Chapter 4  Out of the Ghetto? The Personal Scope of EU Law

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1 Introduction

Our understanding of the modern world has been fundamentally changed by the discussion about globalisation and its consequences. Susan Strange’s retreating state in the modern world is one in which the exercise of authority in society and over economic transactions is not longer the monopoly of the state but rather legitimately exercised by agents other than states.¹ Beck’s modern world is one “through which sovereign national states are criss-crossed and undermined by transnational actors with varying prospects of power, orientations, identities and networks.”² The development of the European Union is often analysed and presented as an example of the fate of the post modern state, its powers ceded on the one hand to a supra national structure which in turn, or more correctly in tandem with developments at the national level, cedes power to non-state private actors.

As control over many of the nation-state’s fields of sovereignty is diminished, attention has become increasingly focussed on those areas remaining or apparently remaining within the control of the state. Torpey’s examination of the appropriation by the nation state of a monopoly over the legitimate means of movement of persons across international borders³ and the bureaucratic requirements of documenting who are nationals of one state and who of another in order to achieve this appropriation fall clearly within this debate. Interest and

attention are focussed on the remnants of state sovereignty, most specifically the right to define individuals.

The tension between the project of the European Union – the ever closer union of the peoples of Europe – and state sovereignty has, over the past 20 years found expression in particular in this space of the definition of individuals and borders. The highly disputed relationship between individuals, citizenship and the crossing of borders at EU level has contributed to the creation of a whole new treaty governing cooperation between the Member States (the Treaty on European Union was necessitated, \textit{inter alia}, by the unwillingness of some Member States to countenance the inclusion of third country nationals within the competence of the EC Treaty)\textsuperscript{4} and a further international treaty competing with the EC Treaty agreed by some of the Member States.\textsuperscript{5}

The changing nature and place of EU borders has been characterised by their de-linking from territory. Increasingly they apply to persons not on the basis of their physical position but on the basis of their nationality and individual characteristics. The law of borders is no longer homogeneous. Instead it has become increasingly like the legal order of the French Ancien Régime, dependent on the personal characteristics of the individual.\textsuperscript{6} Furthermore, borders are controlled by a variety of different agents – Member States on behalf of one another, private actors on behalf of Member States individually and third countries on behalf of Member States. As borders become increasingly complex and difficult to identify so the more powerful of the private sector seek to be exempted from their application at all.\textsuperscript{7}

This emphasis on defining individuals (citizens or foreigners) as the measure of state sovereignty and thus the bulwark against globalisation on the one hand and European integration on the other, has resulted in the development of an orthodoxy regarding Community law, which holds that citizens of third countries and stateless persons (“third-country nationals”) are excluded from the personal scope of the EC Treaty except where specifically included.

This attempt to create an orthodoxy limiting the personal scope of the EC Treaty, along with the EU Treaty, is based on the premise that the treaties are designed solely to confer rights and impose obligations upon citizens

\textsuperscript{5} Schengen Implementing Agreement 1990 which sought to implement the present Article 14 EC. See generally Pauly, \textit{Schengen en panne} (EIPA, 1994).