to share a common societal preference for those who fit an ethnic profile, over those who don’t. Immigration and asylum have become the embarrassing and uninvited guests at the nuptials of the new Europe.

Nevertheless, on the 6th April 2016 the Commission presented options for reforming the Common European Asylum System and developing safe and legal pathways to Europe. The Commission conceded that the large-scale, uncontrolled arrival of migrants and asylum seekers had put a strain not only on many Member States’ asylum systems, but also on the Common European Asylum System as a whole. The volume and concentration of arrivals exposed the weaknesses of the Dublin System, which establishes the Member State responsible for examining an asylum application based

627 Jeffrey T Checkle and Peter J Katzenstein European Identity (Cambridge University Press 2009)
628 Goldberg, ‘Racial Europeanization’. 
primarily on the first point of irregular entry. The differing treatment of asylum seekers across Member States has further exacerbated the problem of irregular secondary movements.\textsuperscript{629}

\textit{The End of History}

It would be hypocritical to be too scornful of these events, because whilst attention is focused on building fences to contain the threats posed by immigration to European hegemony, little attention is paid to the other Europeans whose lives are restricted by boundaries and fences. In the past the Roma have also lived on the margins of society; they were sent to the camps during the 1940’s, and still suffer low social status, poverty and exclusion. In Slovakia, walls have been constructed to segregate the poorer Roma communities from non-Roma neighbours. Since 2008, 14 walls segregating predominantly Roma neighbourhoods from non-Roma neighbourhoods have been erected; the latest was constructed in the country’s second largest city in 2013.\textsuperscript{630} In other times the construction of walls to contain and separate minorities, has been seen as the return of the medieval ghetto, but in the 21\textsuperscript{st} century, such actions by a sovereign state appears to be accepted by the European Union. Claims that these situations are outside the competency of the Union are nonsense, and fly in the face of the 2014 Report on the implementation of the EU framework for National Roma Integration Strategies published by the European Commission’s - Directorate-General for Justice; The Communication from the Commission to the European

Parliament, The Council and the European Economic and Social Committee of the regions 2015; Effective Roma integration measures in the Member States 2016 (COM (2016) 424, 27 June 2016); the 2010 Communication on the economic and social integration of the Roma in Europe\textsuperscript{631} and the paper published by the European\nCommission entitled ‘The European institutions and every EU country have a joint responsibility to improve the lives of the EU’s Roma citizens’\textsuperscript{632}

In the Czech Republic an opinion poll asking for views on the Roma, returned the findings that 69% of those polled, could not tolerate them.\textsuperscript{633} A comprehensive report commissioned by the Council of Europe, found that in Italy, the authorities have regularly forced the eviction of Romani from their homes, sometimes involving the destruction of property. In some cases, whole Roma settlements have been summarily destroyed, and the inhabitants simply left on the street.\textsuperscript{634}

In 2010, France’s immigration minister, Eric Besson, said that France would continue deporting Roma; Monsieur Besson made clear that, "Free movement in the European area doesn't mean free settlement. What has been forgotten is that each of the European countries is responsible for its own national citizens.”\textsuperscript{635} Such a statement seems contrary to Article 45 of the European Charter of Rights\textsuperscript{636} - Freedom of Movement and

\textsuperscript{631} http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52010DC0133
\textsuperscript{632} http://ec.europa.eu/justice/discrimination/roma/index_en.htm
\textsuperscript{633} A Bancroft, ”“Gypsies To The Camps!': Exclusion and Marginalisation of Roma in the Czech Republic” (1999) 4 Sociological Research Online.
\textsuperscript{634} Professor Elspeth Guild and Claude Cahn, ‘Recent Migration of Roma in Europe’ (2010).
\textsuperscript{635} The Guardian Newspaper. Kim Willsher, ‘France’s Deportation of Roma Shown to Be Illegal in Leaked Memo, Say Critics’ The Guardian. (September 2010).
\textsuperscript{636} CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2000/C 364/01)
of Residence, but no one seems to care, and France is not the only European country who exclude Roma. Since 2008, rights groups have alleged clandestine removal of Roma from camps in Belgium.637

Current philosophers, historians and aficionados of European integration, appear to promote the fraternal notion that political, economic and monetary integration heralds the ‘end of history’, and the advent of what Naipaul refers to as ‘our universal civilisation’.638 Maybe in the light of events during 2015 and 2016, these forecasts are a little premature; and claims of the overarching influence of human rights norms that effectively constrain the ability of states to control borders,639 and which infer the demise of national sovereignty, are more aspirational than a matter of social reality.

Moreover, it would be imprudent to imagine that the political, societal and moral dilemmas arising from refugee issues can be easily resolved either in Europe or elsewhere. For example, Pakistan, Iran and Tajikistan closed their borders to the Afghans fleeing the recent conflict. Pakistan, Iran and Tajikistan claimed that the economic, environmental, social and security costs of the many millions of Afghan refugees already in those countries justified the closing of borders. These countries claimed that they were responding to the restrictions placed upon asylum-seekers – including those from Afghanistan – by the industrialized west.640

But what is different about the immigration and asylum debate in Europe, is what might best be described as the problem of the liberal paradox. For example; the economic logic of liberalism is one of openness, but the political and legal logic is one of closure.\footnote{James F Hollifield, ‘The Emerging Migration State’ (2012) 38 International Migration Review 885.} This means that in order for states to survive, they must open their economies and societies to trade and investment; but, the influx of immigrants may involve political risks, which could undermine the social contract and the liberal state itself.\footnote{James F Hollifield, Valerie F Hunt and Daniel J Tichenor, ‘Immigrants, Markets, and Rights: The United States As an Emerging Migration State’ (2008) 27 Washington University Journal of Law and Policy.}

The paradoxes do not end there; liberal norms have generally been assumed to foster open immigration policies, and it is said that the hospitality extended to those seeking asylum goes to the heart of how European states define themselves and their cultural benevolence. In this way, the idealised version of asylum policy is laden with cultural and moral symbolism, which undoubtedly fosters an ideological image of what it is to be a European, and which underpins an assumed Pan-European identity.\footnote{CHRISTINA BOSWELL- European values and the asylum crisis- International Affairs 76, 3 (2000) 5 3 7-5 7}

But, it is difficult to assess the extent to which these ‘liberal norms’ are genuine, and how much they resonate with broad European society. Peeling away some of the predictable rhetoric, perhaps the issue in its simplicity, is about maintaining a society of me and you in which a third person essentially disturbs this intimacy, and needs to be excluded.\footnote{Quoted in Drabinski, John, “The Possibility of an Ethical Politics: From Peace to Liturgy” (2000). Articles, Book Chapters, Essays. Paper 6. http://scholarworks.gvsu.edu/philosophy_articles/6} It is a belief that when applied to issues of the state and the membership of the state, encapsulates the issues that lead communities to exclude individuals.\footnote{P Gabel and D Kennedy, ‘Roll Over Beethoven’ (1984) 36 Stamford Law Review 1.} Therefore in reality the European Union, which boasts a single border, a border protection force, a common policy for the reception of asylum seekers (Dublin I, II, III); displays all the characteristics of a state, and focuses on all the issues that states mobilise to exclude
individuals. In 2007, Jose Manuel Barroso, President of the European Commission, went further and claimed that the Union was the first 'non-imperial empire.  

The ‘Empire of the European Union’ remains preoccupied with questions of citizenship and Identity, of who belongs and who does not, and, as such, rehearses the same arguments as those taking place in the member states, and those arguments which took place a century before in European Imperial Empires. The issues of Difference, Otherness and Exclusion remain at the forefront of this polemic, and non-more so than in the question of immigration and asylum. Thus, as the European Union integrates further, there arises what Jane McAdam calls an ‘Orwellian Paradox’, whereby European Union integration is attained by means of exclusion, (and) freedom achieved by means of control.  

In a sense this is familiar ground, and represents a theme that has woven its way through this thesis; but a further dimension of this alleged paradox worthy of exploring is the concept of European Citizenship, an idea which marked a further stage in the European Union’s development, and which is germane to the wider issues of immigration and asylum.

**European Citizenship and identity**

The concept of European Citizenship emerged from Article 8 of the 1992 Maastricht Treaty, the same Treaty that decided immigration and asylum should be located in a part of its structure dedicated to criminal matters. Despite its haughty description, Citizenship of the European Union was conditional, and applied only to persons holding the

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646 The Telegraph Bruno Waterfield., ‘Barroso Hails the European “Empire”’ The Telegraph (Strasbourg, 11 July 2007).
nationality of one of the member states of the Union; moreover, Citizenship of the Union would only complement and not replace national citizenship.

Nevertheless, it appeared that European Union Citizenship and the associated matter of European identity offered the promise of equality for the marginalised and excluded.648 European citizenship could be a bold challenge to the ethno-national state,649 says Weiler, a move towards reconceptualising the Union as an organisation belonging to citizens rather than nationals, with the next stage being ‘an exploration of civic virtues at the core of community ideals’.650 But Marcelino Oreja, a former European Commissioner for Culture, believed that European citizenship enabled Europeans to understand what it was that united them, and showed the strength of their common cultural roots.651

It is not entirely clear which yardstick Señor Oreja was using to define Europeanness, and whether his definition was political rather than ethnic. In any event, it is puzzling how, in an environment that seeks to further the notion of a pluralistic society, it is beneficial to begin to delve into the myths of common cultural roots, invoking memories of the past, rather than appealing to the future.

Besides, the pomposity that the European Union brings to the question of Union Citizenship are, as Balibar reminds us, only reflective of a moment in history, which is, at one and the same time, full of possibilities and full of dangers. Steering the appropriate

648 Francis Fukuyama Identity, Immigration, and Liberal Democracy Journal of Democracy, Volume 17, Number 2, April 2006, pp. 5-20
650 Weiler, The Constitution Of Europe. ‘Do The New Clothes Have An Emperor?’ And Other Essays On European Integration.
course away from danger is not easy, and, arguably, the Treaty of Rome was about laying the foundations of a closer union between the peoples of Europe, envisaging the union of many, but not the creation of one people. Therefore it is open to question whether the concept of European Union Citizenship not only misses the point, but serves to re-emphasise divisions by highlighting those who are included economically but whose heritage may not be in member countries. The emphasis on European Citizenship may actually prove to be a cause of social exclusion and rejection, focused on those who may be, as Balibar notes, immigrés, extracommunatari, or ‘Ausläunders. Therefore if Europeanness is to be celebrated, - albeit through the concocted idea of citizenship of the European Union, it must embody something that is worthy of celebrating by the many, and it may have to redefine itself if it continues to be constructed in opposition to the notion of non-Europeanness.

Joseph Weiler begins to address the conundrum when he says that ‘We may have made little progress if the ‘Us’ becomes a European (instead of a German or French or British) and the ‘Them’ becomes those outside the community or those inside who do not enjoy the privileges of citizenship.’ This reflection points to a deeper malaise at the heart of the current problems with the European Union, where the issues of ‘us’ and ‘them’, who belongs and who does not, are far more fundamental than the posturing associated with grand schemes of citizenship. But the issue of identity within a European context, is further complicated by the suggestion that ‘liberal’ societies have weak identities, and in such societies their identity is to have no identity. This position of calculated indifference to identity, is indicative of what Bauman calls a, ‘let it be, approach’; a situation in which immigrant communities, for example, are not pressured to ‘acculturate’

652 Étienne Balibar, We, the People of Europe? Reflections on Transnational Citizenship(Princeton UP, 2004)
653 Étienne Balibar, We, the People of Europe? Reflections on Transnational Citizenship(Princeton UP, 2004)
or ‘assimilate’. Seen from a different perspective this apparent indifference to identity and belonging could be interpreted by immigrant communities as evidence that liberal states are not interested in welcoming them into the wider community. It might also suggest that liberal societies remain anchored to distinct cultural norms, which include an official language, traditional holidays, and, for example, the relationship between the church, community and the state.

Perhaps, and in response, immigrant and post-immigrant communities have chosen to embrace the phenomena of transnational identities commonplace in the 19th century. Transnational identities can be essentially religious or national, and they may include political affiliations that transcend the physical boundaries of the state. This may develop into a situation in which the civic and social bonds which would normally be expected to lead to a greater affinity with the national identity of the host state, become “tied into larger global circuits of power and identity”, that reflect broader disputes occurring within a globalised geopolitical context.

Contextually, the fact that immigrant and post-immigrant communities have chosen to embrace the transnational identities can be traced back to the European need to assert its moral and cultural superiority, particularly at a time when Islam was emerging with a new self-assuredness. Writing in the 1990’s Robin Wright suggested that the West and Islam arrived at a crossroads in their relationship, with the establishment of a theocracy in Iran, together with strong evidence of Islam’s emerging political appeal and its future potential. It was open to debate which way the West would choose to deal with

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659 Adamson, Triadafilopoulos and Zolberg.
660 Adamson, Triadafilopoulos and Zolberg.
the situation. There remained the question of whether the West would choose to try and counter or contain Islamist movements by backing or aiding governments that repressed them; but, as Wright says, this involved the issue of whether the West would be prepared to follow a policy that required the demonizing of a centuries-old faith and the culture that went with it.

With the benefit of hindsight it is not difficult to see what happened, and how Europe’s Muslim population became readily identified as the new common enemy, and easy target for demonization. Like the Jews before them, they may have accounted for only a small proportion of the European Union’s population; but and because of acts of terrorism which claimed an association with Islam, Europe’s Islamic communities have come to be regarded as the repository of all that is suspicious and all that threatens the homogeneity of the European demos.

It begs the question as to contemporary European attitudes towards identity and belonging. They can be addressed by looking at the Treaty Establishing a Constitution for Europe, part of the European integration process, which was rejected by the Netherlands because of what was claimed to be a perceived threat to Dutch culture. France also rejected the constitution because of a fear of loss of national identity, and this is particularly interesting.

France has a particular view of citizenship, and Laïcité is a fundamental concept of the French Constitution, which declares France is a secular state. But Laïcité is also understood in France to be about a sense of allegiance to the nation; and this idea of

664 The French Constitution initiated in 1958 states in article 1 that "The Republic neither recognizes, nor salaries, nor subsidizes any religion".
civic unity leads to the wider French community being scrutinised for any symbolism or signs of belonging to a group other than the French nation.\textsuperscript{665}

This position is largely associated with an assimilationist perspective, the view that equality can be achieved only through the adoption of the rules of the majority community. The tradition of assimilation is traceable in contemporary French understandings of secularism,\textsuperscript{666} but this interpretation led, in 2004, to a law prohibiting the wearing of conspicuous religious signs, e.g. the headscarf, crucifixes, and yarmulkes in public schools. This is a policy which has often been criticised because of its exclusionary consequences for those who display their religious differences. In October 2010, French Law prohibited the concealment of the face in public places. Known colloquially as the Burqa ban, it was a law that was challenged in the European Court of Human Rights, under Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.\textsuperscript{667} The European Court of Human Rights upheld France's ban on wearing full-face veils in public, and rejected the argument that it undermined freedoms of religion and expression. But these issues are not new to French society, or indeed other societies across Europe. In an earlier chapter I noted how Napoleon had offered French Citizenship to all Jews in France in return for their willingness to abandon their ‘Jewishness’ in the form of the traditional way of Jewish life, worship and dress, and conform with French cultural patterns of behaviour.

The sub-script to what constitutes a citizen of the new Europe is therefore nothing new, and is rooted in the familiar concept of belonging and not-belonging. Those who do not belong unite those who do, and this was a principle skilfully applied over centuries to exclude and vilify European Jewry, and the Roma. It is an area loaded with mutual and


\textsuperscript{667} Case of S.A.S. v. France (application No. 43835/11) 1\textsuperscript{st} July 2014.
simmering resentment, which cannot be addressed by the banality of European Citizenship. It is a moment in the history of the Union that is full of dangers, in which disaffection fuelled by a lack of a sense of belonging creates a lacuna, easily exploited by those whose agenda is not societal cohesion and harmony. Acts of terrorism by largely home-grown disaffected individuals may be inexcusable, but they are reminiscent of what happened when young Jews in the Russian Pale began looking for alternatives, and turned to the revolutionary movements for inspiration.

This dysfunctionalism gives encouragement to a new and exclusive strain of European belonging that is slowly being constructed, which is not only designed to identify those who belong, rather it identifies those who do not belong. Islam and its followers have come to personify those who do not belong, they represent the new common enemy. In this way Europe has embarked on a new cycle of exclusion, and who knows where it will lead. But, and reflective of the fact that life in our communities is full of ironies, ironies that often repeat themselves, it has been interesting to see how the excluded often become the excluders. During April and May 2016 the British Labour Party was forced to acknowledge the exclusionary and racist language of some of its Muslim members, directed at another minority community. Transnational loyalties, and insular communities all serve, often unwittingly, the wider agenda of Difference, Otherness and Exclusion.

I began this chapter by noting Arendt’s warning against trying to suggest that some historical happening can be interpreted as being keys to history; they are but a reflection of a moment in history, full of dangers and full of optimism. Bauman suggests that identity formation is a continuous renegotiation, a life-long task which is never complete,

668 Francis Fukuyama Identity, Immigration and Liberal Democracy. Journal of democracy April 2006, Volume 17, Number 2
and where at no point is identity final; perhaps collectively we should see this as a cause of optimism, because the alternatives are fearsome.

**Conclusions**

Post war Europe was faced by a need for change, and, in coming to terms with its recent past, it had to decide on the nature of the future, and whether it was able to transform itself to meet the challenges posed by a changing world. There was an air of optimism related to the creation of the early European Union, a unique experiment which, and even allowing for its purely economic foundations, seemed to offer the prospect of rapprochement, and the promise of hope in a century which had come close to the abys.

But, and for all its promise, Europe’s history of exclusion proved a decisive factor when the phenomenon of non-European immigration began to emerge. Conscience stricken because of events in the 1940’s Europeans backed away from the traditional exclusion of minorities within Europe, and began to focus on the arrival of non-Europeans who began to settle and create communities. In this way, the identity of the excluded may have changed, but the principle of exclusion, because of difference, remained firmly in place.

In this way the influence of Difference, Otherness and Exclusion, as applied to the new settled immigrant communities, was also able to found policies relating to immigration and asylum seeking. Arguably the steady development of multi-ethnic societies occurred against the explicit preferences of democratic majorities in many western states; and perhaps this is an indictment of the failure of European states and the European Union itself, to compose the wider intellectual argument relating to immigration. In terms of asylum the Union seems paralysed by the realpolitik of the happenings at its Southern

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borders, and by the vitriol directed at the reception of asylum seekers by some member states.

An issue that is usually avoided in these debates is that of a continuing need for skilled labour that cannot be satisfied in the European Union. This has historical references to the past when immigration from the Indian sub-continent was encouraged by the United Kingdom, in order to help resolve labour shortages in the British steel and textile industries, and in the National Health Service. But unprecedented population movements brought millions of people from the Indian sub-continent to Europe, and, because of a variety of wider global events, together with failed experiments in approaches to multiculturalism, communities began to polarise, allowing Difference, Otherness and Exclusion to become the rule rather than the exception. The societal disjuncture that thrives on Difference, Otherness and Exclusion, also feeds Islamophobia, the 21st century replacement for a previous cycle of exclusion known as anti-Semitism. Muslims face a similar rejection to that suffered by the Jews, and calls on Muslims to reform, to give up some of their traditions and become good citizens, echo similar calls made on the Jews in the past. Scholars, commentators and academics fall into the trap of arguing whether Islamophobia is different from modern anti-Semitism. It is a fatuous discussion because on the one hand anti-Semites questioned whether Jews are fit to be good national citizens, whilst on the other hand, Islamophobes simply question whether Muslims can be good Europeans. Such discussions help bestow a sense of legitimacy to the legal underpinning of immigration and asylum controls, however fair or however irregular they may be, and contribute to the polarisation of communities within the Union. Grand titles speak to the Common European Asylum System, the revised Asylum Procedures Directive, the revised Reception Conditions Directive, The revised Qualification Directive, and the revised EURODAC regulations – all of which, the public are assured, are in conformity with human rights standards, and are open to challenge in the European Court of Human Rights.
But, and with a predictability which only comes from understanding our past, immigration, asylum and post immigrant communities are the subject of suspicion and unease, fuelled by the rise of anti-immigration politics and public scepticism. This public scepticism arises from the realisation that, despite grand schemes the best intentions and much rhetoric, the Union has been unable to address the crisis at the Southern Borders of the European Union. I think it was Samuel Johnson who is credited with saying that the road to hell is paved with good intentions.
Chapter Seven. Conclusion

Introduction

‘It is not necessary to accept everything as true, One must only accept it as necessary.’
Franz Kafka ‘The Trial’.

The issue of immigration and asylum is clearly one of those subjects on which everyone has a view, and which can be guaranteed to divide public opinion. Rather than being alarmed or unduly dismissive of such a situation, it is as well to remember that the debate on immigration and asylum raises fundamental questions about identity, values, and society; and whilst it is easy to claim that populist views elude rationality, the same might also be said of the approach taken by law, politics and society to the same issues.

This is not to imply that discussions germane to immigration and asylum are nihilistic, because whatever the opinions, and wherever they originate, they give a clue to what may otherwise be socially repressed views, which can ultimately influence encounters with the stranger. Being aware of a diversity of opinion provides an intriguing insight into how social and political thought may have formulated a legal approach to welcoming the stranger, and how the stranger’s difference might be judged by the community of the like-minded.

The use of the term stranger is not a matter of happenstance, rather it has been used as a metonym for the milieu that includes immigration, but whose meaning extends far beyond the legal definition of immigration and asylum, to include a societal preoccupation with issues of difference and otherness. In this way, the use of the term stranger encompasses, among other things, the subject of minority or immigrant communities, and those who may be neighbours, but whose religion, ethnicity, gender or societal standing defines them as strangers. It is in this environment that matters of immigration and asylum find a ready home. The notion of difference, or rather the societal triumvirate of Difference, Otherness and Exclusion, is also fundamental to understanding the wider
immigration debate, particularly in respect of the status of individuals and groups, and especially in the contested areas of citizenship, rights and belonging. For example, in the world of social reality, perceptions of difference are not always tempered with anodyne liberalism; rather they thrive on negativity, which, in turn, lends itself to the development of prejudice, discrimination and exclusion. Therefore my thesis has explored how the stranger’s otherness can often result from the arbitrariness of law; in simple terms, drawing a line on a map can determine the gap between, on the one side, an identity which encompasses citizenship or belonging, whereas on the other side there is non-citizenship, exclusion and difference.

In the context of the debate on immigration, which is actually about complex interpretations of the nation and the state, society has come to reify the figure of the stranger, the collective ‘Other’, into that of an essential enemy. The ‘Other’ is seen as embodying all the negativity associated with difference, but, paradoxically, it is only through society’s relationship with the ‘Other’ that it is able to establish its own identity.

Breaching these barriers by crossing the Rubicon of the human condition to engage with the stranger is not an option, because entering into a dialogue with the stranger immediately divests them of their otherness. In this way, dialogue with the stranger is likely to discover sameness rather than otherness, and conceptual notions of cultural and societal superiority, cultivated over generations, then become a matter of uncertainty. But dialogue with the stranger also deprives society of its collective enemy, who is accused of disturbing the hegemony of family ties or of threatening the comfortable homogeneity that holds communities together. Consequently issues arising from immigration and asylum are as ubiquitous as they are confusing, and as covert as they claim to be overt.
The Hypothesis

Therefore the central hypothesis of this thesis has been that hidden behind the legal approach to the welcoming of the stranger, is a deeply embedded need to exclude, which has its roots in historical interpretations of difference and otherness. Moreover, in understanding that the exclusion of the stranger because of her difference, is a cyclical process, insofar as the identity of those targeted for exclusion changes over time, it becomes possible to understand contemporary legal and societal approaches to immigration and asylum. The hypothesis has proposed that exclusionary practice has been honed and perfected into a societal norm from which exclusionary law is able to claim legitimacy. Moreover the hypothesis advances the idea that exclusion is a reflection of a deeper societal unease, rooted somewhere in European history culture and philosophy, the influence of which continues to have a deleterious effect on contemporary attitudes towards immigration & asylum. Finally the hypothesis claims that the cycle of exclusionary practice has moved on from selecting those whose difference occurs from within an essentially European construct; to a new cycle, again based on religious and cultural difference, but focused on what is considered to be an extra-European identity. The inherent difference in the character of this extra-European identity is seen as personifying the many who already live in Europe but are not European; and applicable to those on the ‘outside’, who share the same religious and cultural affiliations, and who wish, through the process of immigration, to also enter and settle in the European Union.

Testing the Hypothesis

Therefore in order to test the hypothesis, the thesis has explored the social history of exclusion in Europe from the 19th century to the present time; has chronicled the changing identities of the excluded and has indicated how law has been complicit in the practice of exclusion. It has looked for the constant, something other than their humanity, that is common to all the excluded. The thesis has explored theoretical notions of if, and
why, society and law is pre-disposed to exclude, and has located the investigative process within the theoretical concept of Modernity. As part of the process of testing the hypothesis, the thesis has drawn on the views of philosophers and sociologists, such as Bauman, who have claimed that among Modernity’s deleterious influences has been the way in which it has sought to persuade society that the coarse was gentle, the cruel benign and the uncouth refined. More importantly, the thesis has explored the proposition that if modernity’s rationale of exclusion is applied, theoretically, to the domain of immigration and asylum, it is able to demonstrate how, empirically, the political and legal conduct of society engages with all the practices that accompany modernity’s propensity to exclude.

Assuming the concept of Modernity as being the philosophical foundation on which society constructed its approach to the reception of the stranger, there then arose a need to consider a whole genre of humanist idealism said to have influenced post war human rights movements. This need arises because western humanist tradition, is said to have spanned the 19th and 20th centuries; to have championed the value and agency of human beings, and to have had an ameliorating influence, or at least a mitigating effect on the worst excesses of exclusion.

However, and problematical in testing the effects of humanist idealism and its influence on post war human rights movements, was the question of whether a humanist tradition ever existed. If it did, and analogous to the exclusion visited on the avuncular figure in Kafka’s Metamorphosis, one wonders if at some point, European humanism turned sour, rejected humanity, and abandoned society to its dehumanising ends.

These are complex issues and it is as well to make clear that, in testing the hypothesis, I have found it beneficial to avoid using a single criteria to evaluate the many paradoxes
of human activity and their associated societal structures. This is because the wider subject of this thesis, which is human experience, can never be the subject of exactness and certainty. Moreover, and borrowing from the views of the Frankfurt School; social inquiry can be enhanced if it combines philosophy and the social sciences in a form of interdisciplinary research. Such a broad based approach is useful in evaluating why, for example, European States preach the credo of inclusion, but practice difference and dissonance. In testing the hypothesis it has also been necessary to adopt a number of ‘givens’, among which is the assumption that exclusion has become the norm, acquiring all the trappings of legitimacy, assuming an air of normality; and enabling exclusionary practices to sit comfortably within the realm of legality. In other words, the practice of exclusion is not an anomaly or a glitch in societal thinking, neither can it be said to be a regression to an earlier narrow minded cultural particularism, which sought to occupy the moral high ground of universalism. It is a conscious choice made for a whole variety of cultural, religious, social and economic reasons, which are then disguised and embedded in all the mysteries of law.

This is even more bewildering because all the elements which are said to drive society: law, politics, religion and so forth, conjoin to give the impression that their common objective is the creation of a fair just and inclusive society which lays claim to inclusion as a norm. Society is then portrayed as embodying a warm, generous and comforting sense of equanimity which sits in harmony with the image Europeans have of themselves. But, and as Adorno and Horkheimer observed, under this cloak of makeshift comradeship, there is a very different reality. Consequently and only by applying the assumption of the normality of exclusion to patterns of historical behaviour does it become possible to reconcile theory with practice. In this way it becomes possible to see how exclusion, acting as a fulcrum for society, was casually practiced, strictly applied and legally sanctioned, circumstances which eventually took Europe to the brink of the abyss. In this way it is not difficult to understand how, particularly in the post war period,
immigration and asylum, as a new development in European history, became subject to
the same principles of exclusionary practice.

Conclusions
During the 19th century, the marginalisation of communities based on ideas of race and
citizenship were commonplace and a characteristic of law, society and politics. In chapter
three, the thesis explored the situation in Austria-Hungary where ethnic diversity was
used as a means of encouraging inter-ethnic conflict and exclusion. Slovaks were
excluded by both Czechs and Hungarians; the Czechs and the Slovaks discriminated
against the German minority, and all rejected the Jews. Czechs became involved in
conflict with Slovaks, calling on them to abandon their identity and cultural traditions, and
submit to the process of Czechization. The overall aim of the ruling minority in Austria
Hungary was to maintain the status quo and their own supremacy, and the exercise of
exclusion was regarded as legitimate devices through which they could achieve their
aims, and society could be regulated. In Germany too, there was a strong philosophical
belief in difference and otherness, and it was the Poles who were the recipients of
exclusionary prejudices, largely because they were believed to stem from a different
biological race. Sociologist Max Weber was among those who saw the Slav nations
generally as being agrarian peoples, with different cultural and political identities, low on
the civilizational ladder, and needing to be separated from Aryan people. Muslims were
even lower on the civilizational ladder and deserved exclusion, and the Jews were
outsiders, who were probably not even allowed near the ladder. The later move to
establish the State of Germany reflected many of these views, and as a consequence
the new German state was established within tight borders so as to exclude as many
non-Germans as possible.

19th century Russia also followed an agenda of exclusion, and, as was also explored in
Chapter 3, Imperial Russia attempted to exclude Polish influence in its western provinces,
where Polish culture was regarded as being subversive. European Jewry, who had long since taken on the role of Europe’s principle excluded, were the recipients of special treatment, and were confined to live in urban settlements, known as Чертá осёдлости, the ‘Pale of Settlement’, along the western borders of the Russian Empire, and were subject to frequent pogroms.

For those Jews who chose emigration to the West as an option, re-settlement in France brought a swift response from the French Socialist movement. *La Revue Socialiste* ran a series of articles entitled *Aryens et Semites: Le Bilan du Christianisme et du Judai’sme*, concerning the purity of the Aryan race, and its perversion by the Jews, who were an inferior combination of human nature. Eventually the term *Juiverie*, or Jewry, came to mean bad behaviour, and the term *Juif*, or Jew, came to be interpreted as referring to all foreigners.

In the United Kingdom, another immigrant community was excluded because of issues of race; they were the Irish. The *London Times*, in its analysis of the Irish Question, used the concept of race and identity to clearly distinguish the difference between the Irish and the British, and to demonstrate the parameters of inclusion and exclusion *vis à vis* the Irish in the United Kingdom.

Political upheaval in Imperial Russia, pogroms and societal unrest resulted in the migration of many Russians to the United Kingdom, believing that their stay would be of a temporary nature, before continuing their journey to the United States. Aware of the potential numbers of immigrants, the United Kingdom established a Royal Commission to look at immigration, and subsequently introduced controls with the introduction of the 1905 Aliens Act. The media was anti-immigrant, and anti-Jewish, as was the Trade Union movement as indeed were many Members of Parliament; and the thesis explored the extent of this opposition as demonstrated by the evidence given to the Royal
Commission. The British Government formulated a legal response to what was, arguably, a humanitarian situation, and in limiting or refusing entry to certain categories of people, the process of exclusion, because of difference, took on a legal persona. Consequently, I have proposed that difference and exclusion as practiced during the 19th century, established a legacy that was adapted and reorganised to meet 20th century societal needs.

The thesis explored the period following the end of the First World War, during which the principle of national self-determination emerged, which, at first sight, may seem to be a rebuttal of the principle of exclusion. But as the new nation states emerged in the aftermath of the First World War, the hitherto excluded, often became the excluders. The new Czechoslovakian state divided along ethnic lines, with the relationship between Czechs and Slovaks remaining uneasy, whilst the three million ethnic Germans in northern Bohemia, who also had a generational history of living in the area, were described as immigrants and colonists, and excluded from public life. In Eastern Europe, a new Polish State was created, and was given access to the Baltic Sea by means of a Polish Corridor. This land corridor effectively separated the German provinces of East and West Prussia, and, given its new sovereignty over the corridor, Poland began campaigning for the Germans who lived in the corridor, to leave. Therefore I propose that although, because of a variety of factors, the identities of the excluded changed, exclusion as a principle of defining who belonged and who did not, continued unabated.

By the 1930's, and as explored in Chapter 4, exclusion acquired a more aggressive nature. This was particularly so in Nazi Germany, where the state initiated a process of dividing and classifying its citizens according to societal and political choices, based on the 19th century notion of Aryanism. Legal Professors drawn from academia played a leading role in establishing difference and otherness as the basis for legal norms of exclusion; and eventually a substantial corpus of law identified those to be excluded. Not
unsurprisingly, as with the exodus from Imperial Russia at the turn of the 20th century, exclusionary law precipitated the migration from Germany of those who were caught in the politics of the time.

Once again the prospect of immigration triggered a crisis in which European States were faced with what were essentially humanitarian issues, but chose to formulate a legal response based on exclusion and difference. The Thesis examined British Cabinet Papers germane to the Evian Conference, which revealed the extent to which the United Kingdom, France and the Netherlands were opposed to accepting refugees from Germany. Although the public report of the proceeding of the conference and its conclusions was largely facile, with excessive expressions of distress; behind the scenes, Cabinet Minutes reveal that the British Government knew of the growing opposition in the House of Commons to Jewish immigration. In France, the Jewish question, which continued to divide French society, returned in a more sinister way during the 1940’s, when the Vichy government looked at removing citizenship from the unfit. In 1940, and the first Statut des Juifs, Jewish identity was defined by race, and Jews were excluded from top positions in the army and civil service. In the same month, Prefects were authorised to intern foreign Jews. In 1941, a second Statut des Juifs, ordered Jews to be removed from the liberal professions, commerce and industry, and it was not long before Jews began to be deported to the extermination camps in Poland.

I have suggested that whereas the camps were the ultimate manifestation of Difference, Otherness and Exclusion, they were also a prophetic vision of what happens when difference is chosen in preference to tolerance. Scholars have argued that the emergence of the camps were consistent with the political sphere of Modernity; and of the legality, normality and guiding spirit of our civilization. Whether such a judgement is correct is open to discussion, but what I have tried to demonstrate is that history did not turn a page after the camps, and the camps should not be seen as an anomaly relating
to the past. Agamben and others have advised, that even today, the camps should be seen as part of a hidden milieu, a *nomos* of the world in which we live. Indeed, even the philosophical architects of Nazi exclusion, particularly those who advocated slavery and expansionism, became celebrated advocates, appearing before the European Court of Justice and promoting the supremacy of European Union Law.

In Chapter 2, I noted how Arendt had skilfully written of how, in order to exploit new markets, there was an attempt to unify people on the basis of the mob, by dividing human kind into master races and slave races, into higher and lower breeds, and into white men and the others. This was part of the legacy of industrialisation and imperialism and went had in hand with the desire for new markets. So, and on the one hand Europeans were creating the notion of some hidden innate racial determinate, a sentiment which was popularly received and which dovetailed with the broader ideas of societal control; whilst on the other hand, these spurious ideas were fundamental to the developing market and industrialisation. In the second half of the twentieth century, the issue of the markets, and of the need for labour to fuel and re-build economies surfaced again, only this time the market developed in a new and unexpected dimension, embracing former enemies, and binding economies together in a common cause.

But the European Union, despite its splendid rhetoric, is shallow and ambiguous when it comes to the issues of the Markets v’s Immigration and Asylum control. Whilst the ideologues preach a confusing message of inclusion, and whilst there are deep divisions between the Commission the European Parliament and the Council regarding immigration and asylum; asylum policy and procedures constituted such a volatile and divisive issue that they were initially negotiated outside the legal jurisdiction of the Union. European Union policy on immigration, remains aspirational rather than empirical, but recent events concerning asylum issues have re-kindled all the latent hostility previously reserved for European Jewry, and for minority communities. The aim of the thesis has
been to demonstrate that there exists cycles of exclusionary practice, and that the identity of the excluded changes to meet given economic or political situations. The hostility towards those fleeing Syria and seeking asylum in Europe, is not specific to their wish for asylum, rather it is more to do with their status as Muslims, and a new cycle of exclusionary practice.

Arriving at explanations of why European states and society have behaved, and continue to behave in an exclusionist way has not been without its problems, largely because contemporary society is anxious to avoid any pejorative comparisons between the past and the present. Their concerns also arise from the supposition that society is now pluralistic, and multiculturalism has ameliorated all the former pejorative influences of race. Exploring the empirical indicates a different reality, in which Difference, Otherness and Exclusion is as rampant as ever they were in the 19th and 20th centuries. What distinguishes the present from the past is the identity of the new excluded, and the sophistication used to achieve old and familiar objectives.

In the first chapter of this thesis I proposed that the objective of this thesis and its conclusions was to temperately reflect on the wider issues of exclusion, and how society had developed and manipulated law to accommodate some deep seated intolerance of the immigrant – the stranger in our midst. I suggested that this objective could be achieved by avoiding aggressive over analysis, rather the thesis should be seen as an invitation to consider whether there are any universal truths, and how the manipulation of invented and transient concepts of morality shape our understanding of society and its attitude towards the question of the stranger.

Having said that, the thesis does not pretend to be an exercise in philosophical relativism, nor has it aspired to be a detailed examination of immigration and asylum law. In the
context of law and the immigration debate, I have tried to avoid objectively defining either truths or morality because I believe that they exist only within a cultural context. The immigration debate, immigration and asylum law, and what I have referred to at the cyclicality of exclusion, are part of a wider societal malaise in which those things which are often thought of as being the permanent truths of human nature, or the permanent truths of society and law, are actually transient notions that change throughout the course of history. The heirs to this continuous uncertainty are the people, their confusion and their vulnerability, and they, as victims, are the real subject of this thesis.
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