

THE 'PROTECTIVE' UNION: CHANGE AND CONTINUITY IN EUROPEAN MIGRATION LAW AND POLICY

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---FIRST DRAFT---

The Limits of the Past

The partial 'Communitarisation' of the so called Third Pillar of the Treaty on European Union (Justice and Home Affairs Co-operation) has been regarded as an important innovation of the 1996 Intergovernmental conference which culminated in the Treaty of Amsterdam (2 October 1997). Judged by the standards of reducing the EU's democratic deficit, deepening co-operation, ensuring implementation of policy and making decision-making procedures more efficient, the transfer of migration-related areas from the third pillar to the Community pillar heralds the beginning of a third phase in the development of a European immigration policy and a break in the intergovernmental methodology to date.

The first phase (from 1985 to 1991) was characterised by an ad hoc and informal form of intergovernmental co-operation in immigration and asylum matters. Embedded understandings and prevailing societal assumptions about the 'problem' of immigration flourished within an institutional framework that was outside the Community competence and, in the opinion of some commentators, thwarted policy development and innovation in this field. This is because instead of responding to the challenge of immigration by elaborating a principled, coherent and integrated policy, national executives chose to build on past experiences and adopt a restrictive policy option (i.e., one centred around issues of control). By so doing, they replicated the national path of exclusion and of restrictive immigration policies at the European level. This phase was followed by a framework of

intergovernmentalism which pronounced migration-related issues as matters of common interest and imposed an obligation on the Member States to co-operate in the context of the Union (1992-1998). Although this form of diluted intergovernmentalism did not prevent the Council and the secretive K4 Committee¹ from continuing the process of non-transparent policy making in this area, it, nevertheless, helped establish institutional links with the other Community institutions (O’Keeffe, 1995, p. 35).

The emergence of a restrictive and law-enforcement immigration regime in both its pre-Maastricht ‘para-Communitarian’ phase (i.e., the first phase) and the post-Maastricht Third Pillar structure (second phase) has given rise to many criticisms. Criticisms have targeted the intergovernmental methodology per se (e.g. the secretive negotiations, the absence of Parliamentary involvement and judicial supervision, the predominance of unanimity, an over cumbersome five-tier decision-making structure, the absence of clear objectives and the lack of enforcement mechanisms) as well as the nature and the rights’ deficit of many of the agreed policies². Against this background, it is not surprising that the future of the Third Pillar emerged as a central issue on the agenda of the 1996 IGC. Both the European Parliament (1995a; 1995b) and the Commission (1995) supported the transfer of asylum and immigration policy from the Third Pillar into the First. This position was endorsed by the Reflection Group (1995) and the Madrid European Council (1995). The Irish Presidency proceeded to draw a framework for this partial communitarisation by devising a new Title on *Free Movement of Persons, Asylum and Immigration* (European Council 1996).

The initiative to introduce a single constitutional basis and more democratic control in this area is a welcome development. However, it may be observed here that the structural shift from the intergovernmental pillar to the Community method has not been accompanied by a re-examination of the issue of immigration and a reflection on the dialectic of inclusion and exclusion which sets apart EU nationals/Union citizens from non-EU migrants. In this paper, I argue that Communitarisation will enable the Union to expand its so far modest *acquis* in migration-related issues (section1), but it has also opened the way for the installation of exclusive categories and the security paradigm which characterised the third

¹ The K4 Committee gives opinions to the Council on its own initiative and contributes to the preparation of the Council’s negotiations

² G. D. Korella and P. M. Twomey (eds) *Towards a European Immigration Policy* (Brussels: Interuniversity Press, 1995); M. Spencer, *States of Injustice* (London: Pluto, 1995); D. O’Keeffe, 1995; R. Wallace, *Refugees and Asylum: A Community Perspective* (London: Butterworths, 1996).

pillar within the system of Community law (section 2). The implications of this for the Union itself, the state and its evolving security agenda, and for the shape of European immigration and asylum policy in Amsterdam Europe will be considered in section 3.

Institutions as Remedy?

The Amsterdam Treaty has transferred into the Community pillar measures in the fields of immigration and asylum, the rights of third country nationals, external border controls, visas, administrative co-operation in these fields and judicial co-operation in civil matters³. Police co-operation and judicial co-operation in criminal matters remain in the Third Pillar, that is, within the framework of intergovernmental co-operation in the context of the Union set up by the Treaty on European Union⁴. However the latter's remit has now been extended to include action against racism and xenophobia, and offences against children. This partial communitarisation of the Third pillar will yield measures which are legally binding on the member states and capable of having direct effect if they satisfy the criteria for direct effect according to EC law, that is to say, if they are sufficiently clear and precise, unconditional and legally perfect, that is, leaving no room for discretion in implementation.

More specifically, the new Title IV (ex Title IIIa on the 'Progressive Establishment of an area of Freedom, Security and Justice') sets out a five-year transitional period from the entry into force of the Treaty during which the Council will continue to take decisions by unanimity and the Commission will share the right of initiative with the MS. After the transitional period, the Commission's right of initiative will be exclusive, but it will be obligated to examine requests for submission of proposals made by the Member States. The initial strengthening of the integrationist features of the decision-making procedure may be followed by the Council's unanimous decision to move to full-blown supranationalism, that is, to qualified majority voting and co-decision with the European Parliament (Article 67 (ex Article 73o) EC). Notably, the transitional period does not apply to measures concerning

³ Heilbronner (1999, p. 1049) has observed that the competence of the Community in the field of immigration and asylum policy is limited to the areas stated in Article 63 EC, thereby excluding measures against clandestine immigration and the integration of asylum seekers and migrants. However, the principle of parallelism could be applied here to expand the Community's legislative competence, and in the absence of express provisions in the Treaty, Article 235 EC (the elastic clause) might be invoked to cover gaps in the new areas of competence.

⁴ Customs co-operation and the protection of the financial interests of the Community are now within the Community domain: Articles 116 and 209a EC respectively.

the list of third countries whose nationals require visas and a uniform format for visas, as these have been subject to qualified majority voting since Maastricht (Article 100c). In addition, after the transitional period, measures on the procedures and conditions concerning the issue of visas by the MS and rules on a uniform visa will be adopted by qualified majority voting and co-decision⁵.

Although the Communitarisation of immigration and asylum policy could be seen as a sign of state retreat in the face of vocal and concerted opposition, the validity of this observation must be judged in light of the relevant provisions of the new title. One observes, for example, that the new system shares many of the intergovernmental features of the Justice and Home Affairs I framework, at least during the transitional period (e.g. unanimity and the Commission's shared right of initiative). Further support for this may be derived from the instances of differentiated integration found in the new Title: the opt out protocols negotiated by Britain, Ireland and Denmark and the Schengen Protocol. Britain and Ireland have also negotiated special arrangements (Article 69 (ex Article 73q) EC) which allow them to maintain a 'common travel area' and to exercise frontier controls on persons at their borders (*Protocol on the Application of Certain Aspects of Article 7a EC*). According to the Protocol relating to Title IV, Britain and Ireland have opted out from the provisions of the Title, including measures adopted under Article 100c TEU. Ireland does have the right to waive the protocol at any time (Article 8), and both the UK and Britain could decide to opt in during or after decision-making in the Council. In particular, according to Articles 3 and 4 of the *Protocol on the position of the UK and Ireland*, each of these states may notify its intention to participate in the adoption and application of a proposed measure within three months of a proposal being presented to the Council or to accept an already adopted measure. Apart from rules on visas, similar provisions apply to Denmark which has dogmatically resisted any possibility of *opting in*. As a party to the Schengen Convention, Denmark may, of course, decide to implement in its national law within six months Council decisions taken under this title that build upon the Schengen *acquis*, but this will create only international law obligations, and not Community law ones.

These Protocols are accompanied by the *Protocol on Integrating the Schengen Acquis* into the EC/EU institutional framework. The *acquis* is not binding on the UK and Ireland, but these states may decide to take part in the provisions which make up the *acquis*

⁵ A special procedure for the adoption of provisional measures in emergency situations is provided for under Article 64(2) (ex 73I(2)) EC.

(Article 4 of the Protocol). The conversion of the Schengen *acquis* into Community law depends on its identification by the Council and the determination of the correct legal basis for each of the provisions and decisions constituting the *acquis* in accordance with their subject matter (i.e., either the First Pillar for free movement matters or the Third Pillar for police matters)⁶. Until such determination is made, the Schengen measures will be regarded as acts adopted on the basis of the Third Pillar (Article 2(1) of the Protocol). Given the important issues at stake, Justice and the Meijers Committee (1988: 10) have recommended that draft decisions concerning the determination of the legal bases should be transmitted to the national Parliaments, and that there should be a six week period between a decision being tabled and its adoption in the Council of the European Union.

This seems to suggest that far from being an example of state retreat, the new arrangements could be seen to represent the entrenchment of the executive state. This is attested by the fact that immigration policy and measures relating to the rights of residence of long term resident third country nationals do not fall within the Community's exclusive competence. Under Article 63 EC, for example, the Member States are allowed to maintain or introduce in the above mentioned areas national provisions which are compatible with the Treaty and with international agreements. In addition, the Member States' exercise of police powers relating to the maintenance of law and order has been left intact. The European Court of Justice has no jurisdiction to review measures or decisions relating to the maintenance of law and order and the safeguarding of internal security. The ECJ will, nevertheless, have jurisdiction to define what measures or decisions fall within the ambit of law and order and the safeguarding of national security but clearly the above provision contradicts the principle of respect for the rule of law underpinning the Union. Moreover, national delegations have circumscribed the role of the ECJ and pruned its integrative dynamic by restricting requests for preliminary reference rulings to courts of last instance (Article 68(1) (ex Article 73p(1))). National courts and tribunals will not be able to refer cases relating to visa, immigration, asylum and other policies to the Court, and requests for references from last instance courts are discretionary, not mandatory (-unless the *acte clair* principle applies), as ex Article 177 EC requires. These inhibitions on the ECJ's jurisdiction

⁶ The Schengen *acquis* consists of the 1985 Schengen Agreement; the 1990 Schengen Implementing Convention; the Accession Protocols with related Final Acts and Declarations; decisions and declarations adopted by the Schengen Executive Committee; and acts adopted by the organs upon which the Executive Committee has conferred decision-making powers. See also Heilbronner and Thiery, 1997.

are likely to undermine legal certainty and the consistent interpretation of Community law throughout the Union, since the ECJ may not have the opportunity to rule on important questions of Community law either because cases may not reach courts of last instance, or the latter may hesitate to refer questions to the ECJ. The limitation of preliminary rulings is likely to yield undesirable implications, such as expense, delay and ultimately lack of effective protection for individuals too who would have now to pursue their cases through the successive tiers of national jurisdiction. Important as the concern not to overburden the ECJ with asylum and immigration questions may be, it has been convincingly argued that the ECJ's present jurisdiction could be extended to the new Title 'while conferring on the Court itself the power to determine, at a later stage, that requests shall be filtered if the number of references should be great' (Plender and Arnall 1997, p.10). Finally, the Council, the Commission or a MS may request the ECJ to give a ruling on a question of interpretation of this title or of secondary legislation, but the ECJ's ruling shall not apply to judgements of courts or tribunal of the MS which have become *res judicata* (Article 68 (ex Article 73p) EC). According to Monar (1998), this will prevent individuals from benefiting retroactively from the ECJ's ruling under this provision.

The conclusion to be drawn from these limitations of the ECJ's jurisdiction⁷ is that the MS are anxious not to relinquish too much control over the shape of the new legal and institutional framework on asylum and immigration. The funnelling role of the previous intergovernmentalist framework and the institutional legacy of the security system in immigration and asylum matters on the new structures is thus apparent. If this is the case, the question that arises is just how the new reforms and the security management of migration will entail or necessitate change. Will the new Title and the potential gains in democratic and judicial accountability, for example, result in substantive changes in the design of immigration and asylum policy? Or will past policies feed forward and flourish within the new institutional setting, thereby shaping the content of policy outcomes and future possibilities? And further, if this proved to be the case, would not reliance on the Community method attribute a degree of legitimacy to past policies flowing out from intergovernmental co-operation? It is interesting to note here that the conversion of the Schengen *acquis* into either Community law or Third Pillar measures is not to be

⁷Dashwood (1998, p. 215) has observed that, 'it is the first exception which has been admitted to the uniform application of the Court's jurisdiction to matters falling within the scope of the EC Treaty. Must we not fear that the worse will follow?'

accompanied by further discussion on the substantive merits of each provision or on the more general political implications of the 'Schengenland' vision for Europe. Other measures adopted in the context of the third pillar may be substantively transformed if they are readopted or replaced by new Community acts under the new Title of the EC Treaty.

An equally plausible scenario is that the expansion of the Community's competence in migration-related areas could lead to an increase in depth and qualitative change⁸. By taking advantage of its new enhanced role, the European Court of Justice may turn the apparent constraints of the new title into an opportunity for reform. Similarly, the Commission could exercise its new responsibilities in ways that may be unintended⁹. After all, what is important is not so much where the right of initiative lies, be it shared or exclusive, as the way in which this right is exercised.

True, too much is yet unsettled for anyone to predict confidently the course or outcome of developments now in train. However, if emphasis is put on the enabling capacities of institutions, then the Member States too could use the new institutional and procedural framework in order to expand the forms of social control, strengthen their regulatory capacities, and consolidate the culturally constructed representation of immigration as both a 'problem' and a 'law and order issue'. Indeed, a rather worrying development, - and one which might provide some insights into the institutional pattern toward which the Community is going, is the permeation of the securitization ethos which characterised the framework of intergovernmental co-operation into the Community concept of an 'area of freedom, security and justice'.

The securitization ethos and the evolving doctrine of immigration control

The institutional pattern of co-operation in immigration and asylum matters from which the EU is moving has not been lean, that is, governed by the 'problem-solving' approach which characterises much of EU decision-making and the 'learning by doing' processes which

⁸ The transition of policies from the third pillar to the first pillar raises a number of legal questions. The question of how to handle third pillar conventions which will be signed but not yet ratified at the time of the entry into force of the Treaty of Amsterdam is mentioned in the Action Plan adopted by the Council and the Commission (p. 4).

⁹ The Commission has proposed a Decision *on Establishing a Convention on rules for the Admission of Third Country nationals to the MS of the Union* (COM(97) 387, 30.7.97). Although the legal basis of the draft convention has been the Third pillar (K1(3)(a) and (b) and K3(2)(c) TEU), the Commission has stated that it intends to propose a directive with the same content under the provisions of the new Title as soon as the Treaty of Amsterdam comes into force.

shape policy outcomes¹⁰. Rather, it has been culturally and structurally ‘thick’: the outcome and the medium of policies and practices rooted in prevailing societal assumptions based on the presumption of the existence of a security deficit within a Europe without internal border controls. On a macro-level, this presumption enabled the Member States to succeed in their demands to be afforded compensatory power of control at the external frontiers in exchange for their consent for the removal of controls at the internal frontiers. On a meso-level, the requirement of stringent policing of external frontiers and internal police surveillance gave police and customs agencies the opportunity to construct a new role for themselves within an enlarged Europe. These agencies have been endowed with the task of identifying specific categories of security risk at the borders, dealing efficiently with them by allocating resources, using computer technology to store and transmit data on individuals, and of developing European-based law-enforcement structures.

The most prevalent security risks to be tackled through co-ordinated action and techniques of control and surveillance across a borderless Europe were identified as drug trafficking, organised crime and immigration¹¹. The inclusion of immigration and asylum in this trilogy did not give rise to concerns as it coincided with domestic systems of cultural representation which had framed immigration as a problem and a ‘law and order’ issue. It is well-known, for example, that after the 1973 policy change in immigration, national governments adopted a tightly restrictionist stance aiming at reassuring voters that states were still capable of managing migration and determining the composition of the community. By so doing, they could stifle support for the extreme right and gain electoral appeal without attracting charges of overt racism¹² (Castles and Miller, 1998; Favell, 1997; Collinson, 1993; Hammar 1990; Geddes, 1999). Though distinctive and driven by their own national dynamics, immigration policies in the Member States were neither immutable

¹⁰ On historical institutionalism, see Thelen and Steinmo et al (eds), *Structuring Politics: Historical Institutionalism in Comparative Perspective* (Cambridge: CUP, 1992); T. Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge MA: Belknap Harvard, 1992). On new institutionalism and its application to the EU, see Bulmer, 1994; Bulmer and Armstrong 1998.

¹¹ As Moravcsik and Nicolaidis (1998, p. 28) have argued ‘even among sceptical governments, here was some concern about the need to pool resources both to manage the pressures of migration (and domestic demand for action associated with it) and to respond to the internationalization of crime, not least drug trafficking’.

¹² Compare, however, G. Freeman (1995) ‘Modes of Immigration Politics in Democratic States’, *International Migration Review*, Vol 29. No. 4: 881-902. See also Rogers Brubaker’s reply: ‘Comments on ‘modes of Immigration Politics in Liberal Democratic States’, *International Migration Review*, Vol. 29. No. 4: 903-906.

nor immune to pressures of convergence. This convergence in restrictionist immigration policies and tighter asylum regulations was officially justified by presenting immigration as uncontrollable and thus as a potential security threat. Since immigrants, by definition, represent the Other or the 'outside brought within', they are seen 'to challenge the basis of 'national' social and political cohesion upon which the integrity of the nation-state ostensibly depends' (Collinson, 1993, p. 14). Given that migrants and refugees became identified as sources of insecurity, restricting immigration (-with the exception of family reunification) was by no means infrequently portrayed as an exercise of the right to self defence or as a form of a counter act, that is, an attempt to redress a balance that allegedly had been disrupted by the presence and settlement of the first wave of post war immigrants.

These domestic environments were the crucial institutional matrixes within which perceptions and the strategic preferences of national decision-makers and other institutional actors were formed¹³. However, these perceptions and strategic preferences could only be acted upon with respect to policy formation towards third country nationals since the free movement provisions of the EC Treaty had stripped the Member states of any power to restrict the movement of Community nationals. True, the Member States could use the public policy, public security or public health derogations entailed by Article 39(3) EC to refuse entry, the issue or renewal of residence permits and order expulsion of EC nationals. However, the exercise of this discretionary power has been circumscribed by Community law and is subject to judicial review by the European Court of Justice¹⁴. So whereas policy towards intra-EU migration was becoming increasing liberal and expansionist due to the ECJ's judicial activism and rights-based approach to free movement, policy towards extra-EC migration was becoming increasingly controlled and restrictive.

In the pre-Amsterdam Europe, these parallel albeit contradictory trends were kept apart. In theory, both are designed to serve the same purpose, that is, to create an area without internal frontiers within which the free movement of goods, persons, capital and services is ensured (Article 14 (ex 7a) EC). However, the methodology, general approach

¹³ See Peter Hall and Rosemary Taylor (1998) 'The Potential of Historical Institutionalism: a Response to Hay and Wincott', 46 *Political Studies* 5: 951-957.

¹⁴ the derogation under Article 39(3) is elaborated by Council Directive 64/221/EEC, OJ (1963-64: Special Edition) 117. See also Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, [1975] 1 CMLR 1; Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219, [1976] 1 CMLR 140; Case 67/74 *Bonsignore v Oberstadtdirektor der Stadt Köln* [1975] ECR 297, [1975] 1 CMLR 472; Case 30/77 *R v Bouchereau*, [1977] ECR 1999, [1977] 2 CMLR 800; Cases 115 and 116/81 *Adoui and Cornuaille v Belgian State* [1982] ECR 1665; [1982] 3 CMLR 631.

and philosophy underpinning them are very different. In many respects, it is this inconsistency in the EU's migration policy (i.e., the securitization ethos characterising extra-EU migration policy v the liberalisation ethos of intra-EU movement) that has provided ammunition for the critique of the intergovernmental methodology, and raised normative expectations that 'more Europe' may yield better, in the sense of more liberal, migration policies and the inclusion of long-term resident third country nationals in the Euro-polity.

The Amsterdam summit ruptured the hymen separating the two migration policies and general approaches. The amended Article 2 TEU states that the Union shall set itself the objective to develop and maintain an area of Freedom, Security and Justice. The latter is defined as an area in which the free movement of persons is to be assured in conjunction with appropriate measures with respect to external border controls, immigration, asylum and the prevention and combating of crime. The Communitarised areas of the third pillar come to support the first pillar: they are indispensable flanking measures to the abolition of internal border controls and to the preservation of the security of the citizens of the EU. The mutual interdependence among the different aspects of this overall objective is confirmed by Art. 61 EC which mentions article 31(e) TEU. In addition, official discourses emphasise that the full benefits of an area of freedom will never be enjoyed unless they are exercised in an area where people can feel safe and secure. As the Action plan of the Council and the Commission (1988, pp. 1-2) on how best to implement these provisions of the Amsterdam Treaty establishing an area of Freedom, security and justice states:

'Freedom loses much of its meaning if it cannot be enjoyed in a secure environment and with the full backing of a system of justice in which all Union citizens and residents can have confidence. These three inseparable concepts have one common denominator - people - and one cannot be achieved in full without the other two. Maintaining the right balance between them must be the guiding thread for Union action. It should be noted in this context that the treaty instituting the European Communities (article 61 ex article 73I a), makes a direct link between measures establishing freedom of movement of persons and the specific measures seeking to combat and prevent crime (article 31 e TEU), thus creating a conditional link between the two areas'.

Hence, 'freedom in the sense of free movement of people within the EU remains a fundamental objective of the Treaty, and one to which the flanking measures associated with the concepts of security and justice must make their essential contribution. The Schengen achievement has shown the way and provides the foundation on which to build. However, the Treaty of Amsterdam also opens the way to giving 'freedom' a meaning beyond free movement of people across internal borders. It is also the freedom to live in a law-

abiding environment in the knowledge that public authorities are using everything in their individual and collective power (nationally, at the level of the Union and beyond) to combat and contain those who seek to deny or abuse that freedom. Freedom must also be complemented by the full range of fundamental human rights, including protection from any form of discrimination as foreseen by Article 12 and 13 TEC and 6 of the TEU’.

The concept of security underpinning the notion of an area of Freedom, Security and Justice refers to measures designed to ensure that the citizens of Europe are free from risk or danger as well as from doubt, anxiety or fear¹⁵. In this respect, the notion of ‘security’ has an individual dimension. To put it differently, what appears to be threatened is neither the order of the state nor the ability of a society to persist in its essential character under changing conditions (i.e., the idea of societal security in the sense discussed by Buzan (1990;1991) and the Copenhagen School (i.e., Weaver et al. 1993)). Rather, the Community worries about Union citizens who are vulnerable to threats and thus in need of security. Interestingly, Union citizens are seen as a homogeneous group possessing as et of unified and unambiguous preferences to which the Community has to respond. In this sense, ‘the term security has undergone an expansion of applications in the EU, where it has until now been used in reference to defence and international security matters under the Common Foreign and Security Policy’ (van Selm-Thorburn, 1998, p. 635).

By contending that there exists a security problem in the EU, the EU inherits from the Member States the tendency to treat security threats and vulnerabilities as objective, that is as independent realities which are not subject to verification and to critical inquiry. By so doing, however, it overlooks the process of defining security threats, that is of the political aspects of ‘security problems’ and the discourses which political leaders tend to articulate in particular historical conjunctures. After all, maintenance of security may not be a purpose distinct from law enforcement, but rather a purpose subsidiary to it. Clearly, the Community has inherited the Member States’ discourse on the ‘securitisation’ of migration and asylum policy (Huysmans 1995) and the concomitant identification of possible sources of insecurity. The notion of Freedom, Security and Justice is based on the assumption that migration is a security threat which must be effectively controlled and reduced¹⁶. The

¹⁵ The Commission’s Report on the functioning of the TEU had stated that security at home and abroad are legitimate concerns for every citizen: Bul. EU 5-1995, p. 92.

¹⁶ Similarly, the creation of an area of ‘justice’ is underpinned by the ambition to create a European judicial area from which Union citizens could derive benefits particularly with respect to access to justice and the reinforcement of judicial co-operation in civil matters. Unlike freedom of movement and justice, however, the aim of the treaty is not to create a European security area in the sense of an area where uniform

significance of this should not be underestimated, for the symbolic framing of an issue defines and confines the terrain within which institutional actors forge preferences, devise policy strategies, and act to maintain or to reform the law¹⁷.

Communitarisation has thus not only left the conceptual parameters of the security paradigm which characterised the Third Pillar intact, but the latter has now come to define the terms of the free movement of persons in Community law. The Community has welcome the Schengen project of creating a unified European migration area surrounded by a uniformly controlled border, and the integration of the Schengen acquis will give the Union a base on which to build further and introduce a restrictive Community migration policy. By so doing, the member states' evolving security agenda and their restrictionist approach will gain a legitimate foothold in the debate. As a consequence, security is no longer an interaction effect between the Third and First pillars. It becomes, instead, a categorical endogenous value of the Community. But what are the implications of this for European migration law and policy, for the Union itself, and for the state and its evolving security agenda?

The protective Union, the mutating state and the EU's future migration law and policy

By assuming the protective role of the state, the Community may promise to deliver security for all but, as already argued, it is the MS who have hegemonically framed the debate on immigration and are still the chief interpreters of security. The impact of this on the production of social identities, the formation of a European identity and the principles underpinning the European project has been largely overlooked by European policy-makers.

Title IV EC may not only help create narratives which are insulated from principled judgements, but it may also contribute to the institutionalisation of a civic but exclusive mode of European identity. As Shaw has argued

'the identity of the citizen is constructed through the 'Other', the foreigner who needs to be excluded to make the citizen 'secure'. This is an alternative 'security-oriented' vision of the area of

detection and investigation procedures would be applicable to all law enforcement agencies in Europe in the handling of security matters.

¹⁷ According to historical institutionalism, problem definition tends to limit the range of available options, and favours particular institutional outcomes. As such, it prevents certain kinds of change and tends to determine the nature and kind of change.

freedom, justice and security which feeds into the profound disquiet on civil liberties grounds which has long been held in some quarters about the implications of the secretive third pillar and Schengen operations' (Shaw 1997: 571).

Instead of giving a coherent normative response to the problems of membership and citizenship in the EU and adopting an enlightened approach to migration flows (Kostakopoulou 1996,1998), the Community seems to have uncritically adopted the Member states' definition of 'who the Europeans are' and their preoccupation in securing national identities¹⁸. By so doing, it risks replicating the deficiencies and contradictions inherent in the nation-statist paradigm at the European level and authoritatively allocating socio-political values which do not conform to the principles underpinning it. Under such circumstances, Union citizenship could well be transformed into to a 'neo-national' form of citizenship in so far as it would disregard the claims of long-term resident third country nationals for inclusion and recognition (Peers 1996; Kostakopoulou 1998b; Hansen 1998).

It may be interesting to note here that in Community official discourses the logic of exclusion is being presented as security enhancing: enforcement of the law against migrants is said to have been dictated by the need on the part of the Union to fulfil its obligations to Union citizens. This not only presupposes a pre-existing subject, but it also affirms the naturalness of 'Europeans' as a group. Although this could well be an intentional strategy designed to enhance the Union's legitimacy, I believe that the Community has chosen the wrong path in order to 're-engage the public'; namely, to imitate the 'protective state' and make the Union relevant to the lives of ordinary Europeans by responding to their concerns and anxieties without distinguishing whether these are in reality their own anxieties or their national governments' anxieties about 'unmeltable ethnies'. In this way, a silent value judgement is made about the importance of a commitment to limiting and controlling the flow of non-European peoples which unavoidably reduces their moral status into 'high risk' or 'low risk' categories. By assuming responsibility for migration-related issues the Community thus becomes more state-like and exclusionary. But such a protective Union might well be a defective Union.

What are the likely implications of this for the Member States? Given that the power to determine who will enter and reside in a territory and under what conditions has

¹⁸ On the constitutive act of the drawing of boundaries for creating sense of belonging, see J. H. H. Weiler (1997) 'To be a European citizen - Eros and civilization', *Journal of European Public Policy*, Vol. 4. no. 4: 495-519 at p. 505. See also Weiler, 1995;1996;1997.

traditionally been the sovereign prerogative of territorial states, is the transfer of competence over migration-related issues to the Community a sign of state retreat? A testimony that states are failing since they cannot effectively control their borders?

Several interpretations may be offered here depending on one's beliefs, perspective and the conceptual frame (s)he uses in order to theorise the relationship between the Community legal order and national jurisdictions. Federalists would argue the transfer of immigration policy to the Community represents a step closer to supranational statehood (Mancini, 1998)¹⁹. Neofunctionalists would also welcome the communitarization of immigration policy, perhaps not as a triumph of supranationalism over intergovernmentalism but as evidence of incremental systemic growth: from informal co-operation to formal intergovernmental co-operation and, finally, to Community activity. Otherwise put, communitarisation represents a 'forward linkage', which may not be necessarily characterised by smoothness, linearity or inevitability since full Community activity may not actually come around 2004. State-centrists, on the other hand, would regret the Community's encroachment on national sovereignty. As immigration policy has been viewed as constitutive of statehood action, the prospect of full blown communitarization of immigration and asylum policy at the end of the transitional period appears to strip modern European states of yet another sovereign power. Of course, it may be observed here that this phenomenon is neither new nor unusual: states are constantly undergoing change in a changing and unpredictable international political system. In this respect, those intergovernmentalists who have come to terms with this might argue that it was in the national governments' interest to cede sovereignty over immigration in order to achieve more credible and pareto efficient outcomes than would be possible through intergovernmental co-operation (Taylor 1996; Moravcsik 1998; Moravcsik and Nicolaidis 1998).

State authority has leaked away, upwards, sideways, and downwards, but diffusion of authority is not a problem in itself' (Strange, 1997, p. 56; Linklater 1996). It only becomes a problem if, 'in the process of dispersion of power, there are tasks that someone should do and no one, no institutions nor associations, does'(Strange, 1997, p. 72). Clearly, this is not the case here. Intergovernmentalists might also wish to point out that the powers conferred on the community are not exclusive in the sense of preventing the Member states

¹⁹ If European supranationalism is seen through the lens of national federalism, then federalists would not share my critical views concerning the undesirable effects of the securitization ethos on the EU.

from acting in these policy areas (concurrent competence). Moreover, the 'leakages of authority' are contained and preserved during the transitional period (e.g. unanimity, the Commission's shared right of initiative, limitations on the ECJ's jurisdiction)²⁰.

Notwithstanding the divergence in the above mentioned explanations, a point of convergence is that states will lose their power of autonomous action in the domain of immigration policy. However true this might be, it would be wrong to assume that states become increasingly hollow and 'defective' in their ability to perform their traditional functions including that of controlling migration flows. An alternative hypothesis that may be worth considering, here, is that states are carving out a new role for themselves in a changing world and, in this respect, they could well be expanding and become more influential. After all, the transfer of immigration and asylum policy to the Community would only be a sign of the decline of the state, if it was shown that competence over these areas is in itself a determinant of statehood. The fact that the Amsterdam Treaty has transferred these areas to the Community seems to indicate the opposite: immigration policy is only contingently necessary to the character of the state.

Since states change as inevitably and unpredictably as the world itself, the meaning of security changes too. The certainty and conceptual clarity of cold-war definitions of security has been superseded by a new security agenda which includes, apart from traditional military-based objectives, broader political aims and conceptions, such as respect for democracy and human rights, peace-keeping missions, combating environmental degradation, tackling migration and so on. What is interesting in this connection is that although states are losing their ability to control their borders and to provide security, they, nevertheless, continue to be the chief interpreters of security. Security continues to mean simply what the rulers say it means, and our earlier discussion on the Community concept of Freedom, Security and Justice has demonstrated this. Otherwise put, the vocabulary may change, the discourse of security may evolve, but states, acting individually or collectively, still remain in control of this discourse.

²⁰ Freeman has argued that the Member states have taken part in this integrative effort motivated by their desire to enact restrictive measures (Freeman, 1998, p. 91). R. Koslowski (1998, p. 738) has criticised this argument for conflating the objective of co-operation with the institutional framework of co-operation. As he has put it 'when a group of states harmonise their migration policies or integrate their migration policy-making institutions, they cede sovereignty regardless of whether the objective of that co-operation or integration is to restrict immigration or encourage it. Co-operation is co-operation; integration is integration'.

Furthermore, the Member States' commitment to stringent border controls leads them beyond the outer frontier of the EU into a virtual projection of borders outwards. The outward shift of borders and the corresponding shift in operational strategies can be seen in the following three key aspects of the Union's migration policy. First, an idea that gains increasing momentum is that more effective management of migratory movements to the EU requires activities to counter migration pressure at the source²¹. In other words, action to reduce the push factors or to tackle the root causes of migration is regarded as a possible 'solution' to the 'problem' of migration. This entails not only the elimination of the economic causes of migration from the Third World through economic schemes of co-operation and development aid, but also policies of prevention of crises and intervention in order to contain conflicts and to assist in the restoration of normality. In other words, immigration is no longer a home affairs issue; it now becomes a foreign policy priority. The need for this kind of intervention was discussed in the Commission's Communication on Immigration and Asylum Policy (1994). The strategy paper on Immigration and Asylum policy submitted by the Austria Presidency (1998) elaborates on this theme, and calls for the development of a co-ordinated approach to reduce migratory pressure that extends beyond the narrow field of policy on aliens, asylum, immigration and border controls by incorporating international relations and development aid too (paragraphs 51-57). As the strategy paper puts it, 'all the EU's bilateral agreements with third States must incorporate the migration aspect. For instance, economic aid will have to be made dependent on visa questions, greater border-crossing facility on guarantees of readmission, air connections on border control standards, and the willingness to provide economic co-operation on effective measures to reduce push factors' (p. 59). This clearly represents a major adjustment of traditional migration policy management patterns since it involves interconnections and parallel policy design with Common Foreign Security Policy and development aid.

²¹The idea of 'root causes' emerged in early 1980s in the context of refugee flows. In the EU context, the idea was adopted circa 1989. Although the need for political involvement and for action to address the causes which force people to leave is a worthwhile goal, its instrumental deployment in the context of migration policy is reactive. This is because action to tackle the root causes does not stem from a sustained commitment to international distributive justice, to peace and democracy. Rather, it is used in order to keep 'foreigners out'. Robert Goodin had foreseen the deployment of such a strategy: 'if the rich countries do not want to let foreigners in, then the very least they must do is to send much more money to compensate them for being kept out' (1986, p. 9). Similarly, Hathaway (1995), Harvey (1998) and others have pointed out, that the rationale for the new found concern for the enforcement of human rights is the desire on the part of states to restrict the numbers of asylum seekers coming to Europe. In this respect, Harvey (1998, p. 579) argues that 'there has been a paradigm shift in international refugee law away from the 'exilic bias' and towards root causes'.

However, this should not detract from the fact that the basic character of the 'root causes' thinking is that of prevention and restriction.

A second (linked) feature is the new emphasis on a comprehensive migration policy which tackles anticipatory migration. In this respect, the notion of 'fortress Europe', which has underpinned most policy initiatives in this area, is gradually replaced by a model of 'concentric circles of migration'. According to this model, the Schengen EU members constitute the first circle, and are surrounded by a second circle consisting of prospective members and associated states. These states are required to bring their migration policies in line with the first circle's standards, particularly with respect to visa, border control and readmission policies. They may be persuaded to meet the Schengen standards or may be forced to do so if they were made a precondition for EU membership para. (60 and 61). A third circle of states in the CIS area, Turkey and North Africa would focus on transit checks and on combating illegal immigration networks. The co-operation of these states could be achieved if the EU linked fulfilment of these obligations with economic co-operation. Finally, a fourth circle of states in Middle East, China and Africa would co-operate with the EU on eliminating the push factors of migration. Once again, co-operation in this area would determine the extent of development aid granted. It is interesting to note here that a priority of the Council's (and the Commission's) work programme in migration policy is the development of the 'model of concentric migration policy circles' through a comprehensive assessment of third states in the framework of that model and the formulation of a medium-term plan for each circle (par. 134 et seq).

The third aspect of the EU's future migration law and policy involves the concept of control of legal entry. The Strategy paper calls for the formulation of an overall concept of control of legal entry which shifts the focus from illegal apprehension after entry to deterrence before entry. According to this document, an effective entry control concept is not based simply on controls at the border but centres around increased legal regulation and effective preventative strategies. It begins in the country of departure at the time of granting the visa, and covers every step taken by a third country national from the time (s)he begins her/his journey to the time (s)he reaches her/his destination: in transit by checks on transport undertakings, involving the transit states from which migrants reach the Union territory in a control system; EU external border controls, security nets at the internal borders and so on (para. 41, 85-92). For this reason, national executives believe that 'the earliest possible

fulfilment of the requirements particularly of the Schengen-type visa, external border control arrangements and comparable aliens law is of particular importance for preparation of the accession process' (par. 89).

In view of the above, it would be hasty to argue that the Communitarization of immigration policy leaves the Member States disempowered. States may lose sovereignty over migration-related issues but their power increases. Communitarization offers them the opportunity to expand the logic of control and law-enforcement which underpinned the intergovernmental framework of co-operation, and to construct new forms of power which do not only increase the regulatory capacity of states within a geographically contained structure (i.e. the EU), but also enable them to impose their security agenda beyond the narrow confines of the Union.

Does this signal the absence of any major shift in the basic direction of European migration law policy? True, the Amsterdam Treaty does contain, for the first time, a set of objectives for a European migration policy, but these neither well-defined nor do they entail an unambiguous specification of the nature of the 'problem'. The provisions of the new title IV reflect the priorities and measures on which some basic agreements among the MS have already been reached, and do not pay the proper attention to either the rights and entitlements of asylum seekers or the legitimate claims of long-term resident third country nationals for inclusion in the European polity. In this respect, it is highly unlikely that the existing restrictive and law enforcement approach to migration flows will be reversed - unless, of course, the ECJ's involvement profoundly affects the nature of the migration regime. Indeed, the draft strategy paper submitted by the Austrian Presidency to the K4 Committee (9809/98, Brussels 1 July 1998) outlines a general framework for the articulation of a European migration policy based on the determination to reduce the causes of migration and to control immigration more effectively. In this respect, a consistent, medium-term migration policy strategy for the EU will aim at: a) the reduction of migration pressure in the main countries of origin of immigrants; b) the reduction of illegal immigration and the suppression of illegal immigration networks; c) immigration control; d) an overall concept of control of legal entry at all stages of movement of persons; e) determination of the status of legal immigrants with a view to promoting integration; f) new protection for refugees; g) agreements with the states of origin and transit states in the field of prevention and with regard to effective repatriation (parag. 40). In light of this, Title IV

seems to represent a new and more effective management of immigration control, and not the end or the beginning of the end of an era.

Conclusion

Perhaps, we have now entered yet another phase in the unfolding history of the state and in the evolving process of European integration. In the past, the dualism between supranationalism and intergovernmentalism provided an all too convincing explanation for either 'too much Europe' (the teleology of European integration) or 'too little progress' (intergovernmental resistance). As far as migration law and policy is concerned, this is no longer the case. The foregoing discussion has shown that these two opposing forces not only co-exist but have become interdependent. The Community has inherited the states' security agenda and their identification of security threats as well as their policy repertoire and their ways of searching for solutions, however unlikely to follow any predetermined pattern these may be. At the same time, Communitarization of immigration and asylum policy offers the states an opportunity to virtually extend their borders and influence developments and policy-making in other parts of the world.

As far as the specific provisions of Title IV are concerned, the democratic deficit of Justice and Home Affairs I has been reduced but not removed (Monar, 1998, p. 335), and the merits of the restrictive and law-enforcement approach to immigration and asylum flows have not been debated in the public arena. This leads me to suggest that it is not the substratum of the European migration policy that has undergone changes (e.g. not the game itself), but the particular ways in which the institutions relate to each other (-including the legal quality and potential effectiveness of measures to be adopted under this title). True, the new institutional structures and procedures may create opportunities for change and policy innovation in this field. After all, structures almost never establish a complete institutional closure: the fact that they are products of institutional design means that other designs or changes in the design are possible too. However, unless normative expectations coupled with active interventions by the Commission and the ECJ subvert conceptual and structural determinants, there is the risk that notions and approaches associated with the security paradigm of Justice and Home Affairs co-operation will impose their demands on the liberalisation ethos of the free movement paradigm thereby deforming it. Amsterdam

seems to have opened the way for the installation of exclusionary categories within the body of Community law.

Hence, what appears to be needed is a new approach: it is time for a cognitive shift to accompany the structural shift from the intergovernmental pattern of co-operation in the context of the Union to the Community framework. By cognitive shift, I mean a new conceptual frame of reference which challenges the securitization of immigration and reflects critically on the meaning and terms of membership in the EU. However, such an interpretative turn is unlikely to occur so long as European decision-makers refuse to consider seriously the idea that responding appropriately and efficiently to the challenge of immigration implies neither better and firmer border controls (i.e., Fortress Europe) nor the shift of the border outwards and the extension of immigration controls to all stages of the movement of people (i.e., the concentric circles model and an overall entry control concept). It may require, instead, a shift of approach away from the very idea of control.

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