Editorial

Law and the Other – Special Issue

1. Introduction

In recent years both European and traditional settler societies such as the USA, Canada or Australia have faced a moment that has been diagnosed as the crisis of recognition and multiculturalism and have experienced the rise of post-multiculturalism (Gozdecka, Ercan & Kmak 2014; Kymlicka 2010; Vertovec 2010). This has come as somewhat of a surprise, since Western societies have for years been aspiring to adopt laws and policies that tend to include rather than exclude different types of minorities and recognise a vast array of identities. This trend towards increased inclusion has been driving both national and international legal platforms, leading to affirmation of the rights of minorities, pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men by the majority of constitutional orders (Skrentny 2010) and institutions such as the EU (Treaty on European Union, article 2). Recent years, however, have witnessed these hard won principles in crisis, accompanied by a departure from the rhetoric of inclusion, primarily in the context of ongoing arrivals of refugees and asylum seekers from Iraq and Syria. Constant references to a 'migration crisis' (Kenneth 2015) have led to such unprecedented changes as the victory of the Brexit platform (Johnston 2017), the election of Donald Trump (Klinkner 2017) or, more recently, the victory of Sebastian Kurz's conservative right-wing party in Austria (Oltermann 2017). All of these political movements have been driven to a significant extent by anti-immigration sentiment (Drummond 2009). The same tendencies have also been visible in traditionally multicultural countries such as the USA, Australia, or Canada, where control of immigration (Tasker 2017), detention of refugees in offshore camps (Doherty 2017) and targeting

culturally distinct populations (Karp 2018) have become the focal point of political campaigns and some policies adopted by the government. The most symptomatic example has been the recent approval by the United States Supreme Court of Donald Trump's revised ban on migration from Muslim countries (McCarthy & Laughland 2017). As noted by Dauvergne, this 'new politics of immigration' is characterised by such features as rapid change, defiance of partisan expectations, existential fear and, in particular, a new worldwide 'us' and 'them' divide, which takes an 'unprecedented place on the central political stage of all Western liberal democracies', leading to an end to both 'settlement' and 'society' as key immigration values (Dauvergne 2016, 8, Anderson 2013). The new politics of distinguishing between the local population and those who arrived later have been widespread in Europe (Bohman & Hjerm 2016) and globally (Hogan & Haltinner 2015). These exclusionary discourses have not only targeted new arrivals but also escalated beyond the realm of migration law and touched those who are culturally different (Gozdecka 2015). The most recent example of this escalating tendency can be seen in comments by the Australian Minister for Immigration, Peter Dutton, who lately targeted the Melbournian population of African descent, linking them to gang violence (Karp 2018).

Despite its aura of neutrality, law takes a more or less active part in processes of othering, sanctioning policies of marginalisation and exclusion of difference. Such measures as the Trump migration ban already mentioned, bans on minarets or burqa bans, democratically sanctioned by national legislatures in Switzerland, France or Belgium, the offshore detention of refugees or processes of interlinking migration law with criminal law (crimmigration; Stumpf 2006) have become not only legal but also increasingly more robust. As a result, law has sanctioned and strengthened Islamophobia, the perception of migrants and asylum seekers from the global South as criminal, dangerous and a threat (Joao Guia, van der Woude & van der Leun 2013) or refugees as bogus asylum seekers and immoral others, unable and unwilling to conform to Western legal and social norms (Mezzadra & Neilson 2013; Kmak 2015).

In that light, this special issue focuses on the theory and practice of contemporary processes of othering and investigates how these processes operate through laws passed and practiced. The objective is, however, not merely to illustrate that discriminatory and othering processes exist, but instead to examine how exactly legal techniques of othering operate. In this analysis, we will emphasise how these techniques, even when ostensibly neutral at first glance, in reality generate, perpetuate and fail to prevent creation of the 'other'. This special issue conceptualises these processes and tools and scrutinises how the legal other is created through 'governmental xenophobia',

'securitisation practices', 'the apparatus of human dignity', 'the common good', the 'legitimate community' or 'citizenship discourses'.

2. The other and apparatuses of othering

The term 'other' and 'othering' have a long history and have been used prominently in various research areas across the social sciences (Young 1990, Young 2000, Gingrich 2006, Dominquez 1994, Jensen 2011), the humanities (De Beauvoir 1949; Said 1978; Spivak 1985) and the law (Stabile 2016; Pedrioli 2012; Murphy & Green 2011; Todres 2009). Indeed, the word 'the other' has been used so frequently that some (Gingrich 2006) have argued that the term has mutated into a metaterm encompassing everything and nothing and thus risks becoming rather meaningless. But against that fear, the quest continues for outlining the mechanisms of othering. Ever since the rise of phenomenology in early XXth century France, the postcolonial writings of Edward Said and Gayatri Chakravorty Spivak and the ground-breaking studies of alterity by Emmanuel Levinas, 'the other' as a term seized the imagination of scholars across the board. The other is someone different from oneself (Levinas 1994; Derrida 1998, 197), but also someone different from the norm (De Beauvoir 1949), the rightless (Arendt 1985), bare life (Agamben 1998) or the part that has no part (Rancière 2010).

Managing and accommodating difference has occupied many disciplines, especially in relation to diverse perspectives on discrimination (see Davies et al. 2016, 61—65). To be sure, othering is not a term alternative to racism, sexism or class, but a way of addressing and classifying their various aspects. 'Hence othering concerns the consequences of racism, sexism, class (or a combination thereof) in terms of symbolic degradation as well as the processes of identity formation related to this degradation' (Jensen 2011, 65) As Young pointed out, othering is the process of identity politics that changes the merely different into the other (Young 1990, 99). When 'othered', the one that is not oneself becomes devalued and dehumanised, through a discursive process, changing the one into the 'other' (Jensen 2011, 65). Society and its institutions marginalise the other and shape the response to all forms of difference, from gender difference (Graycar 2002), to racial difference (Loomba 2015). "Such discursive processes affirm the legitimacy and superiority of the powerful and condition identity formation among the subordinate (Jensen 2011, 65).

Legal scholarship has been catching up with these processes. However, most of the scholarship on othering in law or through law retains either a focus on concrete groups being targeted by concrete legal measures (Murphy & Green 2011), a legal-historical analysis of marginalisation (Mulcahy & Sugarman 2015), human rights perspectives on inclusion (Arias & Gurses 2012) or on the processes of exclusion and discrimination more generally, but without a strong focus

on theoretical conceptualisation of the processes of othering (Wrench 2016; Simpson & Yinger 2013; O'Donovan 2016; Vrielink 2013; Juss & Zartaloudis 2015; Gozdecka 2015).

This special issue goes beyond the question of who is targeted and delves deeper into the questions how and by what means. Rather than focusing on discrimination, which we see as a result rather than the origin of othering, we want to expound the rationales behind the processes that have recently been occurring in human rights law, migration law and citizenship law. We conceptualise them as elements of 'othering apparatuses (dispositif)' in the vein of a Foucauldian understanding of the term (Foucault 1998). The authors deconstruct the techniques lying behind marginalisation of particular groups and examine their rationales and manner of perpetuation in the context of a broader set of technologies, mechanisms, knowledges and structures based on differentiation between citizen/foreigner, us/them, inside/outside. This issue contributes to critical legal methodology, which attempts to exemplify and bring to the fore the processes and strategies that result in production of the other. By exposing such knowledge this issue provides a backdrop for the processes of resistance to othering that would dispute the 'given' or the 'common sense' (Rancière 2010) and give a basis for new becomings, challenging the hegemonic us/them dynamics of the 'new politics of immigration' (Dauvergne 2016) and post-multiculturalism.

The investigation of the legal processes of othering is theorised and the primary focus of the articles in this issue is on the genesis and perpetuation of these processes. This investigation seems crucial today at a time when acceptance of difference appears to be waning and areas of law traditionally suited for accommodating difference have begun to emphasise coherence and ethno-national sentiments instead. These new discourses single out traditional minority cultures, emphasise and exploit their religious or cultural difference and frame them as a security problem (Gozdecka, Ercan & Kmak 2014, 53). It is therefore important not only to understand that these processes are occurring but to answer the question how they are possible and what has propelled their emergence despite the seemingly world-wide affirmation of equality, inclusion and rights.

3. Othering and law

This special issue begins by examining how these technologies, mechanisms, structures and processes work in particular contexts. The first focus area is the othering of migrants visible across different legal contexts. On this topic, Magdalena Kmak in her article *Crimmigration and othering in the Finnish law and practice of immigration detention* focuses on the concept of crimmigration and its othering role in Finland. The article focuses on multifaceted relations between 'the bordered' and

'the ordered' embedded in contemporary crimmigration practices in Finnish law. The article not only reveals how crimmigration features in the law and practice of administrative detention of foreigners in Finland but also shows how the strong relationship between 'the bordered' and 'the ordered' in Finnish law and practice contributes to processes of othering of foreigners. The article illustrates that othering occurs, on the one hand, through differing state response to crime and its prevention depending on a person's immigration status and, on the other, through directly linking migration with crime.

Following in a similar vein, Likim Ng in her *Securitization of Refugees: Increasing Otherness through Exclusion* examines the exclusion clause contained in Article 1F of the Refugee Convention and focuses on how emergency is enacted to suspend law by going above the normal political decision-making process and depart from international criminal law statutes and rules. By analysing select cases from Australia such *Dhayakpa v Minister for Immigration and Ethnic Affairs (1995) 62 FCR 556* and *Ovcharuk v Minister for Immigration & Multicultural Affairs [1998] FCA 1314*, this article shows how asylum seekers are presented as securitized by the language and discourse of decision-makers, which furthers the 'othering' of refugees. Relying on Agamben's theory of exception, Ng demonstrates how the exceptional nature of the exclusion clause becomes the norm and how it affects genuine refugees that are unable to access rights.

To illustrate that othering, once limited to migrants and refugees, can expand exponentially, Anne Macduff in the article *The Citizen's Other: Australian Political Discourse on 'Australian Values', Migrants and Muslims* examines the political construction of Australian citizenship. This article studies how ideas of citizenship are narrated in the field of political discourse. The analysis focuses on narratives of 'Australian values' that can influence the exercise of discretion by judges and decision-makers in deciding certain citizenship cases. Relying on critical discourse analysis, Macduff examines the 2007 legislative reforms and identifies how the content of 'Australian values' was articulated. The article goes on to show that such articulation was achieved through constructing the migrant and the Muslim as cultural Others that are particularly incompatible with Australian values. It further suggests that, while the narratives in which discourses achieve this exclusionary outcome are specific to historical and social contexts, they can provide a neutral and inclusive cover for exclusionary agendas.

Similarly, Aleksandra Gliszczyńska-Grabias and Witold Klaus examine the parallel between the treatment of migrants and treatment of other minorities in their contribution *Governmental Xenophobia and Crimmigration: European States' Policy and Practices towards 'the Other'*. This article focuses on what Jérôme Valluy calls "governmental xenophobia" and its role in constructing 'the Other'. It shows that both migrants, but also those existing inside the community such as Roma,

can be affected by public and legal discourse aimed at stigmatizing and identifying them as a source of problems, threats and dangers to the rest of society. Gliszczyńska-Grabias and Klaus examine practices including coercive instruments engaging criminal law and demonstrate how these approaches violate fundamental human rights, including prohibition of discrimination.

Continuing the focus on rights Dorota A. Gozdecka in her article *'Barbarians' and 'Radicals' Against the Legitimate Community? Cultural Othering Through Discourses of Legitimacy of Human Rights* focuses on how human rights discourses themselves may marginalise and otherise certain identities. Gozdecka examines the mutations of rights from instruments of inclusion to instruments of exclusion and examines how interpretations of the legitimacy of international human rights law can create and propagate otherness. The text employs the notion of a 'legitimate community of rights' and evaluates how it excludes those deemed too culturally different to belong. The article does so primarily in light of managing religious difference and argues that European human rights regimes have created two distinct categories of dissidents seen as subversive and a priori excluded from the protection of rights – the 'barbarians' and the 'radicals'.

To illustrate that even the most protective legal principles risk resulting in marginalisation and othering, Ukri Soirila examines the apparatus of human dignity in his article *Othering through human dignity*. While acknowledging that the concept of human dignity is significant and crucial for human rights, the article examines what the concept does to particular identities. Soirila argues that, despite its inclusive and all-encompassing aim, any use of the concept necessarily also produces 'othering' in presupposing some fixed notion of 'human'. By approaching human dignity not as a metaphysical concept but as an 'apparatus' (dispositif) that can be used to assemble various forces, discourses and sentiments, and to direct them to achieve concrete aims, the article focuses on how exclusion can occur with the help of the concept.

The issue provides a rich and encompassing comparative tapestry, illustrating that otherness can occur not only through straightforward rejection of equality, but quite the contrary, despite the best efforts at ensuring fair and inclusive legal conditions.

Dorota Gozdecka and Magdalena Kmak

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Bibliography

Anderson, Bridget: *Us & Them: The Dangerous Politics of Immigration Control*. Oxford University Press, Oxford 2013.

Arendt, Hannah: *The Origins of Totalitarianism.* A Harvest Book, Harcourt Inc., San Diego, New York, London 1985.

Arias, Aimee Kanner & Mehmet Gurses: 'The complexities of minority rights in the European Union'. 16 (2) *The International Journal of Human Rights* (2012) 321–336.

Agamben, Giorgio: *Homo Sacer: Sovereign Power and Bare Life*. Stanford University Press, Stanford 1998.

Bohman, Andrea & Mikael Hjerm: 'In the wake of radical right electoral success: a cross-country comparative study of anti-immigration attitudes over time'. 42 (11) *Journal of Ethnic and Migration Studies* (2016) 1–19.

Dauvergne, Catherine: *The New Politics of Immigration and the End of Settler Societies*. Cambridge University Press, New York 2016.

Davies, Chantal, Nuno Ferreira, Anne Morris & Debra Morris: 'The Equality Act 2010: Five years on'. 16 (2–3) *International Journal of Discrimination and the Law* (2016) 61–65.

De Beauvoir, Simone: *The Second Sex*. Vintage, New York 1997 [1949].

Derrida, Jacques: *Of grammatology*. Johns Hopkins University Press, Baltimore 1998.

Doherty, Ben*: Australia should bring Manus and Nauru refugees to immediate safety, UN says,* The Guardian, 10 November 2017.

Dominquez, Virginia R.: 'A Taste for "the Other": Intellectual Complicity in Racializing Practices'. 35 (4) *Current Anthropology* (1994) 333–348.

Drummond, Adam: It is immigration, above all else, that has united the right and divided the left. *The Guardian*, 11 September 2009.

Foucault, Michel: *The History of Sexuality: The Will to Knowledge v. 1.* Penguin, London 1998.

Gingrich, Andre, 'Conceptualising Identities: Anthropological Alternatives to Essentialising Difference and Moralising about Othering'. In Gerd Baumann, (ed.): *Grammars of identity/alterity: a structural approach.* Berghahn Books, New York 2006, 3—17.

Gozdecka, Dorota A., Selen A. Ercan & Magdalena Kmak: 'From multiculturalism to post-multiculturalism: Trends and paradoxes'. 50 (1) *Journal of Sociology* (2014) 51–64.

Gozdecka, Dorota A.: 'A community of paradigm subjects? Rights as corrective tools in culturally contested claims of recognition in Europe'. 21 (4) *Social Identities* (2015) 328–344.

Gozdecka, Dorota A. (ed.): 'Identity, Subjectivity and the Access to the Community of Rights'. 21 (4) *Social Identities* (2015a), Special Issue 305–422.

Graycar, Regina, and Jenny Morgan: *The hidden gender of law*. Federation Press, Sydney 2002.

Hogan, Jackie & Kristin Haltinner: 'Floods, Invaders, and Parasites: Immigration Threat Narratives and Right-Wing Populism in the USA, UK and Australia'. 36 (5) *Journal of Intercultural Studies* (2015) 520–543.

Jensen, Sune Q.: 'Othering, identity formation and agency'. 2 (2) *Qualitative Studies* (2011): 63–78.

Joao Guia, Maria, Maartje van der Woude & Joanne van der Leun (eds): *Social Control and Justice: Crimmigration in the Age of Fear.* Eleven International Publishing, 2013.

Johnston, Ian: *Brexit: Anti-immigrant prejudice major factor in deciding vote, study finds,* The Independent, 21 June 2017.

Juss, Satvinder & Thanos Zartaloudis: 'Critical Approaches to Migration Law'. 22 (1) International Journal of Minority and Group Rights (2015) 1–6.

Karp, Paul: Peter Dutton says Victorians scared to go out because of 'African gang violence'*, The Guardian*, 3 January 2018.

Klinkner, Philip: Anti-immigrant views helped Trump win. Will they also cause his undoing? *Chicago Tribune*, 18 April 2017.

Kmak, Magdalena: 'Between Citizens and Bogus Asylum Seekers: Management of Migration in the EU through the Technology of Morality'. 21 (4) *Social Identities* (2015) 395–409.

Kymlicka, Will. 'The rise and fall of multiculturalism? New debates on inclusion and accommodation in diverse societies'. 61 (199) *International social science journal* (2010) 97–112.

Lévinas, Emmanuel: *Outside the Subject*. Stanford University Press, Stanford 1994.

Loomba, Ania: *Colonialism/postcolonialism*. Routledge, London, New York 2015.

Mezzadra, Sandro & Brett Neilson: *Border as Method, Or, the Multiplication of Labor*. Duke University Press, Durham, London 2013.

McCarthy, Tom & Oliver Laughland: Trump travel ban: supreme court allows enforcement as appeals proceed, *The Guardian*, 5 December 2017.

Mulcahy, Linda & David Sugarman: 'Introduction: Legal Life Writing and Marginalized Subjects and Sources'. 42 (1) *Journal of Law and Society* (2015) Special Issue 1–6.

Murphy, Cian C. & Penny Green: *Law and Outsiders, Norms, Processes and 'Othering' in the 21st Century.* Hart Publishing, Oxford, Portland 2011.

O'Donovan, Darren: 'Breaking the cycle of discrimination? Traveller/Roma housing exclusion and the European Convention on Human Rights'. 16 (1) *International Journal of Discrimination and the Law* (2016) 5–23.

Oltermann, Philip: Conservative Sebastian Kurz on track to become Austria's next leader, *The Guardian*, 16 October 2017.

Pedrioli, Carlo A.: 'Constructing the Other: U.S. Muslims, Anti-Sharia Law, and the Constitutional Consequences of Volatile Intercultural Rhetoric'. 22 *Southern California Interdisciplinary Law Journal* (2012) 65–108.

Rancière, Jacques: 'Who is the Subject of the Rights of Man'. In Jacques Rancière: *Dissensus: On Politics and Aesthetics*. Bloomsbury Academic, London, New York, Sydney 2010, 70–83.

Roth, Kenneth: *The Refugee Crisis that Isn't*, The Huffington Post, 9 March 2015.

Said, Edward, *Orientalism*. Penguin Books, Oxon 2003 [1978].

Skrentny, John David: *The minority rights revolution*. Harvard University Press, Cambridge Massachusetts 2009.

Simpson, George Eaton, & J. Milton Yinger: *Racial and cultural minorities: An analysis of prejudice and discrimination*. Springer Science & Business Media, New York 2013.

Spivak, Gayatri C.: 'The Rani of Sirmur: an essay in reading the archives'. 24 (3) *History and Theory* (1985) 247–272.

Stabile, Susan J.: 'Othering and the Law'. 12 *University of St. Thomas Law Journal* (2016) 381–410.

Stumpf, Juliet P., 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power', 56 *American University Law Review* (2006) 367–419.

Tasker, John Paul: Far-right, anti-fascist protesters temporarily shut Quebec border crossing, *CBC News,* 30 September 2017.

Todres, Jonathan, 'Law, Otherness, and Human Trafficking.' 49 (3) *Santa Clara Law Review* (2009): 605–672.

Treaty of Lisbon amending the Treaty on European Union [2007] OJ C306/01.

Vertovec, Steven: 'Towards post-multiculturalism? Changing communities, conditions and contexts of diversity'. 61 (199) *International social science journal* (2010) 83–95.

Vrielink, Jogchum; '"Islamophobia" and the law: Belgian hate speech legislation speech and the wilful destruction of the Koran'. 14 (1) *International Journal of Discrimination and the Law* (2013) 54–65.

Wrench, John: *Diversity management and discrimination: Immigrants and ethnic minorities in the EU*. Routledge, Oxon, New York 2016.

Young, Iris M.: *Justice and the politics of difference*. Princeton University Press, Princeton 1990.

Young, Iris M.: *Inclusion and democracy*. Oxford University Press, Oxford, New York 2000.