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Deportation, non-deportability and ideas of membership

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Introduction[1]

In 2006, Amnesty International released a report condemning the fact that in the United Kingdom there was "a huge disparity between the number of people refused asylum and the number who are either removed by the Immigration Service or make a voluntary departure" (Amnesty International, 2006: 5). The report cited estimates by the National Audit Office (NAO) according to which in 2004 "between 155,000 and 283,500 rejected asylum applicants were awaiting removal from the UK" and the House of Commons Committee of Public Accounts according to which "it would take between 10 and 18 years to tackle the backlog at the IND's removal rate" (Amnesty International, 2006: 6). The discrepancy between "deportability" and actual deportation resonates with a recent debate on deportation and removal practices in the United States. On 22 February 2010, James M. Chaparro, head of the US Immigration and Custom Enforcement (ICE) detention and removal operations, wrote in a memo that the overall number of deportations had decreased. While ICE was on track to achieve "the Agency goal of 150,000 criminal alien removals" for 2009, the total deportations set around 310,000, were "well under the Agency's goal of 400,000" and nearly 20 percent behind last year's total of 387,000 (The Washington Post, 27 March 2010). Both these cases indicate that deportability, i.e. the likelihood of being deported, does not necessarily coincide with actual deportation enforcement. The growing number of foreign nationals that find themselves in a legal limbo whereby they are not officially members of the host country, yet cannot be deported, raises a number of important questions. What explains the fact that the state is unable to deport a significant number of deportable people? How does this affect our understanding of the state's social regulative function and capacity? What does this tell us about the rights and obligations that link the state and non-deportable people? How can the link between the state and non-deportability be conceptualised? These questions are the at the core of this paper whose starting assumption is that deportation and non-deportability can be treated as two distinct concepts which shed light on shifting notions and practices of membership.

There is an emerging academic discussion centred on the rise of deportation and removal of irregular migrants and convicted foreign criminals across European countries as well as the United States (Gibney, 2008; Fekete, 2005; Kanstroom, 2007). By contrast not enough attention has been paid to foreign nationals liable to deportation whom the state cannot deport. This discrepancy is relevant in as much as it reveals the many ways in which membership is constructed and how the "socially coercive capacity of states" changes over time (Ellermann, 2009). The purpose of this paper is thus to bridge the scholarships on deportation and citizenship and account for the "soft line" between aliens and citizens (Ngai, 2004) epitomised in the current dilemma on deportation enforcement.

1 This paper was made possible by the John Fell Fund, OUP, which funded the project "Deportation and the Development of Citizenship". The project was led by Dr Bridget Anderson at the Centre on Migration, Policy and Society (COMPAS) and Dr Matthew Gibney at the Refugee Studies Centre, University of Oxford. This paper summarises and elaborates upon extensive discussions with both Matthew and Bridget. In other words, the ideas presented here own a great deal to them. The author however is responsible for any errors.

In particular, this paper explores the extent to which, and why, states are unable to enforce deportation orders and the concurrent creation of new forms of quasi-members of the polity. Building upon the emerging literature on the so-called deportation turn, whereby countries are seeking to deport an increasingly high number of undocumented migrants to their alleged countries of origin (De Genova and Peutz, 2010), I focus on the constraints that states face in fully implementing deportation and the manner in which they respond to them. This path of inquiry may be fruitful for two reasons. First, it challenges prevailing arguments in the academic and public discussion on the power that states allegedly enjoy when it comes to deportation. Second, it also raises substantive questions about evolving state–citizen relations and ideas of membership. In going beyond polarising accounts of deportation powers, I will elaborate on degrees of desirability along the citizen and non-citizen continuum. While I focus on the United Kingdom, the analysis and methodology developed lend themselves to other countries.

This paper is divided into four sections. First I review the literature on citizenship and deportation and define the key concepts employed in this paper. I present two contrasting accounts of citizenship: the first one viewing citizenship as closure and the second making the case for universal citizenship. In doing so, I set the framework for the more empirical discussion which will eventually lead us to challenge this binary conceptualisation. Indeed in the second section, I present data on the "deportation turn" based on official statistics produced by the United Kingdom, United States and South Africa. Having established the depth of the deportation turn, in the third section I examine the data on those who are non-deportable. Given the lack of comprehensive statistics, I will focus on the case of the United Kingdom. In the concluding section I will bring the different strands of this discussion together and suggest that the limited capacity of states to exercise efficaciously their power of coercion, such as deportation, can be understood as a function of the predicament of liberal democratic society.

Theoretical framework: linking deportation and citizenship

A brief review of the scholarship on citizenship in relation to deportation allows us to clarify the meaning of our central concepts. In simplistic terms, two schools of thought can be identified.

The first tradition defines citizenship as closure. The idea of citizenship as both an instrument and an object of closure has a long history in the academic debate (Brubaker, 1992 and Rawls, 2005). Here citizenship is premised on difference and on the distinction between those who are included and excluded from the demos (Tambakaki, 2010). Communities are bounded and thus exclusive (Tambakaki, 2010: 35).

As Brubaker writes,

> closure against noncitizens occurs in two stages. Free access to the territory and to certain benefits and activities within it is reserved to citizens and access to citizenship is reserved to persons meeting certain qualifying conditions (Brubaker, 1992: 34).

Citizenship in the sense of the inclusion and participation of everyone is inherently based on exclusion and homogeneity (Young, 1989: 396). According to some, at the empirical level, this closure is exercised by a "centralised, well-focused and quite harsh government power" (Kanstroom, 2007: 354). For example, exclusion may be associated with lack of entitlements to vote and access to welfare and the social-psychological aspects of life as "aliens" in a not always hospitable country (Cesarani and Fulbrook, 1996). As Cesarani and Fulbrook note,

> for all the ambiguities and variations, there has been an almost universal tendency for whichever group is deemed to be legitimate residents in and defendants of the inherited territory to erect barriers to the influx of others – or to define the permitted newcomers as second-class citizens, present merely as "guests" so long as they behaved properly and were economically useful (1996: 213).

In other words, the articulation of the existence of a community is itself a symbol whose purpose is to invoke the boundary (Frazer, 1999: 81). One of the manifestations of this closure is to be found in the practices of deportation, banishment and expulsion. In exemplifying boundaries between citizens and non-citizens, they embody the state's *raison d'être* to enforce its territorially bound sovereignty. At this point, let me pause to clarify how I use the term deportation in this paper. It goes beyond my purposes to review the academic discussion on deportation and removal (Gibney, 2008; Gibney and Hansen, 2003; Goodwin-Gill, 1975; Pelonpaa, 1984 Gordon, 1984; Walters, 2002; Clayton, 2006). Instead here I opt for a simple and fairly open definition of deportation as the enforced and authorised removal of non-citizens from state territory. In the empirical section, however, I will present and contrast different definitions of return, deportation and removal as formulated by each of the selected countries. Unless otherwise stated, the terms removal and deportation are used interchangeably.

As Walters writes, deportation is a "constitutive practice" of citizenship and, as such, "it is actually quite fundamental and immanent to the modern regime of citizenship" (Walters, 2002: 288). In quoting Hindess he further observes that if citizenship

> can be seen not just as rights and responsibilities exercised within a polity, but a 'marker of identification, advising state and non-state agencies of the particular state to which an individual belongs', then deportation represents a means by which this principle can be operationalized (Walters, 2002: 288 quoting Hindess, 2000).

Because of its regulative function, deportation thus becomes a sine qua non "in the making of the world" (Walters, 2002: 288). This reflects one of the prevailing arguments on deportation in the academic literature. There seems to be a consensus that deportation acts as symbol of and mechanism for exclusion.

In his often quoted work on deportation, Daniel Kanstroom makes the case for considering deportation as evidence of the "the assertion, development and refinement of centralized well-focused and often quite harsh government power subject to minimal judicial oversight" (Kanstroom, 2007: x). Likewise, De Genova and Peutz argue that "deportation has […] emerged as a definite and increasingly pervasive convention of routine statecraft" (De Genova and Peutz, 2010). In fact the data to be explored in the next empirical section shows that deportation is on the rise and has been institutionalised as one of the key instruments of migration control (Gibney, 2008: 148).

The point relevant to us here is that this new phenomenon known as the "deportation turn" (Gibney and Hansen, 2003) renders also more manifest the state's inability to fully adhere to its socially coercive imperative. In this respect, I shall go beyond the idea of deportation as a "normalized and standardized technique of state power" (De Genova and Peutz, 2010) and consider the complexities surrounding its implementation. In transcending the binary citizen–alien paradigm, I will seek to conceptualise varying statuses of membership as the expansion of liberal practices. In keeping this in mind, let me turn to the theoretical discussion on citizenship as closure and its relation to deportation as public spectacle (Anderson, 2008; Hedman, 2008).

The regulative function that deportation performs can be partly explained in terms of electoral politics and public expectations. The state needs deportation to assure public opinion of its authority within national borders (Gibney and Hansen, 2003). Hedman, for example, elaborates on irregular migrants in Malaysia as "consumers of public spectacle" which is part of a process of "performative or discursive (re)enactment of the making of national identity" (Hedman, 2008: 382). In her view, spectacle can be understood in two ways: either "as signals to (forced) migrants and sending states alike" or as social reproduction of "official nationalism" (Hedman, 2008: 366).[2]

The notion of citizenship as closure stands in opposition to the idea of universal citizenship understood in a Kantian sense. This presupposes uncoupling the citizenship/nationality link and viewing citizenship in terms of homogeneity, universality and egalitarianism (Tambakaki, 2010: 42). On this account, Hobhouse's definition of citizenship is instructive. Citizenship is conceived in spatial terms and at the expense of the principle of authority (Freeden, 2003: 279).

Hobhouse and Meadowcroft's "organic" conception of the relation between individual and society seeks to reconcile potentially conflicting appeals to individual rights on the one hand and to the requirements of social welfare on the other (Hobhouse and Meadowcroft, 1994: xvii). This view is closely linked to the concept of liberal citizenship formulated by Baubock whereby citizenship is disconnected from territory and formal legal status. The dynamic of inclusion of non citizens beyond the boundaries of democratic politics is thus set in motion (Tambakaki, 2010: 48 and Baubock, 1997: 8).

[2] Other authors who have elaborated on the concept of spectacle concerning migration and citizenship are Vukov (2003) and Hindess (2000).

This approach also resonates with the sociological interpretation of network analysis elaborated, inter alia, by Margaret Stacey, J.A. Barnes and Elizabeth Bott who denote 'community' as 'incorporation', 'encompassingness' and the absence of external boundaries (Frazer, 1999: 69).

Thus Baubock's liberal model sets the basis of what Benhabib calls the "radical universalist argument for open borders" (Benhabib, 1999: 711). Radical universalists argue that, from a moral point of view, national borders are arbitrary and that the only morally consistent position would be one of open borders (Benhabib, 1999: 711). One empirical example of this approach is to be found in the evolving debate on human rights and the implications for states' actions. Sovereignty entails the right of a people to control its borders as well as to define the procedures for admitting "aliens" into its territory.

However, according to this understanding of the liberal-democratic polity, such sovereignty claims are constrained by human rights, which individuals are entitled to, not in virtue of being members of a polity, but insofar as they are human beings simpliciter (Benhabib, 1999: 711).[3] The notion of universal human rights extending to all persons shapes the manner in which entry and exit norms are conceived and enforced. In this sense, a paradox has been observed: the institutionalisation of liberal values hampers the authority of the liberal state (Gibney and Hansen, 2003: 1). Fundamental to the sovereignty of the state is the capacity to control borders, yet "these capacities sit uneasily with liberal principles" (Gibney and Hansen, 2003: 1).

A clear illustration of the tension between the two theoretical approaches on citizenship and of the liberal paradox is the practice of deportation for it challenges "permanently and completely" the relationship of responsibility between the state and the individual under its authority (Gibney and Hansen, 2003: 1). Deportation then epitomises the contradiction between the logic of citizenship as closure with the liberal aspiration for universal individual values. The antithesis between "the liberal state's support for the demos and its support for rights" (Gibney and Hansen, 2003: 15) sets forth the analytical framework which the ensuing empirical analysis builds upon. It also allows us to address the central questions of this paper concerned with the relation between ideas of membership and the coercive strength of the state in the form of deportation power.

Having introduced the broad theoretical landscape, I turn to the empirical analysis of the deportation turn in the UK, US and South Africa. It will emerge that the deportation turn is only part of the bigger picture as a significant number of foreign nationals is instead subject to non-deportation – to be explored in the third section.

[3] For a thorough analysis on the contentious link and overlap between citizenship and human rights see Tambakaki (2010).

The deportation turn

Until the nineteenth century, the limits of state action in migration were "strictly set" and expulsion and deportation were confined to criminal matters (Castecker, 1998: 74). Indeed, in nineteenth-century Europe the central aim of migration policy was to prevent aliens from disturbing public order. Hence, while deportation, expulsion and return of foreign nationals as well as citizens date back centuries (Gray, 2009), European expulsion policy has been largely limited to those migrants unable to secure a livelihood for themselves in the host country (Castecker, 1998: 74).

Yet, recently deportation has emerged as a form of state practice distinct from other forms of expulsion as a way to deal with failed asylum seekers, as well as foreigners convicted of crimes (Gibney, 2008: 146). Especially since the terrorist attacks in New York City and Washington, DC, of September 11 2001, and again following the bombings in London on 7 July 2005, migration and asylum laws have been presented as key elements in the task of reducing risk from somewhat vague external threats and from dangers posed by specific local communities (Bosworth, 2008: 201 and Gibney, 2008). In the process, states have come increasingly to rely on narratives, norms and practices that are drawn from the criminal justice system (Bosworth, 2008: 206). Expulsions and deportations have come to be among the main devices to enforce modern migration policies (Castecker, 1998: 94 and Gibney, 2008). In this context a brief look at the statistics on removal provided by the UK, US and South Africa is illustrative and serves to contextualise the discussion on non-deportation in the next section. Our first example is Britain.

The definition of deportation in the British legal context is complex. While not aiming to provide a fine-grained legal investigation, it is important nevertheless to be clear on its fundamental features. To this end, I rely on the definition provided by Gina Clayton in her textbook on Immigration and Asylum Law. Clayton introduces the concept of deportation in the following way:

> Deportation is a process of enforced departure from the UK pursuant to an order signed by the Home Secretary which also prevents the deportee from returning to the UK unless and until the order is revoked. In this respect it may be distinguished from the other forms of enforced departure. Although removal, supervised and voluntary departure will affect the ability of the individual to return to the UK, unlike a deportation order they do not have any continuing legal force beyond the departure date (Clayton, 2006: 544-545).[4]

Notably, the scope of the measure has been expanded over the years. For example, in

[4] Importantly, while a person may be liable for deportation, he/she cannot be deported unless the grounds exist. The grounds for deportation are set out in section 3(5) of the Immigration and Asylum Act 1999 whereby "a person who is not a British citizen shall be liable to deportation from the United Kingdom (a) if the Secretary of State deems his deportation to be conducive to the public good or (b) if another person to whose family he belongs is or has been ordered to be deported" (Clayton, 2006: 550).

August 2008, the Home Office introduced a new category of foreign national offender liable to deportation. Since then, non-EEA nationals who are convicted in the UK and receive a custodial sentence of any length for an offence relating for example to the supply of class A, B or C drugs have been considered for deportation. Furthermore, where the sentence imposed is 12 months or more, the duty to deport remains under the "automatic" deportation provisions of the UK Borders Act 2007 (Home Office, 2008).

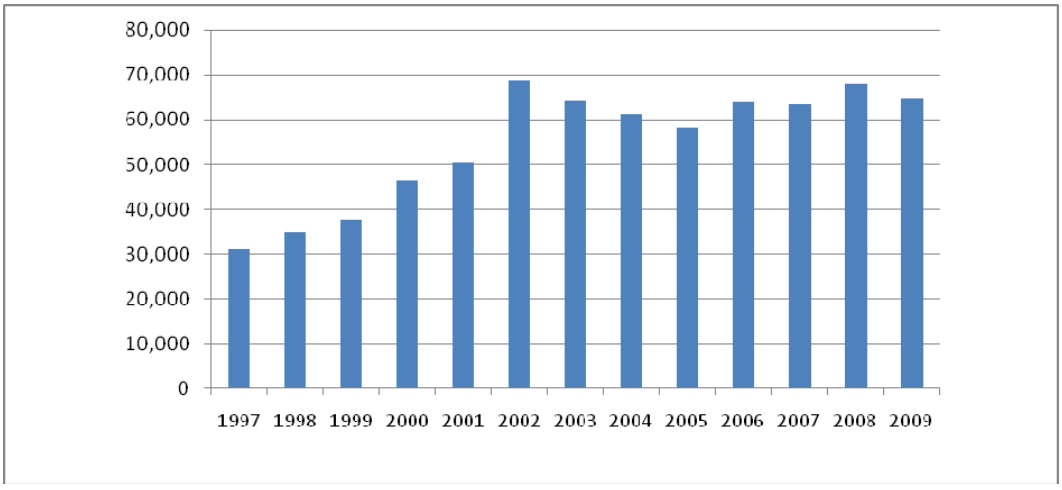
Whereas this expansion of deportation powers can be considered a clear manifestation of the deportation turn, the increasing complexity of laws and regulation has also given rise to new "legal limbos" (Edwards, 2009) in the form of non-deportability. Before turning to this concept, let us now clarify the meaning of removal and how it relates to deportation in the British context.

Removal is also defined by the Immigration and Asylum Act 1999 and targets individuals

> Who do not have any legal right to stay in the UK. This includes persons who: (1) enter, or attempt to enter, the UK illegally, (2) overstay their period of legal right to remain in the UK, (3) breach their conditions of leave, (4) are subject to deportation action; and (5) persons who have been refused asylum (Home Office, 2008: 116).

As Clayton further clarifies, unlike deportation, directions for removal may be given without any kind of judicial process. Because of the abrupt and potentially speedy nature of this process it can be described as "summary removal". Accordingly, there is scope for a great deal of confusion in the use of the term. Indeed, one use of the term "administrative removal" refers to removal on the grounds which used to be grounds for deportation. Another use of the term "administrative removal" is to refer to all removals, using "administrative" to distinguish it from deportation which has an enduring legal effect. Eventually all enforced departures including deportation end in removal. This is why the term is often used to "describe the actual embarkation on transport which takes the person away and all such departures are preceded by removal directions" (Clayton, 2006: 573).

Chart 1: Total Removals in the UK 1997-2009



Elaborated from Home Office (2008) and (2010)

Hence while the terms "deportation" and "removal" are technically distinct (Home Office, 2008) they are often used interchangeably (Bloch and Schuster 2005; Bonner 2007; Phuong 2005). That said the data presented here refers mainly to removal. In particular, as Chart 1 illustrates, according to the UK Home Office the number of total removals has increased from 30,000 in 1997 to 60,000 in 2007. This twofold increase is taken here as partial evidence of the deportation turn. Other evidence is to be found in the alarmist and "securitised" rhetoric formulated by British politicians. While this second issue has already been amply documented and analysed (Huysmans and Buonfino, 2008; Schuster, 2005), a few quotes from the parliamentary debates on deportation "tipping points" may add further depth to our understanding of the possible layers of the deportation turn in the UK. For example, in 2009 Phil Woolas clarified the scope of deportation targets:

> According to the [UK Border] Agency's own provisional internal management information, […], over 5,000 foreign national prisoners were deported in 2008. This means that the UK Border Agency yet again exceeded its target for the year as well as exceeding the previous year's record number of removals and deportations of foreign national prisoners (Hansard, 10 February 2009).

As a matter of fact, the UK had long made deportation targets a cornerstone of its migration policy. For example, in 2005 with regard to the deportation of "failed asylum seekers" Charles Clarke declared:

> We want to make a major new effort to increase the removal of failed asylum seekers. We will use £30 million of savings from the asylum budget to recruit 500 new front-line staff and we will continue our efforts to reach more agreements with major source countries on returns, building on the considerable successes that we have already achieved. That will help us, by the end of the year, to return more failed asylum seekers than there are new unsuccessful claims (Hansard, 5 July 2005).

Beyond the public discourse, the fact that the UK has sought to respond creatively to a range of legal and administrative constraints – to be discussed in the next section – also needs to be taken into consideration. For example, clauses 115 to 122 of the Criminal Justice and Immigration Bill (130 of 2006-2007) are designed to do what the Secretary of State on his own could not: to create a new restricted immigration status as an alternative to leave to remain for persons who the Government wishes to deport but who cannot be removed from the UK for human rights reasons (Library House of Commons, 2007: 106).

The Government does not want these people to be given leave to remain merely as a result of their "irremoveability" (Library House of Commons, 2007: 106). The resulting new special immigration status can be then be seen as an *escamotage* that the state uses as a substitute for removal. It applies to those people whom the state cannot remove but who are considered to be a danger to the community (Hansard, 30 April 2008).

Memoranda of Understanding on deportation with assurances are another example showing how the UK has sought to circumvent human rights rules. In these, the receiving state is requested to assure the United Kingdom that it will comply with human rights obligations under international law. Memoranda of understanding on deportation with

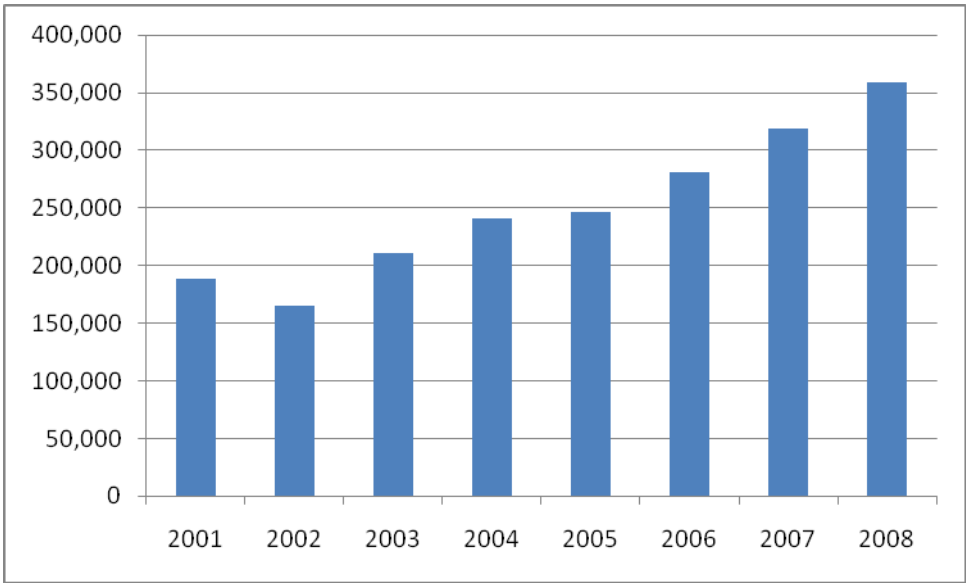
assurances have been signed with Jordan, Lebanon and Libya in 2005 and separate arrangements, set out in an exchange of letters in July 2006, apply to Algeria (Hansard, 29 October 2008).

Having sketched the extent of the deportation turn in the UK, I now turn to a brief review of the US and South Africa. Although I will not elaborate on the complex manner in which public discourse on deportation has been framed in these two other countries, an overview of available data helps us further contextualise the initial proposition on the deportation turn.

As far as the US is concerned, removal is understood as an order issued by the Department of Homeland Security based on the determination that the presence of the alien is in violation of Section 237 of the Immigration and Nationality Act which establishes the grounds for deportation (Department of Homeland Security, 2008). By contrast, return is defined as the situation whereby apprehended aliens are offered the opportunity to return to their home country without being placed in immigration proceedings. This procedure is common with non-criminal aliens who are apprehended by the Border Patrol (Department of Homeland Security, 2008). Needless to say, the definitional dilemmas illustrated for the British case apply also here (Ellermann, 2009).

According to Kanstroom, since 1925 the number of times an individual non-citizen has been caught somewhere on US soil and determined to be subject to deportation has exceeded 46 million, with more than 44 million people actually ordered to leave. From 2001 through 2004 the total number of formal removals of persons from within the United States was over 720,000 while those expelled pursuant to a grant of "voluntary departure" exceeded 4 million (Kanstroom, 2007: 3). As Chart 2 shows, the number of foreign nationals removed between 1997 and 2007 has increased from 114,432 in 1997 to 319,382 in 2007 (Department of Homeland Security, 2008). This upward trend has continued also under the new Obama administration. The ICE reports that in 2008 it removed 356,739 "illegal aliens" from the United States—a 23.5 percent increase over the previous year's total (US Immigration and Customs Enforcement, 2009). This is an average of more than 1,000 deportations a day, i.e. more than double the annual number for 2001 when Bush entered the White House (In These Times, 25 March 2010).

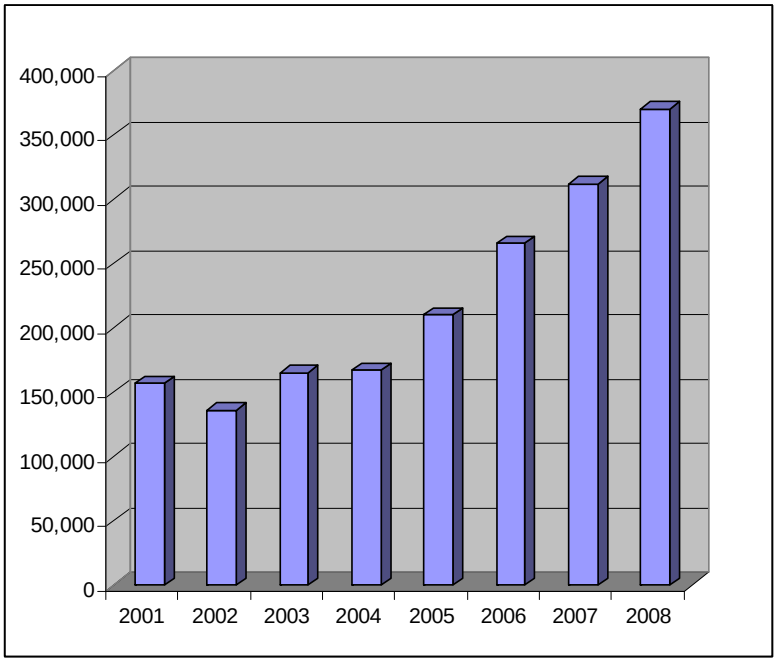
Chart 2 - Aliens removed or returned from the United States 2001-2008



Figures elaborated from Department of Homeland Security (2009). As of May 2010 the figures for the removals undertaken in 2009 were not yet available.

The same trend is to be found in South Africa where, as chart 3 shows, the number of people deported has increased from 156,883 in 2001 to 370,000 in 2008. In this case, deportation is defined as the action or procedure aimed at "causing an illegal foreigner to leave the Republic of South Africa involuntarily, or under detention as set in the 2001 Immigration Bill" (Republic of South Africa, 2001).

Chart 3 - Number of deportation in South Africa 2001-2008



Elaborated from Department of Home Affairs (2003, 2005, 2006, 2007 and 2008).

In sum, it emerges that countries across different continents have intensified the practice of deporting undocumented and criminal foreign nationals. Yet this is not the whole story. There is another side of the coin, namely, the increasing inability of states to conduct the kind of mass deportation campaigns they claim to aim for. Given the paucity of the available data, in the next section I focus on the case of the United Kingdom.

Non-deportability

While it is clear that the number of deportation and removal practices has increased over the last decade, the discrepancies between policies and implementation deserve more attention. In taking further Ellermann's argument on the limits of the state's socially coercive capacity (Ellermann, 2008), I wish to draw attention to the tension between "deportability" and deportation and the implications for ideas and practices of membership. As Ellermann notes, "absolute numbers of deportation are rarely indicative of state capacity because they aggregate factors that determine the degree of difficulty of deportation" (Ellermann, 2009: 25). Here, I seek to disaggregate such factors. I examine the relative capacity of the United Kingdom to implement deportation policies in order to better understand "the process of re-articulation of rights" of membership (Benhabib, 2005: 14). The complex net of rights and duties that link the state and the non-deportable opens up a more fluid conceptualisation of membership. Accordingly, my objective here is to offer a tentative analytical framework. Through the prism of deportation and non-deportation I intend to account for the process of construction and reconstruction of identities and ideas of membership (Tambakaki, 2010: 30).

The limited available figures on deportation enforcement in the UK show that increasing removal enforcement is one aspect of a much more complex picture. A significant number of deportation orders are not actually enforced and hence do not result in the actual removal. As an official statement from the Home Office in 2007 makes clear:

> There are also high levels of attrition in the casework and cases can fall at each stage of the process. Even after a deportation order is made a removal may not take place, for example if the country of removal is uncooperative. It is estimated that only one third of cases initially considered ends with a substantive deportation (Home Office, 2007: 23).

Likewise on 21 February 2008 during a parliamentary debate, Shailesh Vara observed that

> Only a small number of illegal immigrants are ever deported from the UK. […] We now find that a large number of those people are turned back by the country to which they are deported and returned to the UK because the Home Office has messed up their paperwork. Even when the Home Office tries to deport someone, it cannot get it right. We need an urgent statement from the Home Secretary on the continued mismanagement of her Department (Vara, 2008).

The 2006 report by Amnesty International cited at the beginning of this paper documents "the many reasons why the return of rejected asylum seekers – whether voluntary or enforced – may be impeded" (Amnesty International 2006: 390). This issue was also at the centre of a major public debate in 2007 when it emerged that the Immigration and Nationality Directorate (IND) of the Home Office had failed to consider for deportation the cases of some foreign nationals convicted of serious crimes (Home Office, 2007). The central question here was that a category of foreign nationals was not considered for deportation in the first place.

On the basis of such statements it is possible to speculate that there is a critical gap between those liable to deportation, "deportable", and those actually deported. In order to examine the extent to which the first group does or does not correspond to the second, it would be useful to compare and contrast the number of deportation orders versus the number of enforcements, i.e. the deportable who are actually removed. A deportation order is enforced when the person to whom it relates is removed from the UK. Technically, then, the enforcement of deportation orders is a specific subset of overall removals which include also persons subject to administrative removal and removal due, for example, to irregular entry. In fact, the UK Border Agency removes people who enter, or attempt to enter, the UK illegally; overstay their period of legal right to remain in the UK; breach their conditions of leave; are subject to deportation action; and persons who have been refused asylum (Home Office, 2007). Therefore, the removal category is broader than the one of deportation enforcement measures. In order to probe the relation between deportability and deportation enforcement the following data can be taken into consideration: the number of foreign prisoners subject to deportation because of either their undocumented status or a criminal record, the number of foreigner nationals detained indefinitely if removal cannot be effected and the deportation orders actually enforced.

This exercise, however, is not problem-free. Since 2002 data on the number of deportation orders and more generally on persons against whom enforcement action has been initiated have not been made available (Home Office, 2008: 116). The quarterly statistics produced by the Home Office indicate the number of removals enforced as opposed to the number of deportation orders, and more generally the removal actions. The number of people liable to deportation but whom the state cannot remove is thus missing. This is also due to the fact that for many years it has been public policy that foreign prisoners convicted of serious offences should be considered for deportation "as a means of protecting the public from the risk of further offending" (Home Office, 2007: 2). This further expands the category of deportable and, from our point of view, exposes further limitations on the data. Indeed available figures on the number of foreign prisoners liable to deportation are also sketchy. For these reasons, I shall now provide a brief analysis of the data available so far with a view to understanding of the gap between deportability and actual deportation.

In 1998 deportation action was initiated for 4,580 people and 1,730 were actually deported. However in 1999 the ratio changes significantly, for 1,210 were deported out of

1,785 deportation orders and in 2000, 1,280 versus 2,525 (Home Office, 2001). The overall figures on removal also display a significant gap between deportability and actual enforcement. In total, enforcement action was initiated for 21,080 people in 1998, 22,955 in 1999 and 50,580 in 2000. However the number of people leaving as a result of such action was 7,315 in 1998, 6,485 in 1999 and 8,370 in 2000 (Home Office, 2001).

The same issue applies to so called "failed asylum seekers". According to the above quoted report by the National Audit Office, between 1994 and May 2004, a maximum of 363,000 applications for asylum were unsuccessful. Yet over the same period the Home Office reported that it had removed 79,500 failed asylum applicants (Amnesty International, 2006: 7; National Audit Office, 2005: 1). In other words, there are reasons to believe that the current system leaves a number of people in an ambiguous legal status that defies clear-cut categorizations between citizens and non-citizens. The current concern placed by the UK government on meeting given deportation targets can be thus considered a response to this observed deficiency (UK Border Agency, 2009).[5]

The fact that deportation may not be such an efficient machinery as is often contended, raises two sets of questions. (1) What prevents states from fully realising their stated objectives on migration control and deportation enforcement? (2) How can membership or non-membership statuses of people who cannot be deported be conceptualised? To what extent are different types of deportable people associated with different degrees of desirability? What do gradients of desirability tell us about how membership is actualised? These two questions are interrelated in as much as the emerging membership statuses created by the state can be seen as a way in which the state responds to, and arguably evades, certain norms and established practices which characterise the liberal polity. These dynamics are insightful in as much as they help understand the manner in which membership is conceptualised and translated into everyday practice.

I address the first question by relying on the parliamentary discussions and official documents produced by the Home Office and identify four closely interrelated factors: (1) legal procedures and human rights considerations, (2) financial constraints, (3) domestic administrative procedures and (4) limited cooperation with receiving countries.

First, legal procedures on migration can often be unclear, and ad hoc interpretation may slow down, if not prevent, their implementation. The UK operates a complex system of national migration laws, policies, regulations and guidelines. It has long been argued that the immigration rules, which form the substance of UK immigration law, allow considerable scope for individual judgement (Clayton, 2006: 29). Deportation is a case in point. While the government has the authority to return persons without the legal right to enter or stay in the UK, "the constantly changing laws and regulations lead to much confusion and lack of accountability" (Edwards, 2009: 3). As Clayton documents, more often than not the decision to deport is an exercise of personal judgment as to whether the

[5] This is in line with Ellerman's findings on the implementation failure in deportation policies in Germany and the United States (Ellerman, 2009).

specified criteria are met (Clayton, 2006: 29). A recent report on the "Rights of immigrants in voluntary and involuntary return procedures in national law" notes that this situation coupled with the fact that the UK has not opted-in to the EU Returns Directive has made it more "difficult to facilitate swiftly the return for irregular immigrants" (Edwards, 2009: 3). The limits imposed by international human rights and refugee law and Community obligations and the overlapping standards related to human rights which are regulated mainly by secondary legislation such as guidelines and policy directives, give rise to a number of challenges. One of the most relevant for our initial purposes concerns "the curious legal limbo" (Edwards, 2009: 17) applying to individuals either subject to a deportation order or liable to detention linked to their deportation. Edwards offers an additional insight:

> Persons who cannot be removed but who are not detained are left in legal limbo, with only the status of temporary admission with very few correlative rights attached. The issue of destitution for these persons has been widely studied. Individual assessments are required for the return of unaccompanied children, however, policy guidance does not mention leading international safeguards on this (Edwards, 2009: 4).

Legal constraints are part and parcel of evolving human rights norms. In the case of deportation, the Home Office is expected to consider the European Convention on Human Rights (ECHR) at all stages of the deportation process. Guidance on human rights issues relating to foreign national criminals is given in Home Office instructions to caseworkers. One of the relevant provisions is Article 3 ECHR, on freedom from torture. Indeed removal from the UK may in some circumstances be challenged when the anticipated treatment in the receiving state would breach the ECHR. Furthermore, anyone who has a spouse and/or child who is settled in the UK could argue that removing them from the UK is a breach of their rights under Article 8 ECHR (respect for private and family life) because of their need to be together with family members or because of other connections they have developed with the UK (Library House of Commons, 2007). As a matter of fact, in the case of failed asylum seekers, the majority of the non-deportable are from countries which they cannot be returned to, such as Iraq, Iran, Zimbabwe and Eritrea (Asylum Support Partnership, 2009).

Second, according to the Home Office, financial issues were among the primary motives behind the deportation crisis in 2007 (Home Office, 2007). The failure to deport a large category of deportable foreign prisoners was attributed to the financial crisis early in 2003 and in particular to the recruitment and budgetary freeze in 2003 and 2004 (Home Office, 2007). The latter prevented extra resources from being devoted to Criminal Casework Teams. According to the same source, when new resources became available in April 2004 they were not enough to keep pace with the rapidly growing caseload. The caseload was further increased in June 2004 by the early removal scheme for foreign prisoners, which was aimed at reducing prison overcrowding; and again in October 2005 in order to reduce the prison population. Although additional temporary staff were provided for the early removals casework, the underlying growth remained under-resourced (Home Office, 2007: 2).

The inability to maintain satisfactory deportation levels, and the cost to taxpayers, are also repeatedly mentioned during parliamentary debates. For example in 2004, Lord Avebury declared:

> Outside the walls [*sic*], our aim should be to reduce the number of people who are sent to prison by the courts with recommendations for deportation, to be kept inside at the taxpayers' expense for a few months or years when, after that, we will never see them again (Hansard, 24 May 2004).

In the same vein, on May 2008, Theresa May lamented the fact that:

> The Government have gone from the sublime to the ridiculous: making up court sentences, telling migrants to deport themselves, and showing disdain for the tax burden that they have inflicted on the public. It is little wonder that people now say that it is time for a change (Hansard, 13 March 2008).

Therefore, financial constraints partially explain the delays in, if not impossibility of, enforcing deportation and the increase in the detainee population.[6] However, non-deportability due to financial constraints is different from "permanent" non-deportability arising, for example, from human rights considerations. In order to understand and explain this tension I will later return to the examination of varying degrees of desirability.

Financial issues are related to administrative hurdles which Ellermann links to the relative "infrastructural capacity" of the state (Ellermann, 2009: 14). The point here is straightforward. Administrative and legal procedures often result in lengthy delays and "destitution". The latter is defined as a condition whereby an individual either does not have adequate accommodation or any means of obtaining it or has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs (Asylum Support Partnership, 2009). For example, the Home Office acknowledges that in 2007:

> there were ambiguous lines of accountability between the Directors and the Senior Director, and a long chain of responsibility to the staff dealing with deportation cases. This meant that the nature of the work was not fully understood at more senior levels. CCT [Criminal Casework Team] was showing apparently good performance results, and senior staff, who had other priorities to pursue in their large commands, did not look behind the figures (Home Office, 2007: 3).

[6] A similar argument applies to the case of the US. According to a recent study by the Center for American Progress the total cost of deporting all undocumented migrants would amount to the "prohibitive" cost of $285 billion (in 2008 dollars) over five years (Center for American Progress, 2010: 3). As the report observes, this "would require an unprecedented deployment of resources, and the problems currently plaguing our detention system and immigration courts would be exacerbated in the extreme" (Center for American Progress, 2010: 18).

The report by the National Audit Office also identifies the following "significant practical challenges in effecting the removal of failed applicants:"

- The application, support and enforcement processes have operated as largely separate systems, leading to poor communication and co-ordination within the [Home Office's Immigration and Nationality] Directorate, thereby reducing the prospect of quick removal of newly failed applicants;
- Bottlenecks in the removal process have limited the Directorate's removal capacity. The recent expansion in the number of detention places and work to improve the administration of requests for emergency travel documents will help;
- the Directorate has lacked adequate management information leading to insufficient control over how resources are deployed against its various objectives, although it is now collecting information on the operations its staff undertake; and
- Insufficient effort has been made by the Directorate to promote the option of assisted voluntary return amongst applicants, but it is working to improve communications about voluntary return. (National Audit Office, 2005: 2)

Administrative obstacles may also involve lack of travel documents. This could often lead to a form of permanent detention for de facto stateless detainees with pending deportation orders.

Fourth, failure to enforce deportation stems also from difficulties in establishing successful cooperation, such as readmission agreements, with third countries (Cassarino, 2008). Even after the successful negotiation of bilateral agreements non-compliance can remain a significant problem (Ellermann, 2008). Attempts by European countries to deport either irregular migrants or "failed" asylum seekers have regularly been frustrated by the refusal of foreign governments to issue the necessary repatriation documents (Ellermann, 2008). One clear example is represented by China that has often not accepted the return of its country nationals from either the UK or the US (Hansard, 29 April 2004; Sutherland, 2009).

In sum, a combination of different factors has led to the partial failure of the UK to enforce deportation and has triggered a creative response on its side. Far from engaging in either a defence or critique of liberal democracy, the point here is to examine the overlapping and continuous tensions at two different levels. At the level of state practices, deepening liberal norms account for some of the obstacles that limit the state's action as well as for its attempts at evading them. At the level of ideas of membership, the inability to deport results from, and culminates in, the creation of a variety of statuses of non-citizens who are nevertheless still considered to be more or less worthy of membership from the perspectives of the state and local groups.

I am now in a position to address our second set of questions on the implications for our understanding of shifting degrees of membership and the role of the state. On the one hand it can be argued that non-deportable status is a glaring example of radical exclusion. In simple terms, as a manifestation of non-citizenship, non-deportability is best

characterised by restrictions on liberty within the state. The restrictions on liberty within the state for non-citizens, upholds the view of citizenship as closure. The stripping from such individuals of basic rights and access to essential services can be in itself considered not only a human rights infringement but a deliberate act of exclusion from society. The direct corollary of this argument is that by creating a category of "non-deportable", the state actually sets the preconditions for forcing them out of the polity and, eventually, for them leaving the country. Not surprisingly the resulting legal limbo and automatic denial of the benefits of membership represents a critical political issue which has been condemned by numerous advocacy groups. The critical point lies in the values called for by advocacy groups, according to which non-deportable people should be entitled to some, if not all, the benefits of membership. This reflection comes as part of my wider concern for the ideas and practices of membership. It implicates us in discussions about evolving norms and typologies of membership from the perspectives of both citizens and the state alike.

On the other hand, the very fact that individuals are prevented from being deported may be evidence of a bond between the state and the non-citizen. In not fully exploiting its monopoly of power and, hence, not getting rid of potentially unwanted individuals, the state manifests an important connection which links it to individuals who are formally non-members. This takes the form of specific rights – such as against torture and statelessness - that states uphold in the very moment an individual "becomes" non-deportable. While generally considered to be antithetical to any form of right, the institution of non-deportability testifies to the recognition by the state of, and duty to abide by, the right of an individual not to be returned. In other words, what is normally associated with exclusion from society and economic and political destitution, is also the site of certain, yet limited, rights.

Moreover, the fact that the non-deportable are still within the territory of the state implies that they remain part of a loosely conceived polity. In virtue of such polity they are often, although not systematically, the object of intense mobilisation by anti-deportation campaigns which make the case for their deservingness. Communal ties and above all their contributions to society are often called upon in order to reverse the decision to enforce their deportation. In fact, the standard position of advocacy groups and anti-deportation campaigns is that non-citizens still deserve to be included and obtain some sort of recognition on the basis of their contribution to society. Apart from criminals and terrorist suspects, there is a sense, then, that non-citizens are still part of the polity.[7]

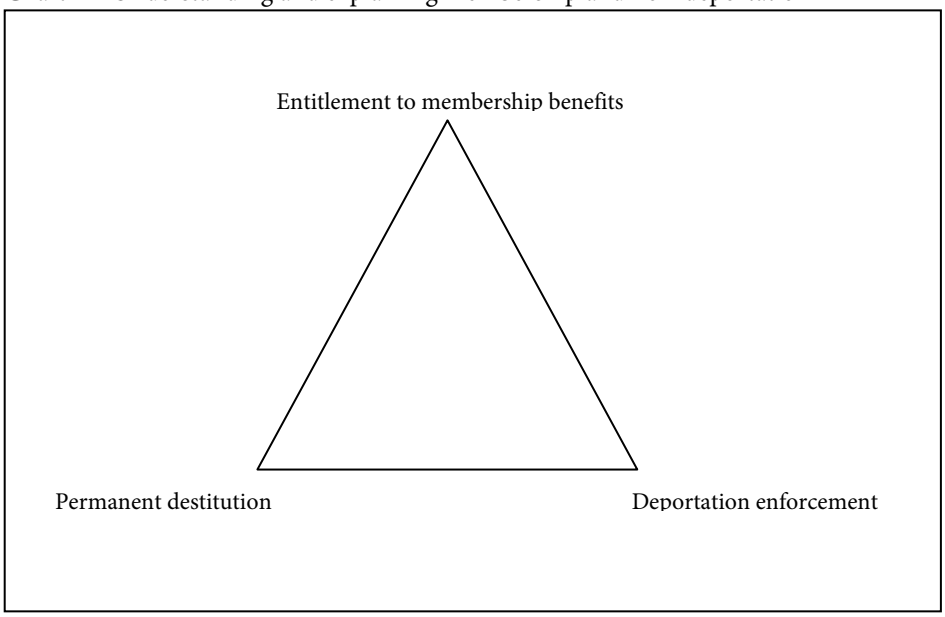
At its most basic, non-deportation can be understood and explained in the light of a system of norms and procedures, which, if weak and confusing, prevents individuals from either leaving the host country or benefitting from full membership. Hence, this is the central argument of this paper: non-deportation, in all its brutality, may ironically be

[7] This draws our attention to the meaning of "good citizen" as formulated and presented by campaigns against and in favour of deportation. Paradoxically, their accounts of deservedness are not so far from each other (Nyers, 2003).

considered a symptom of the conflicting trends in the process of liberal norms taking new forms and relations of membership being reconfigured. We are thus exposed to another dimension of what Mouffe would call the "democratic paradox" (Mouffe, 2000). Recasting our understanding of non-deportation in this way forces us to broaden the categories of citizenship as presented in the first section. In recognising these limits, the more encompassing notion of membership may then better fit in my overall argument. In this context Connolly's insight on the "uncertainty, diversities, heterogeneities and paradoxes" in today's society which participate in the construction and reconstruction of identities and notions of membership is useful (Connolly, 1995: 154). It provides us with cues as to how to conceptualise the state's inability to deport and prospects of conflicting ways of being a member of a political community. We then return full circle to my initial concern with the practical and ideational controversy surrounding the distinction between legal and illegal individuals (Anderson and Rogaly, 2009).

The question lingering has to do with explaining and understanding varying formal and informal statuses of membership in relation to norms and practices defining state capacity. To do so, I attempt to visualise said dynamics around a hypothetical spectrum of desirability. By reflecting upon relative "desirability" of foreign nationals we may then be able to understand where values that determine current understanding of membership lie. Desirability may be analysed from the perspectives of the state or other social actors in the host country such as advocacy groups and the private sector. The proposed framework – illustrated in chart 4 – features at one extreme deportation enforcement. This condition combines two conditions: the foreign national being undesirable and the state being able to enforce deportation. At the other end, permanent destitution captures situations of similar undesirability. In this case however, the state is unable to return the individual to his/her country of origin. The third extreme refers to full desirability and entitlement to membership benefits.

Chart 4 – Understanding and explaining membership and non-deportation



What interest us most are the uncertain and multifaceted statuses located in between the three vertices of the triangle. In a formal sense, only those towards the upper end of the triangle can be considered members of a political community. Yet, in this paper I argued that non-citizens located at any other point between permanent destitution and deportation enforcement are also members of the community in another guise. This proposition is based on the appreciation of the ties - embodied in limited reciprocal rights and responsibilities- that connect non-deportable individuals, the state and the broader community in the host country. Let us be clear: these rights and responsibilities are not problem-free. They raise profound moral and practical questions about the power of the liberal state vs. individual agency and vice-versa. Yet the point here is that, from an analytical perspective, the two overlapping notions of deportability and non-deportability relate to an indefinite possibility "space" which has much to say about states' constraints and binding obligations with regard to foreign nationals, whether or not fully members of the host state. In turn they allow us to go beyond supposedly incompatible understandings and practices of citizenship – as presented in the first section - and consider shifting relations between gradients of non-membership and the state. They manifest evolving values and perceptions and, in a slightly post-modern fashion, the non-boundaries of membership.

Conclusion

This paper sought to explore the meaning and actuality of membership in relation to the growing reliance of states on the power to deport as a way to manage migration. The argument unfolded in three sections. First I summarised the relevant academic literature on citizenship and distinguished two main conflicting views. According to one school of thought, citizenship entails by definition boundaries between communities. In simplistic terms, the prevailing approach to deportation both in the academic and advocacy literature can be located in this first camp. Conversely, drawing from philosophical communitarianism, the second tradition sees universal citizenship as the way in which particularity and territory can be overcome for the sake of the greater good. Insights from both of these paradigms provided the necessary analytical basis for the empirical sections centred on the so-called deportation turn and non-deportation. The first term refers to the fact that especially since 9/11 more and more countries have resorted to deportation as a way to deal with unwanted foreign nationals. In fact in the second section I presented statistics showing how the number of people deported from the UK, USA and South Africa has increased sharply. Importantly, statistics are only one of the many faces of the deportation turn. The public discourse of politicians emphasising the security dimension of "migration management" and evoking societal fears are another – much debated – aspect. Against this background, in the third section I sought to problematise the concept by considering the failure of states to remove deportable individuals. By elaborating on non-deportation we are led to consider evolving categories of non-membership and what defines the threshold for inclusion and exclusion, as imagined and actualised by different

actors. This threshold is inherently in transition. Having documented the many forms of non-deportation and the reasons behind states' inability to enforce deportation orders, I sought to trace and account for this transition. I argued that the apparent disconnect between the actuality and possibility of deportation and the resulting multitude of ambiguous statuses are consequential upon shifting norms of democratic order and states' attempts at evading them. The somewhat paradoxical conclusion is that the existence of non-deportation is partially linked to the constitutive nature of the liberal democratic order. By participating in public exchanges, different actors are given the opportunity to both construct their basic rights as well as respond creatively to the constraints upon them. In the process the scope of inclusion and exclusion and related rules and procedures are being questioned and re-negotiated (Tambakaki, 2010:28). Within the remit of our discussion on non-deportability, I proposed an analytical framework that may be applied to future research on deportation and citizenship. Overall, the highly sensitive nature of the debate on migration control and deportation has often generated polarising views. Although scholars' and practitioners' increasing attention to deportation is a welcome development, more rigorous analysis on related trends taking place more at the margins –such as non-deportation– may also be revealing.

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