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ARTICLE

The nomos of citizenship: migrant rights, law and the possibility of justice

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Abstract

Superficially, citizenship appears relatively simple: a legal status denoting political membership. However, critical citizenship studies scholars suggest that citizenship is first and foremost a political practice. When non-citizens, such as irregularised migrants, constitute themselves as citizens through their actions, irrespective of legal status, these practices of citizenship have transformational potential because they are extra-legal. Yet, there is an ambivalence here: rights-claiming migrants tend to frame their key demands within the terms of the law often by calling for the regularisation of their status. This article addresses this ambivalence by adopting a 'deconstructive method' to investigate the legal dimensions of citizenship as sites of theoretical and political intervention. It is argued that practices of rights-claiming by irregularised migrants are important to grasp because they mobilise the paradoxes inherent to the fact that universal rights are enshrined in the constitutional texts of modern citizenship in order to generate new legal meanings and horizons of justice. This hypothesis is explored through a series of illustrative examples of rights-claiming taking place within and beyond the formal confines of legal orders. In so doing, the article sets out a novel conceptual framework for analysing how migrants' claims to justice strategically negotiate citizenship in its legal form.

Keywords Citizenship · Migration · Human rights · Law · Deconstruction · Derrida

In a text titled 'What We Owe to the "*Sans-papiers*"', Etienne Balibar wrote that 'we owe them ... for having recreated citizenship among us, since the latter is not an institution nor a status, but a collective practice' (2000, p. 42). Balibar's claim poses important questions about citizenship, particularly in relation to law. Citizenship is conventionally understood as 'a [legal] status bestowed on those who are full members of a community' where all 'are equal with respect to the rights and duties' (Marshall, 1950, p. 18). From this perspective, the *sans-papiers,* an undocumented

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migrant-led political group in France, were not citizens. So why would Balibar see them as exemplars of French citizenship? Dominant understandings of citizenship (for example, Marshall, 1950), struggle to answer these kinds of questions because they see citizenship primarily as a legal status. There have been many attempts to theorise citizenship in more dynamic terms (Bauböck, 1994; Benhabib, 2004, 2006). However, there is still a tendency to reduce citizenship to legal status and/or be over-determined by legal frameworks (see Honig, 2011; Thomassen, 2011).

Contemporary research in the field of critical citizenship studies offers a promising way forward. Adopting a performative perspective, theorists such as Engin Isin (2008, 2012, 2017), and Anne McNevin (2011), amongst others, have developed the theory of 'acts of citizenship'. For these theorists, political practices of citizenship are prior to it as a legal status and even the condition of its possibility (Isin, 2008, p. 17). They foreground how legally marginalised figures, such as irregularised migrants, enact themselves as citizens in substance but not status in order to challenge and redefine the meaning(s) of citizenship.

The problem is that for many irregularised migrants, legal citizenship remains of great importance. It is precisely their insecure legal and political standing in their host polities that renders them deportable, resulting in experiences of rightlessness (Gündoğdu, 2015). There is an ambivalence in the theory of acts of citizenship because irregularised migrants still tend to frame their key demands within the law (Nyers, 2008). This ambivalence is indicative of a wider problem in the politics of migration. Contemporary academic and political debates on migration have reached something of an impasse, caught between the demand for 'no borders' (Sharma, 2020) and the politics of recognition which tends to place too much emphasis on law and litigation as an avenue for the realisation of migrant rights (El-Enany, 2021).

This article addresses these dilemmas by charting a course between approaches to citizenship that are over-determined by law and those that do not fully account for its effects. It does so by combining a deconstructive method (Gasché, 1986; Thomassen, 2010) with research in the fields of citizenship and legal studies (Derrida, 2002; Douzinas et al., 1994; El-Enany, 2021; Fitzpatrick, 2008). Rather than proposing a comprehensive theory of law and/or citizenship as a legal category, through a deconstructive approach, I investigate how practices of rights-claiming by irregularised migrants come up against, interact with and might transform legal orders.[1] While this article draws attention to some of the limitations in the theory of acts of citizenship, it is indebted to it methodologically. As Rutvica Andrijasevic observes, a strength of this framework is that it introduces 'a different entry point for analysis that approaches citizenship starting precisely from mobilisations of marginal groups rather than from an institutional or representational angle' (2015, p. 49). By maintaining the same analytic and epistemic entry-point as the concept of acts of citizenship, but using it to investigate contestations over the content and meaning of citizenship and immigration law, this article sets out a new conceptual framework for analysing citizenship.

[1] In this article, I understand rights-claiming as a performative practice of persuasion taking place across a range of sites and scales (see Zivi, 2012).

I argue that practices of rights-claiming by irregularised migrants mobilise the paradoxes inherent to the fact that universal rights are enshrined in the constitutional texts of modern citizenship in order to generate new legal meanings and horizons of justice.[2] However, the emancipatory potential of these practices can only be realised if we take seriously the contingent and dynamic nature of the law and legal meaning. This hypothesis is substantiated in three sections: the first identifies the research gap; the second section investigates the possibility of justice from within legal systems through using the case of *BA Nigeria v SSHD;* and the final section explores the 'civil disobedience' of the French farmer Cédric Herrou. The examples used are there to illustrate the argument. There are other examples that could be used instead, and others still might contradict these claims. The selection of cases demonstrates possibilities, not necessities. The aim is to highlight the discursive spaces of citizenship law as potential sites of strategic intervention in a migrant rights movement seeking to contest and potentially transform citizenship.

Constituting citizenship

Legal status alone cannot capture the many dimensions of citizenship. When individuals and groups like the *sans-papiers* enact themselves as citizens in substance but not status they play out the tensions between the different sides of citizenship. While dominant understandings of citizenship struggle to account for the inherent diversity, many theorists have set out more dynamic accounts (Bauböck, 1994; Benhabib, 2004, 2006; Isin, 2012; Isin & Nielsen, 2008; McNevin, 2011). Yet, when it comes to law, there is a tendency for these different approaches to citizenship to oscillate between two poles, either being over-determined by its legal and institutional form or struggling to explain how radical political practices of citizenship encounter and transform legal citizenship. In the current section, I set out two alternate approaches that exemplify the problem: the first is Seyla Benhabib's model of 'democratic iterations' (Benhabib, 2004, 2006) which is inhibited by an excessive legalism; the second is the concept of 'acts of citizenship' (Isin, 2012; Isin & Nielsen, 2008; McNevin, 2011) which foregrounds an understanding of citizenship as an extra-legal practice of contestation.

Democratic iterations

Benhabib proposes a dynamic theory of democratic citizenship through the concept of democratic iterations. Rooted in the theoretical framework of Jürgen Habermas' discourse ethics (Habermas, 2007), democratic iterations are constitutional learning processes through which 'a democratic people, which considers itself bound by certain guiding norms and principles, engages in iterative acts by re-appropriating

[2] I am using James Tully's (2014) understanding of modern citizenship, referring to citizenship in its hegemonic mode, where it constitutionally enshrines universal rights and is organised around two institutional features: law (nomos) and representative democracy (demos).

and reinterpreting these, thereby showing itself to be not only the subject but also the author of laws' (Habermas, 2007, p. 49). In developing the concept of democratic iterations, Benhabib relies heavily on the Derridean notion of 'iterability' (Derrida, 1988). Iterability is when in repeating 'a term or a concept, we never simply produce a replica of the original usage and its intended meaning; rather, every repetition is a form of variation. Every iteration transforms meaning, adds to it, enriches it in ever-so-subtle ways' (Benhabib, 2004, p. 48). When applied to citizenship, iterability emphasises its dynamic and performative dimension, where '[w]e, the people who agree to bind ourselves by these laws are also defining ourselves as a 'we' in the very act of self-legislation' (Benhabib, 2004, p. 48).

The strength of Benhabib's concept of democratic iterations is that it proposes a dynamic account of citizenship (Thomassen, 2011). However, her (mis) appropriation of the Derridean concept of 'iterability' means that iterative political processes end up being constrained by an excessive legalism, because they take for granted the legitimacy and authority of pre-existing political formations. The problem is that Benhabib deploys the Derridean concept of iterability, while still invoking the idea that constitutional texts have an authoritative 'original meaning', despite the fact that Derrida repeatedly highlights the contingency inherent in all acts of foundation (1986, 2002). The erasure of the contingent dimension of foundations poses significant conceptual and concrete difficulties that will be explored later in this article. However, it is worth touching on their implications for the concept of democratic iterations here.

While democratic iterations are supposed to bring law back into the political field, in reality, the opposite happens. By Benhabib's own admission, 'the law provides the framework within which the work of politics and culture go on' (Benhabib, 2006, p. 60). This would be less of a problem if we were to acknowledge that the law has no absolute moment of authority. Instead, as Bonnie Honig puts it, 'Benhabib assesses new rights in terms of their fit with moulds and models already in place, incomplete, but definitive in their contours' (2011, p. 119). While law is meant to be made subject to democratic processes of iteration, in truth law can only be challenged within a narrow frame that takes as given the legitimacy of pre-existing political formations.

There are real-world consequences to this move. Benhabib reproduces what Andreas Wimmer and Nina Glick Schiller (2003) refer to as 'methodological nationalism': a tendency to equate all society with the form of the modern nation-state, thus naturalising the nation-state as the container of all social processes. Methodological nationalism can have important consequences for how justice is conceptualised and operationalised in practice by failing to account for the injustices that arise from the nation-state form (2020, p. 125).

British citizenship is a pertinent example. Recent postcolonial literature has highlighted the unjust foundations of the United Kingdom's borders (El-Enany, 2021) through which the spoils of empire are cordoned off from racialised commonwealth subjects. Despite this, the government continues to introduce deeply unjust laws and policies, such as the so-called 'hostile environment' which criminalised irregularised migrants for doing the bare necessities of what it takes to survive, such as renting accommodation, working and going to the doctor (Liberty,

2019). By assuming the legitimacy of laws that exclude former colonial subjects, the iterative processes proposed by Benhabib run the risk of concealing the violence and dispossession that the law authorises. In so doing, they narrow the scope for the kinds of claims to justice that can be made in the present, leaving unjust and exclusionary laws largely unchallenged.

Acts of citizenship

If Benhabib's account of democratic iterations is over-determined by law, then work in the field of critical citizenship studies offers an alternate perspective. Theorists such as Engin Isin, Greg Nielsen and Peter Nyers, amongst others, introduce the concept of 'acts of citizenship' as a novel way of investigating citizenship (see Isin & Nielsen, 2008). For these theorists, 'what is important about citizenship is not only that it is a legal status but that it involves practices' (Isin & Nielsen, 2008, p. 2). Such 'practices' are not just prior to citizenship as status but the condition of its possibility. The primary innovation of acts of citizenship is to shift the object of analysis away from legal status towards an investigation of political actors who may not hold legal citizenship but enact themselves as citizens to claim rights. Citizenship is practiced not just by exercising the rights we have but also by claiming them, meaning citizenship is often constituted by those who are not citizens in the formal (legal) sense (Isin, 2017).

One of the defining features of the acts of citizenship literature is a tendency to turn away from law. This move is exemplified by the third principle of acts of citizenship, which states that they '*do not need to be founded in law or enacted in the name of law* [emphasis original]' (Isin, 2008, p. 39). However, there is an ambivalence noted by Nyers: despite the third principle, most migrant rights movements still ground their 'key demands within the law' by calling for the regularisation of their status (2008, p. 179). If irregularised migrants' insecure legal standing often leads to experiences of rightlessness (Gündoğdu, 2015) then law remains an important object of analysis. While it is disingenuous to suggest that the acts of citizenship literature excludes law from its analytic framework altogether, I contend that the question of how acts of citizenship interact with and might transform citizenship as a legal category is under-investigated.

There is a tendency for law to be treated somewhat reductively: in legal terms, citizenship is typically reduced to status and sidelined in favour of the question of how it operates as a radical political practice. It remains unclear exactly how theorists of acts of citizenship conceptualise law, because this is a task that receives little sustained attention.[3] However, when they reduce legal citizenship to status, there seems to be an implicit acceptance of the dominant jurisprudential tradition that sees law as a stable and internally coherent body of rules around which societies are organised (for example, Hart, 1961). What is occluded in the reduction of law to

[3] An exception is Isin's book *Citizens Without Frontiers* (2012), where he does discuss law, albeit briefly—a point I will return to shortly.

rules is an understanding of how legal citizenship shapes and is shaped by political practices.

Herein lies the problem this article addresses: Benhabib's account of democratic iterations is over-determined by its legalism, and the concept of acts of citizenship does not sufficiently account for how through experience acts might transform citizenship in its legal form. While this forms the problem around which this article is oriented, it is demonstrative rather than definitive. There is a vast array of contemporary literature in the fields of citizenship and migration studies that considers (political) questions of law. Recent work has sought to highlight the 'making of migration' in regard to processes of bordering through which some people are produced as migrants (Tazzioli, 2020) and, in so doing, to disrupt the 'natural order of things' by making human mobility the central object of analysis (Scheel & Tazzioli, 2022). Addressing the question of the law more directly, Anastasia Tataryn suggests that 're-thinking law and the legal citizen-subject' (2016, p. 39) is necessary to address irregularised migrants' experiences of rightlessness. In *(B)ordering Britain,* El-Enany's postcolonial analysis highlights ongoing forms of 'colonial dispossession' and calls for an approach to migration that rejects a politics of recognition—the strategy of appealing to legal status-recognition and to conceptions of citizenship in order to claim rights for racialised migrant (El-Enany, 2021, p.9).

Perhaps the most relevant work has been undertaken by Bridget Anderson, who has proposed a 'methodologically de-nationalist' approach to migration studies and questions of justice (2020, 2021). Anderson poses the question of how the injustices flowing from citizenship and immigration law can be remedied, given the crucial role of the nation-state in shaping mechanisms of justice (2020, p. 125). Her solution is a 'methodologically de-nationalist' framework that attends 'to citizenship and its inequalities' by 're-exceptionalizing citizenship at the same time as de-exceptionalizing displacement' (2021, p. 300).

Yet, there remain unanswered questions that run through all the approaches outlined above: none of them articulate how a transformational political practice might engage with law and particular legal orders. To address this omission, this article turns to the field of critical legal studies and, in particular, to its poststructuralist tradition (for example, Fitzpatrick, 2001, 2008; Golder & Fitzpatrick, 2009). While critical legal studies are a diverse field (see Douzinas et al., 1994; Fitzpatrick & Hunt, 1987), it is united by a critique of the dominant jurisprudential understanding of law as rules. Critical legal theorists adopt a shift in the theory and practice of law:

> Where the politics of jurisprudence was previously conceived as a question of epistemology—it was sufficient to know that this rule or norm was law—it has now been faced more directly with the question of ontology or of the social and institutional being of law (Douzinas et al., 1994, p. 15).

Starting from an understanding of law as a contingent, dynamic and evolving body of meaning, the task for the remainder of this article is to investigate citizenship and immigration law as a site of political 'resistance' and 'transformation' (Fitzpatrick, 2008). To do so, I introduce a deconstructive approach.

A deconstructive approach: law, justice and contingency

How can laws that articulate citizenship in exclusionary and racist terms also be a mechanism for emancipation? The legal historian Michael Klarman considers a similar question. He asks how, in the case of *Brown v Board of Education of Topeka,* which nominally ended segregation, the U.S. Supreme Court could arrive at such a different conclusion to *Plessy vs Ferguson,* which legally enshrined segregation, when the constitution has not changed. He concludes that 'because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times' (2004, p. 5). In the period between the two cases, the Civil Rights Movement had shifted the social and political consensus in the U.S., and it is primarily this fact which explains the difference in the two judgements. Law, even in its formal sense, does not only shape public opinion, but is also shaped by it, making it a site of political struggle.

If the indeterminacy of constitutional law makes it an important area of political intervention, then this holds especially true with citizenship. In a recent examination of citizenship and constitutional law, Jo Shaw finds that, from a constitutional perspective, 'citizenship does not have a settled meaning' (2020, p. 16). Formal constitutions are surprisingly silent when it comes to citizenship. Furthermore, because the meaning of citizenship also tends to be drawn from a variety of different sources—for example, international law— 'citizenship is best seen as relational and in flux' (2020, p. 16). Consequently, constitutions do not generally set out precise definition of citizenship; rather, they articulate the discursive framework within which practices of citizenship, and contestations over its meaning are played out.

The aim of the current section is to investigate how citizenship can be contested and rearticulated from within particular legal orders. This section is developed in contrast to Habermasian discourse ethics, in order to problematise Benhabib's claim that legal orders have authoritative moments of foundation. As indicated above, this is done by employing the shift that critical legal studies make in moving from a jurisprudential analysis of law to an ontological one (Douzinas et al., 1994). More specifically, I utilise a deconstructive method (Gasché, 1986; Thomassen, 2010) in order to investigate the relationship between law and justice as a generative site of intervention and resistance (Fitzpatrick, 2008). Such an approach is hinted at in the acts of citizenship literature when Isin adopts a Derridean perspective, suggesting that justice is defined as the 'drive to improve the law' (2012, p. 118). Yet there is very little interrogation of what this means when it comes to citizenship and the law, or how justice and the law interact in practice. I argue that because universal rights are encoded into the constitutional texts which found citizenship regimes, claiming rights through processes of litigation is one way of opening up new horizons of justice. In exploring this thesis, I understand 'litigation as a distinct method of social protest' (Klarman, 2004, p. 7) that comes with important possibilities and limitations.

Contingency and the possibility of justice

In *Citizens Without Frontiers*, invoking Derrida, Isin writes, 'I understand justice… [as] principles by which people living under a particular system act and are inspired to act as opposed to laws which they must obey' (2012, p. 118). While this line of thought is not developed further, it appears that Isin adopts a normative conception of justice as 'principles' that is juxtaposed to law as a, seemingly, stable body of rules that one 'must obey'. For Derrida, however, the relationship between law and justice is more complex. As with many of the concepts he deconstructs, such as hospitality, the relationship between justice and law is structured by an ethico-political aporia.[4] Justice is 'unconditional' because it is concerned with the realisation of the ethical relation. In contrast, law is inherently 'conditional' because it concerns rules and norms. Justice and law imply and exclude each other: the unconditional (justice) asserts the necessity of being put into effect in a conditional (legal) order that it necessarily transcends (Derrida, 2002, pp. 237-238). It is in this ethico-political aporia that Peter Fitzpatrick locates the site of '*law as resistance* [emphasis added]' (2008; Fitzpatrick et al., 2020). The possibility of legal and political transformation and, therefore, justice appears in the political space that opens up between the conditional and the unconditional. The question is, how does this work? Or more specifically, how does the play between the conditional and the unconditional work within the institutional confines of legal systems? The answer lies in the performative structure of the legal system; specifically, in the logic of precedent. However, this requires taking seriously law's contingent foundations.[5]

The possibility of justice is a question of foundations. It is a question of whether the violence that founds the law is acknowledged or concealed in its day-to-day operation. Derrida highlights the act of violence upon which all legal orders are founded through his discussion of the 'mystical' (hereafter, contingent) foundations of authority. The contingent nature of foundations is inscribed in legal systems through the logic of iterability. The establishment of law works on the assumption that it can be repeated time and again and that each repetition refers to an origin that can never be fully determining. Because justice needs law, but can never be reduced to law, and because the logic of iterability inscribes law with a dynamic principle for change, iterability is the possibility of justice. It is the mechanism through which law can be contested and renewed. While this appears highly theoretical, it does have real-world implications. Using the example of the case of *BA (Nigeria) v SSHD*, I set out some of the practical consequences of a deconstructive approach to law.

[4] For a discussion of the aporetic relationship between law and justice in Derrida's work, see Fagan (2013) and Honig (2011).

[5] The notion of contingency links together a deconstructive approach with the critical legal studies movement, most notably in its poststructuralist turn. It refers to the absent foundations of any given legal order. However, that does not mean there is no ground at all but that there is an 'ontological weakening' (Marchart, 2007, p. 2) of ground through which all attempts at foundation, while necessary, are always partial and incomplete.

BA (Nigeria) v SSHD: iterability at the Heart of Law

On the 20 May 2005, a Nigerian citizen, who had been living in the United Kingdom for 17 years, was served with a deportation order. As the first respondent in the case *BA (Nigeria) v Secretary of State for the Home Department,* BA had been granted indefinite leave to remain on 25 May 1994.[6] BA was served with the deportation order following his release from a 10-year prison sentence. BA appealed the order, on human rights grounds, to the asylum and immigration tribunal, but the appeal failed, and he was once again served with a deportation order on 25 May 2007.[7]

At the time it was an important case, determining the meaning of a key point of immigration law. In the published judgement, the case is 'concerned with meaning and effect of the statute' found in Part 5 of the Nationality, Immigration and Asylum Act 2002 which deals with immigration and asylum appeals, where 'on occasion the meaning that is to be given to them is the subject of controversy'. BA appealed his deportation order by invoking a human rights claim under the Geneva Convention on the Status of Refugees and Article 3 of the European Convention on Human Rights to not be deported from a country in which they are seeking refuge. He successfully contested the deportation order and remained within the United Kingdom. The judgement also amended the meaning of Immigration Rule 353 so that 'where a human rights claim is made it will always generate an in-country right of appeal' (Yeo, 2009). The case was then cited as precedent in subsequent cases to successfully contest further deportations (Yeo, 2015).There are three interrelated elements that I want to draw from the case of *BA (Nigeria) v SSHD*: the importance of iterability *qua* precedent, the contingent foundations of legal orders, and the constitutional questions specific to modern citizenship regimes.

Firstly, the case highlights how the movement of justice functions to 'improve the law' (Isin, 2012, p. 118). It does so by problematizing the assumptions of jurisprudential theorists, such as Hart, who believe that the meaning of law forms a coherent and unchanging centre that can be applied with minimal interpretation. The case was heard by the United Kingdom Supreme Court precisely because the meaning of the relevant statute was unclear and was subject to controversy. For Hart, while there may often be uncertainty around the facts of a case, at a certain point there is always a 'core', 'germ', 'embryon' of meaning which acts as an 'authoritative mark' (Hart, 1961, p. 119), at which point interpretation stops and a rule can be properly applied. This is evident in how precedent apparently reflects the stability of law. Hart contends that there are always 'plain cases' that are 'constantly recurring in similar contexts to which general expressions were clearly applicable' (1961, p. 123). There are also 'borderline cases', whereby if the immediate rule is unclear, then it can be clarified by secondary rules. However, the case of *BA Nigeria* does not fit this schema: not only was the meaning of how the law applies to the case

[6] This case has not been selected because it resolves a set of problems once and for all, or because it is influential in the way that *Brown v Board of Education* was. Rather, it is a good example of a set of dynamics occurring within the legal system around questions of immigration and citizenship law.

[7] Unless otherwise stated the case study is referencing the reasoned decision (UKSC 7, 2009).

at hand unclear, but it could not be clarified by reference to either further rules or to precedent.

The argument made by the QC for the Secretary of State highlights the often-ambiguous meaning inherent to law with exceptional clarity. Because in this case the statute was unclear and could not be clarified through reference to any further rules, or in relation to the similar preceding case of *Onibiyo* (1996), the QC argued that that a further, entirely absent, sentence should be read into this section along the lines of 'as long as the Secretary of State agrees that it is a fresh asylum or human rights claim as defined in Immigration Rule 353' (see Yeo, 2009). This argument was not upheld, and the Secretary of State lost the case. The consequence was that the whole framework around fresh claims took on a new meaning because this case was then cited as a precedent in future cases. As the legal scholar Stanley Fish observes,

> The truth about precedent then is the opposite of the story we tell about it; precedent is the process by which the past gets produced by the present so that it can then be cited as the producer of the present (1988, p. 893).

The case of *BA Nigeria* clearly problematises an understanding of law as a stable body of rules. This is not to deny that 'plain cases' exist and that the operation of legal precedent helps to stabilise law and the operation of the justice system. However, it is also true that what is now viewed as a plain case had once been contested and settled, and 'it is always possible, and indeed likely, that what has apparently been settled will become unsettled, and argument will begin again' (Fish, 1988, p. 900). Of course, this is a double-edged sword. Iterability is not necessarily progressive.[8] As the battle over abortion rights in the United States makes clear, the constitutional right to abortion which became settled law in *Roe v Wade* can become 'unsettled', as it did in *Dobbs v. Jackson Women's Health Organization,* where the Supreme Court decided that the Constitution does not confer a right to abortion. Yet, iterability is also the possibility of justice. 'Rights are not dead instruments, they are live practices' (Honig, 2001, p. 800), and it is through practices of right-claiming that they are kept alive.

The second point that the case of *BA Nigeria* highlights is what is at stake in a deconstructive understanding of foundations, *qua* contingency. It is about how we are to interpret the law's silence, which is a matter of whether the law is a fundamentally a conservative self-justifying system, or whether it can be transformed. It is only by acknowledging the contingent foundation of law that it can be part of a transformational political project. A deconstructive approach to law insists that '[s]ilence … is to be constructed as the 'not yet thought', not the 'self-evident that need not be spoken' (Cornell, 1989, p. 1060). *BA Nigeria's* case turned on the silence in the law. This is the gap which the QC for the Secretary of State argued then implied another, entirely absent, sentence. The QC's claim was predicated on fact that the 'to avoid an absurdity', the interpretation of the silence must be 'self-evident'. If you accept that the law can and should be read within an authoritative context, then

[8] See Nyers (2008) for a discussion of this issue as it pertains to acts of citizenship.

this position makes sense. Therein lies the problem with failing to acknowledge the contingent foundations of legal orders: erasing the paradoxes of foundational acts places limits on how these silences are to be interpreted, and, in the process, might prevent the kind of political transformation necessary for justice to be realised.

Benhabib's notion of democratic iterations and the broader Habermasian tradition are a striking example of this problem (see Honig, 2001; Thomassen, 2006). Theorists of deliberative democracy, such as Habermas and Benhabib, fall into the trap of what Erin Pineda calls 'seeing like a white state', that is, 'taking for granted the legitimacy of the constitutional order, assuming as primary the ends of constitutional integrity and stability, [and] centering the white citizen as the normative ideal' (2021, p. 4). Habermas famously argues that it is possible to satisfactorily 'resolve' the paradoxes inherent to founding legal orders through constitutional learning processes—recall that democratic iterations are precisely these learning processes. However, such processes require that

> later generations will start with the same standards as the founders ... The descendants can learn from past mistakes only if they are 'in the same boat' as their forebears ... All participants must be able to recognize the project as the same throughout history and to judge it from the same perspective (Habermas, 2001, p. 775).

The problem is, if in these processes founders and descendants are all 'in the same boat' and judge the political project 'from the same perspective', then how we are to read these silences are determined in advance. There are real consequences to this, because when groups, such as irregularised migrants, contest the law, an entire set of justice claims is silenced: those who are not in the same boat, yet wash up on the same shores, cannot be seen or heard within the bounds of the law. That does not mean that iterability is not present in the legal system, just that its effects are radically circumscribed. By concealing the violence of the founding moment, iterability is no longer a mechanism for political transformation but a part of 'the legal myths that seemingly create a self-justifying system' (Cornell, 1989, p. 1058) of established legal meaning. The result is that universal rights become 'dead rights' (Honig, 2001), granted only to those deemed central to the nation's history.

If the law itself embodies racial violence (El-Enany, 2021), and if that violence is subsequently disavowed, then that poses the question of whether meaningful justice can be pursued through legal channels. However, a deconstructive understanding of foundations invites a different reading of law's silence. It is to recognise that, as was the case with *BA Nigeria*, the law might entail unforeseen (ethical) obligations that open it up to new meanings. Because the act of foundation can never be its own justification, and because this absence of authority is inscribed in law through its 'fabulous retroactivity' (Derrida, 1986, p. 10), the silence must be read as the not-yet-thought. This holds law open to new claims that can transform its meaning in the present. *BA Nigeria's* case highlights how this works.

In the everyday operation of the legal system, irregularised migrants can and do successfully contest deportations in court. Such cases might well be just decisions, but they do not necessarily alter the meaning of the law. In contrast, cases like *BA Nigeria* operate quite differently, because they do not simply reproduce legal

meaning but resignify it: where the meaning of the law was unclear in relation to who had an in-country right of appeal to contest a deportation order, the judgement clarified the point of law. Here, the absence of authority, manifest in the law's silence, functioned in conjunction with iterability so that the statute in question took on a new meaning. The deconstructibility of law is what makes it possible for the legal system to be transformed, rather than just evolve, and that is why its erasure is a 'horror story'. Justice calls us to recognise that the 'not yet thought' is inscribed in the legal order from the very beginning.

Finally, the case of *BA Nigeria* illuminates how the indeterminacy of constitutional citizenship shapes the discursive space within which political contestation takes place. A deconstructive understanding of law explains *how* justice happens in specific cases but not *why* it happens. What is to say that law's instability tends towards justice? Furthermore, if 'no descriptive set of current conditions for justice can be identified as justice, does that mean that all legal systems are equal'? (Cornell, 1989, p. 1058). We might ask, then, how constitutional questions about rights and citizenship fit into this equation? Specifically, this means understanding the concrete ways in which ambiguities in the relationship between international law, specifically human rights law, and particular legal orders, play out. Shaw contends that the primary role of constitutions in relation to rights is to create discursive spaces for political contestation (2020, p. 151). In addition, I propose that it is through practices of rights-claiming that the law can be contested and (re)shaped.

The Judgement written for *BA Nigeria* cites the court's obligations regarding both the European Convention on Human Rights (ECHR) and the 1951 Refugee Convention.[9] The reference to the 1951 convention is particularly relevant as it was introduced with the explicit intention of addressing the dangers inherent to the loss of citizenship. It asserts the right of political refugees to seek asylum and the obligation on states to accept them. There is a tension inherent in the fact that the obligations which the court refers to are obligations to recognise that the first respondent (BA) has a right to a political community, which comes into conflict with the sovereign right of nation-states to police their borders, as evidenced by the Home Secretary's attempts to deport *BA*.[10] What the judgement reveals is the aporetic terrain upon which modern citizenship law is founded. As Fitzpatrick illustrates in *Modernism and the Grounds of Law*, modern nation-states are permeated by a universalism in regard to notions of free universal citizenship and human rights (see also Tataryn & Ertürk, 2021); yet there is a contradiction in the fact that political belonging is almost exclusively reduced to the nation-state, meaning that a 'purely universal citizenry cannot exist' (Fitzpatrick, 2001, p. 135). In modern citizenship regimes, mobilising this aporia through rights-claiming opens up the law to new horizons of justice.

[9] Both the ECHR and the 1951 Convention are legally binding but the difference is that the 1951 Convention has no formal enforcement mechanisms above and beyond the state.

[10] Recall that in the first section I argued that deportation is constitutive of citizenship, both as a formal legal status (an identity defined in domestic and international law) and as a normative ideal.

Rights claims made from within legal institutional settings enact a deconstructive gesture that makes justice possible. The decision that had to be made in *BA Nigeria's* judgement took place between a particular legal statute with an unstable meaning and the universal principles upon which it was founded. The judgement found that 'where a human rights claim is made it will always generate an in-country right of appeal'. BA's rights claim functions as an ethico-political injunction which makes the just decision possible: it at once demands transformation and change by resignifying the meaning of the law, but it is also faithful to the experience of order and continuity, because it is a call for a place within the law. The multiple sources of constitutional law shape the discursive framework within which contestations of citizenship play out. Within this context 'human rights' provide a 'nonhegemonic language of resistance' (Fitzpatrick, 2014, p. 127) which, when mobilised through the political practice of rights-claiming, can negotiate the limit between law and justice to resignify statute.

The current section of this article started with a dilemma: the political spaces and practices through which legal citizenship could be transformed were either over-determined by law (democratic iterations) or tended to discount law altogether (acts of citizenship). To address this problem, I adopted a deconstructive approach in order to investigate the possibility of achieving justice from within particular citizenship regimes. Utilising the case of *BA Nigeria*, three primary claims were developed: first, the logic of precedent inscribes law with a dynamic principle for change; second, the transformational potential of such change depends on acknowledging the contingent foundations of all legal orders; thirdly, because constitutional citizenship regimes are 'assembled from different sources' (Shaw, 2020, p. 253), practices of rights-claiming can mobilise their inherent tensions to challenge and resignify particular laws. However, litigation has its limitations when it comes to transformational politics, nor does it exhaust the realm of law. In the final section of this article, I investigate acts of civil disobedience carried out by French farmer Cédric Herrou in order to understand how the law shapes political possibilities beyond the confines of the courtroom.

Citizenship beyond legality: the just politics of civil disobedience

Litigation is a distinct form of political practice which can have an important role in emancipatory politics. Yet, transformational political practices cannot and should not be reduced to litigation alone. As Cover observes in relation to judges, '[t]heirs is a jurispathic office' because 'judges characteristically do not create law, but kill it' (1982, p. 53). The jurispathic, in Cover's terms, refers to the ways in which the court system often closes down legal meaning and reinforces hegemonic power. However, there is more to law than litigation. As Alan Hunt observes, '[l]itigation 'failure' may, paradoxically, provide the conditions of 'success' that compel a movement forward', because they are 'instances of a dying discourse' (1993, p. 240). In the final section of this article, the task is to explain how this works. Extending the ethico-political understanding of law and justice adumbrated previously, I set out an account of transformational citizenship practices that mobilise law's constitutive

aporia in order to generate new legal meanings through 'jurisgenerative' political processes (Cover, 1982).Utilising the example of Cédric Herrou's civil disobedience, I conceptualise the sites of transformational citizenship practices that are carved out through a negotiation between the state and civil society. In so doing, this article once again navigates between two poles through which law either over determines political processes (democratic iterations) or tends to be excluded from the analysis (acts of citizenship).

Derrida's ethico-political account of law and justice extended beyond the courtroom and was central to his understanding of concepts and practices such as democracy (2005), hospitality (2000) and civil disobedience (2014). In what follows, I highlight how the aporetic relationship between law and justice has 'jurisgenerative' potential that helps to theorise practices of transformational citizenship. Jurisgenesis posits an understanding of law where '[w]e inhabit a *nomos*—a normative universe' (Cover, 1982, p. 4). The consequences of this are profound, for the meaning of the legal 'universe' cannot be delimited to the formal institutions of law because no 'set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning' (Cover, 1982, p. 4), and these narratives are always multiple and contestable. Because legal principles acquire meanings that they cannot control, the *nomos* we inhabit makes possible new claims to justice that are in excess of formal processes of law-making and existing laws. In developing her conception of democratic iterations, Benhabib also drew upon the concept of jurisgenesis. However, once again there is a distinction to be drawn. Benhabib's insistence on the authoritative nature of foundations places limits on the possibility for new legal meanings in a manner that is incompatible with Cover, who insists that [t]he return to foundational acts can never be prevented or entirely domesticated' (Cover, 1982: 24).[11]

The concept of jurisgenerativity challenges and enriches the acts of citizenship literature. The third principle states that acts '*do not need to be founded in law or enacted in the name of law* [emphasis original]*'* and might 'call the law into question' or 'break it' (Isin, 2008, p. 39). However, the relationship between law, practices of rights-claiming and radical acts that might even break the law is in fact more complex. A jurisgenerative framework highlights the ways in which acts of civil disobedience might be simultaneously illegal and contestatory while they still 'signify a surplus of respect for the law' (Derrida, 2014, p. 25) and are founded in its principles. The example of Cédric Herrou, whose civil disobedience destabilised French constitutional law according to its own logic, demonstrates how this works, and demonstrates its potential for theorising transformational practices of citizenship.

[11] Thomassen (2011) suggests Benhabib is more indebted to Michelman's understanding of jurisgenesis, which has less radical connotations.

Cédric Herrou: citizenship as disobedient fraternity

Cédric Herrou is an olive and poultry farmer from the Roya Valley in France. He was arrested for enacting a form of solidarity that violated French laws—providing aid to refugees travelling into and across France from Italy (see Jeanticou, 2017; Pescinski, 2017). Herrou did not deny that his actions were illegal. When asked by the judge why he broke the law, Herrou responded, '[t]here are people dying on the side of the road. It's not right. There are children who are not safe … I am a Frenchman' (Nossiter, 2017).

Herrou was first arrested in August 2017. On this occasion, he was absolved on humanitarian grounds. However, following his arrest he received a great deal of publicity. Herrou's continued action, alongside his rising profile, led to a second arrest in October 2017, for which charge he was found guilty. However, that was not the end of the story. He challenged the decision in France's highest court, and his conviction was overturned. What makes this such a pertinent example, from the perspective of our understanding of law, and particularly from a jurisgenerative understanding of citizenship law, is the rationale behind his conviction being overturned.

The judges' reasoned decision is a clear example of law's ethico-political aporia. They acknowledged that in 'banning all help provided to an undocumented foreigner' there was an imbalance between law's two modalities: the 'principle of fraternity' and 'preserving public order'. The jurisgenerative potential of Herrou's civil disobedience mobilises law's ethical dimension (the principle of fraternity) against its political one (preserving public order) to generate new legal meanings: the constitutional court called upon the French parliament to amend the law so that humanitarian aid was no longer criminalised. As a repertoire of action, the jurisgenerative potential of civil disobedience works according to the same deconstructive logic of rights-claiming delineated previously: when organisations and individuals, such as Herrou, carry out acts that are *just* but not *legal*, they enact a deconstructive gesture that reveals particular laws to be in violation of their own internal logic. Herrou's civil disobedience exemplifies the movement of justice, deconstructing the law as part of the drive to make it more just.

Herrou's case specifically highlights the generative potential of modern citizenship, a potential that is made possible by the manner in which 'superordinate principles such as equality and dignity which are enshrined as constitutional rights in many countries' (Shaw, 2020, p. 8). In this case, the constitutional principle of fraternity, the very basis of the common bonds of citizenship, entails a set of rights and duties towards non-citizens which call French law into question. In coming to their verdict, the court relied heavily on an interpretation of France's national motto: 'Liberty, Equality and Fraternity'. What makes this reasoning relevant to the question of citizenship is the fact that within French law, the motto is not merely symbolic but constitutionally enshrined. Read in conjunction with the universal principles of liberty and equality which make up the other two-thirds of the constitutional triad, they found that the 'freedom to help another, for humanitarian reasons, follows from the principle of fraternity, without consideration of the legality of their presence on the national territory' (Boudou, 2018). Herrou's defence was predicated on the fact

that he did not reject French citizenship but was 'defending its values' (Nossiter, 2017), because the state was in 'dereliction of justice' (Derrida & Rottenberg, 2002, p. 144) by failing to realise its universal promise. Rather than seeing his actions as illegal, his civil disobedience is the point at which the excess of justice over law manifests itself in the form of action. The principle of fraternity which defines the common bond of all citizens simultaneously entails ethical obligations to others, exposing the contingent foundations of all articulations of 'the people'.

Consequently, Herrou's civil disobedience troubles the third principle of acts of citizenship—the fact that acts '*do not need to be founded in law or enacted in the name of law* [emphasis original]' and might, 'sometimes, break it' (Isin, 2008, p. 39). While his actions were illegal, the *just* foundations of Herrou's civil disobedience were 'enacted in the name of law'. In so doing, he engaged in what Cover calls a form of 'redemptive constitutionalism' (1982, p. 24) by enacting the universal dimension of the principle of fraternity. Practices of citizenship which are formally illegal are not wholly other to law, and their generative potential is derived from the nomos that the law generates.

While Herrou's enactment of universal fraternity was clearly just, there are question-marks over its transformational potential (see also Pescinski, 2021). When Herrou justifies his civil disobedience by invoking his identity as 'a Frenchman' (Nossiter, 2017), or suggests he is doing the 'work of the state' (Jeanticou, 2017), there is a risk that this politics of 'redemptive constitutionalism' falls back into the trap identified by Pineda of 'seeing like a white state' (2021). However, for Robin Celikates practices of civil disobedience by and on behalf of irregularised migrants can be transformative because they politicise 'questions that are excluded from the political domain', potentially 'reconfiguring public space and existing institutions' (2019, p. 69).

In this regard, we might see in Herrou's actions and successful defence the kind of methodologically denationalist orientation discussed in the first section: resignifying the principle of fraternity, so that it applies to others in France irrespective of their legal status, begins to 're-exceptionalise citizenship' and to 'de-exceptionalise displacement' (Anderson, 2021). While this might be insufficient alone in achieving migrant justice it can be an important step in the transformation of French citizenship, opening up new spaces for political action—ones that are already being taken up (see Pescinski, 2021). Properly understood, civil disobedience is not 'a limited justificatory enterprise' but a dynamic political practice constrained by the dilemmas caused by having to act 'within and against' (Pineda, 2021, p. 50) the structures of the state. That is why Derrida preferred 'the word "negotiation" to more noble words' when describing ethico-political practices, because 'there is always something about negotiation that is a little dirty, that gets one's hands dirty' (2002, p. 13). Herrou's acts neither affirm nor wholly undercut the constitution but are ethico-political negotiations undertaken in the present, in light of the past and with a view to the future.

Out of this the possibility, a new understanding of the theory and practice of legal citizenship starts to emerge. As discussed in the first section, the law can have a pedagogical function (El-Enany, 2021), articulating citizenship in particularly exclusionary and racist terms, resulting in an ever-hardening border between citizens

and migrants. A jurisgenerative politics starts to pick apart such distinctions because law can also authorise new meanings and generate new political practices. As Lisa Lowe observes, because 'law is the apparatus that binds and seals the universality of the political body of the nation then the 'immigrant', produced by the law as margin and threat to that symbolic whole, is precisely a generative site for the critique of that universality' (1996, pp. 8-9).[12] This is not to fetishise migrants' struggles but to observe that their very presence troubles the logic of citizenship. These generative practices of citizenship start to unpick the hard border between citizens and migrants by reversing and displacing the terms in which the opposition is conceived. This is not to erase citizenship altogether but to open up the possibility of less exclusionary forms of political belonging in the future.

Conclusion

This article began by setting out a central ambivalence: citizenship cannot and should not be reduced to legal status, yet migrant rights movements tend to frame their key demands within the terms of law. Citizenship scholars have attempted but have struggled to deal with this ambivalence. The task this article has undertaken is to negotiate this seeming paradox by bringing law back into the political arena and theorising the discursive spaces and political strategies through which legal citizenship is contested and rearticulated. In the struggle for migrant rights, the law can be both disabling and enabling. Law can stifle politics and articulate political belonging in particularly exclusionary and racialised terms. Yet, law can also be transformational and emancipatory.

As the case of *BA Nigeria* shows, legal orders are a living body of meaning that can be contested and redefined by claiming rights from within the legal system. Furthermore, contestations over the meaning of law should not be confined to the courtroom. The constitutive tension between law and justice can be rendered fruitful through jurisgenerative political processes. These practices, as was the case with Herrou's acts of disobedient fraternity, utilise the 'normative universe of meaning' that law creates to make new claims to justice that are not (yet) recognised in statute. This is not to say that law is inherently emancipatory. Nor is it to reduce all struggles over citizenship and rights to a legalistic horizon. Rather it is an attempt to consider how legal citizenship shapes, and is shaped by, transformational practices of rights-claiming.

The deconstructive method deployed in this article identifies the aporias that pervade modern citizenship and analyses how they are mobilised through practices of rights-claiming. The promise of this approach is that it moves beyond the dichotomy, identified in the first section, which pervades the field of citizenship studies: it understands citizenship as both a 'status' and a 'collective practice'

[12] Celikates makes a similar point when he argues 'for conceptualizing irregularized migration as a form of civil disobedience that manifests a specific kind of constituent power, namely, the power to initiate a reconstitution of borders and categories of membership' (2019, p. 68).

(Balibar, 2000), and investigates how the two interact and are mutually constitutive. To do so is not to take as given the authority of pre-existing laws and institutions in a way that limits the scope of claims to justice in the present. Instead, it means recognising that constitutions shape the discursive space in which contestatory and transformational citizenship practices play out in dynamic ways.

The examples of rights-claiming analysed in this article repoliticise unjust formations and rearticulate deeply entrenched discourses. In so doing, this research extends beyond the field of citizenship studies, helping think through some of the most intractable problems of the current political moment concerning questions of migration, borders and the politics of recognition. By revealing the contingencies and violence that haunt all legal orders, and by foregrounding the political practices of irregularised migrants and activists, this article demonstrates how the law can authorise rights-claims that open citizenship up to new possibilities which are not over-determined by old models.

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