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Is There an Alternative to 'Schengenland'?

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The process of 'Schengenizing' the law on immigration and asylum matters and the tensions generated by the intergovernmental pattern of cooperation, in the context of the European Union, have had negative effects upon the principles underpinning the European polities and the identities of their citizens and residents. A principled, enlightened and non-restrictive Union immigration policy would have to be based on the questioning of states 'right' to exclude aliens and on an alternative way of thinking about immigration. This entails 'constitutionalization' of immigration in the European Union and the creation of partnership arrangements among political units in supranational, national and subnational environments.

As Europe moves towards abolition of internal frontiers and border controls, in full implementation of the Schengen Implementing Convention,[1] immigration has become an issue of increasing concern. A number of studies have contributed towards a greater understanding of the politics of immigration in the EU by combining theoretical and empirical perspectives on migration flows in the EU;[2] by providing an overview of legal-institutional developments in this area;[3] or by placing European migration within the context of international migration.[4] Yet the discussion rarely moves beyond the level of 'diagnosis' towards alternative institutional designs.

Comparative research, be it on conceptions of national identity in Western European countries; on citizenship, nationality and immigration laws; on

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[1] The Schengen Implementing Agreement of 19 June 1990 introduces a series of provisions to compensate for the abolition of border controls in the Schengen area. As from March 1995, it was applied among Germany, France, the Benelux countries, Spain and Portugal. Italy and Greece have acceded to the Convention, but are excluded from its application until a later stage. Austria acceded to the Convention in April 1995 and it is expected that all Nordic States will join the Schengen club. Although the Schengen Agreements are part of International Law and not European Law, they have, nevertheless, been the model for the emerging European immigration policy. The Schengen Convention stipulates that Community rules take precedence over the Schengen in the event of conflict (Article 134), and efforts are made for the Schengen's incorporation in the Third Pillar structure

[2] R. Miles and D. Thranhardt (eds), *Migration and European Integration: the Politics of Inclusion and Exclusion in Europe* (London, Pinter, 1995).

[3] J. Monar and R. Morgan (eds), *The Third Pillar of the European Union: Co-operation in the Fields of Justice and Home Affairs* (Brussels, Interuniversity Press, 1994); G. D. Korella and P. M. Twomey (eds), *Towards a European Immigration Policy* (Brussels, European Interuniversity Press, 1995).

[4] S. Castles and M. J. Miller, *The Age of Migration: International Population Movements in the Modern World* (London, Macmillan, 1993); S. Collinson, *European and International Migration* (London, Pinter, 1993)

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official immigration discourses; on racism and the rise of anti-immigrant political parties; confirms that the future is not bright for migrants in Europe.[5] But alternative proposals consist of recommendations on how to promote more democratic control and better management of (albeit limited) migration.[6] They rarely entail 'a politics of vision' founded on the hypothesis that immigration may be a blessing – not a curse.

Political philosophy may help here.[7] This paper offers a principled, non-restrictive paradigm for immigration policy in the EU, based on a different way of thinking about immigration and on the questioning of states' or democratic communities' 'right' to exclude. I argue that European polities have a positive obligation to admit immigrants, out of concern about the profound effects that closure and the current law-enforcement immigration regime have upon the principles on which they profess to be based, and upon the identity of their citizens. After all, admission and belonging are issues relating to 'what kind of polity we wish to have' and 'who we choose to become' – not simple correlatives of the state's power to exclude.

An obligation to admit does not give rise to a corollary right to be admitted. Breaking the correlation between rights and duties in this case has concrete implications for the politics of immigration in the EU. First, unlike the proposed human right to transborder movement,[8] it establishes a 'morality of duty' and not a 'morality of aspiration'.[9] Second, by shifting the focus from the immigrant to the host, it shows that alienage is produced only in relation to what constitutes membership. Such a shift may be necessary, for the current

[5] See D. Cesarani and M. Filbrook (eds), *Citizenship, Nationality and Migration in Europe* (London, Routledge, 1996); P. Weil, 'Nationalities and Citizenships' in Cesarani and Fulbrook, *Citizenship, Nationality and Migration in Europe*; T. Hammar (ed.), *European Immigration Policy: a Comparative Study* (Cambridge, Cambridge University Press, 1985); M. Baldwin-Edwards and M. A. Schain, 'The politics of immigration', *West European Politics: Special Issue*, 17, 2 (1994); J. Wrench and J. Solomos (eds), *Racism and Migration in Western Europe* (Oxford, Berg, 1993); J. Rex and B. Dury (eds), *Ethnic Mobilization in a Multi-Cultural Europe* (Aldershot, Avebury, 1994).

[6] S. Collinson, *Beyond Borders: West European Migration Policy Towards the 21st Century* (London, RIIA, Wyndham Place Trust, 1993), p. 101.

[7] The debate on free movement and borders used to be conducted in crudely dichotomous terms: either as an affirmation of the national state's or a democratic community's right to exclude, or as an open admissions policy and a universal right to transnational movement. But this dichotomy has been persuasively questioned, thereby opening up room for a range of intermediate positions – or even for arguments beyond, which could make much difference in practice (See T. Nardin, 'Alternative Ethical Perspectives on Transnational Migration' in R. Goodin and B. Barry (eds), *Free Movement* (Pennsylvania, Pennyslvania State University Press), pp. 267–78; V. Bader, 'Citizenship and exclusion', *Political Theory*, 23, 2 (1995), 211–46; B. Parekh, 'Three Theories of Immigration' in S. Spencer (ed.), *Strangers and Citizens* (London, IPPR/Rivers Oram Press, 1994), pp. 91–110. Notwithstanding this opportunity for the introduction of more effective arguments to the political game, the debate has now drifted from openness and liberal admission policies to 'legitimate closure', as theorists, with the exception of Goodin and Dummett, seem keen on considering an ever increasing list of 'legitimate' reasons for excluding immigrants; R. E. Goodin, 'Inclusion and exclusion', *Archives Europ. de Sociologie*, 2 (1996), 343–71; A. Dummett, The Transnational Migration of People Seen from within a Natural Law Perspective' in Goodin and Barry, *Free Movement*, pp. 169–80.

[8] Both Carens and Dummett concede that the right to free movement is not a politically feasible option, but an ideal target, or a critical standard by which to assess existing policies; Carens, 'Migration and Morality', p. 45; Dummett, 'The Transnational Migration of People', p. 179.

[9] The terms are taken from L. Fuller's, *The Morality of Law* (New Haven, Yale University Press, 1964).

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politicization and 'securitization' of the issue in the EU to demonstrate that the 'problem' of immigration lies primarily with the 'host' Member States, – not with migration flows.

What is Wrong with the Present Immigration Regime?

The current intergovernmental framework for co-operation in immigration and asylum in the context of the Union is problematic in the following ways.

(a) The Way Immigration is Framed and Policy Objectives are Defined

The introduction of compensatory measures of control at the external frontiers and closer police co-operation has been presented as an 'inevitable' consequence or essential requirement of the logic of the internal market. In reality, these have been political decisions. True, the removal of controls at internal frontiers requires some form of harmonization of the conditions for entry, and visa and asylum policies. But a harmonized policy need not resemble the Schengen model of intensive cooperation between police and judicial authorities of the Member States.

The character of the intergovernmental co-operation mirrors Member States' anxiety to be afforded sovereign power of control at the external frontiers, in exchange for their consent for the shrinking of internal borders. The choice of the intergovernmental restraint model, however, can only be understood by reference to the national restrictive immigration policies and to the ideological redefinition of immigration that took place during 1969–1985. This period saw a convergence in restrictive immigration policies in Western Europe.[10] Official discourses on the 'social costs' or the 'problem' of immigration replaced earlier proclamations on the significance of immigration in aiding post war economic recovery during the first phase of migration policies in Europe (1945–1968).

Whilst the recession associated with the 1973 oil crisis coupled with rising unemployment have traditionally been blamed for this shift in immigration discourse and policy,[11] the motives were political-ideological rather than pragmatic. The halt to labour migration and restrictive legislation actually preceded the economic crisis. In addition, no official empirical data was ever collected on the socio-economic impact of immigration in order to justify this shift. Concerns about the social repercussions of 'coloured migration' and fears of 'being swamped' by alien cultures seem to have prompted the restrictionist response.[12]

By situating the current immigration regime in the context of national restrictive immigration policies, dominated by a particular nationalist way of thinking, one can explain both its ad hoc character and its 'overdetermined' objectives. Immigration is presented as a 'law and order' problem, which Interior ministers hope to resolve, alongside drug trafficking and international

[10] Hammar, *European Immigration Policy*; R. Cohen, *The New Helots: Migrants in the International Division of Labour* (Farnborough, Avebury, 1987).

[11] H. J. d'Oliveira, 'Fortress Europe and (Extra-Communitarian) Refugees: Cooperation in Sealing Off the External Borders' in H. Schermers *et al.* (eds), *Free Movement of Persons in Europe* (Dordrecht, Martinus Nijhoff, 1993), pp. 166–82, p. 167.

[12] Z. L. Henry, *The Politics of Immigration: Immigration, 'Race' and 'Race' Relations in Post-war Britain* (Oxford, Blackwell, 1994); A. Findlay, 'An Economic Audit of Contemporary Immigration' in S. Spencer (ed.), *Strangers and Citizens*, pp. 159–201, p. 168.

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terrorism, by stringent policing of external frontiers and internal police surveillance.

(b) The Way Immigration Policies are Designed

The design of EC-wide immigration policies from 1986 to 1993 has been 'para-communitarian'. In this phase of informal intergovernmentalism, a number of ad hoc bodies, such as the TREVI Group, the Ad hoc Group on Immigration, the Schengen Group, set up under the aegis of the EC Interior and Justice Ministers, assumed responsibility for immigration and asylum policy. These committees were outside the competence of the EC institutions and acted as quasi-legislators empowered to adopt rules, provisions and measures. The concentration of power in the hands of national executives and their law-enforcement agencies, coupled with the absence of effective controls by parliamentary and judicial bodies, exacerbated the democratic deficit and aroused fears of an 'authoritarian Europe being created in secret and with little democratic debate'.[13]

In an attempt to provide some organizational infrastructure and co-ordination in the work of these groups, the European Council instituted a Group of National Coordinators in 1988. The Group compiled the Palma document, entailing measures necessary to realize the free movement of persons. This marks the formalization and institutionalization of the intergovernmental pattern of co-operation under the auspices of the Council of Ministers.

The Maastricht Treaty institutionalized further the intergovernmental methodology – but in a more diluted form, by providing a number of links to the Community institutions. Co-operation in Justice and Home Affairs replaced informal intergovernmentalism. This covers controls on people crossing EU external frontiers, policy on resident nationals of third countries, combating drug addiction and international fraud, judicial co-operation, customs and police cooperation.[14] Visa policy is the only area transferred to the Community's scope of jurisdiction under article 100c. The various Groups have been subsumed by a Co-ordinating Committee (the K4 Committee), consisting of senior officials by each MS, and its three senior steering groups (on immigration/asylum, police/customs co-operation, judicial cooperation). The Committee gives opinions for the attention of the Council and contributes to the preparation of the Council's decisions. The Commission has limited input in this process, and the European Parliament's right of consultation takes the form of reports submitted to it *ex post facto*. This lack of safeguards at the supranational level is coupled with lack of national parliamentary involvement and of a system of judicial review by the European Court of Justice, which is only optionally provided for under Article K3(2) for Third Pillar Conventions.[15] There exists, though, the possibility of 'Communitarization' of intergovernmental matters via the 'passerelle' provision of Article K9.

[13] T. Bunyan, 'Towards an authoritarian European state', *Race and Class*, 32 (1991), 19–24.

[14] P.-C. Muller-Graf, 'The legal bases of the Third Pillar and its position in the framework of the Union treaty', *Common Market Law Review*, 31 (1994), 493–510.

[15] D. O'Keeffe, 'The emergence of a European immigration policy', *European Law Review*, 20 (1995), 20–36; 'Recasting the Third Pillar', *Common Market Law Review*, 32 (1995), 893–920.

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(c) The Substantive Rights' Deficit of the Instruments that are Agreed

The present regime has methodological and substantive inconsistencies. Methodological consistency demands the realization of a Union objective, such as the abolition of internal controls, via instruments of Community law. Substantive consistency requires similar treatment of both intra-Community and extra-Community migration. Presently, the former constitutes a fundamental freedom, whilst the latter is portrayed as a threat or invasion.

More importantly, the law enforcement character of the intergovernmental instruments introduces wide administrative discretion in areas where human rights and civil liberties are at stake. It creates difficulties in subjecting the implementation of policy to due process of law. Both the Schengen Accord (14 June 1985), and the Supplementary Agreement for the execution of the Accord (June 1990) have been criticized for the undue concentration of powers in the hands of the Schengen Executive Committee; for lacking adequate protection of human rights, equality of treatment and non-discrimination; for the uneasy relationship with the Geneva Refugees Convention of 1951; and for failing to protect personal data.[16]

The tightening of asylum rules under the Schengen and the Dublin Convention (1990, in force as per 1 November 1996), which has now superseded the chapter on asylum in Schengen (1990), has also been criticized for failing to observe the Geneva Convention as amended by the 1967 New York Protocol and the ECHR.[17] The Dublin Convention stipulates that a decision on asylum made by the first country of application is binding upon the other signatories, but this appears problematic as there are neither harmonized asylum procedures nor uniformity in the interpretation of the Geneva Convention. The imposition of sanctions on air and sea carriers (Article 26, Schengen II), has attracted sustained criticism for impeding unfettered access to status determination procedures and to asylum from persecution. Post-Maastricht developments such as the Commission Communication on Immigration and Asylum Policies, the Resolution on Minimum Guarantees for Asylum Procedures, the Convention on Simplified Extradition Procedures and the Joint Position on the Harmonized Application of the term 'refugee', all have confirmed fears that the EU is moving towards restrictive asylum regulations.[18]

(d) The Official Justifications that are Offered

EC-wide official discourses emphasize the idea that integration of ethnic communities can only work if immigration is controlled. Nothing damages

[16] J. P. H. Donner, 'Abolition of Border Controls', in Schermers *et al.*, *Free Movement of Persons in Europe*, pp. 5–26; P. Boeles, 'Data Exchange, Privacy and Legal Protection Especially Regarding Aliens' in Schermers *et al.*, *Free Movement of Persons in Europe*, pp. 52–7; F. Hondius, 'Legal Aspects of the Movement of Persons in Greater Europe', *Yearbook of European Law*, 10 (Oxford, Clarendon, 1991).

[17] M. Spencer, *States of Injustice* (London, Pluto, 1995); H. Storey, 'International Law and Human Rights Obligations' in S. Spencer, *Strangers and Citizens*; M. den Boer, 'Moving between Bogus and Bona Fide: the Policing of Inclusion and Exclusion in Europe' in Miles and Thranhardt , *Migration and European Integration*.

[18] For an overview of these developments, see R. Wallace, *Refugees and Asylum: a Community Perspective* (London, Butterworths, 1996). Compare also the EP's Resolution on the Right of Asylum, C99/167, OJ 1987, 12 March 1987.

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community relations, however, more than the claim 'fewer immigrants, better race relations', as it appears to blame the victims for the increase in racial violence. Given also that substantial numbers of new arrivals are close family members of *de jure* or *de facto* ethnic citizens, restrictions on the right to family re-unification create legitimate, internal grievances. By 'accepting public concern about immigration as a legitimate grievance and seeking to remedy that grievance by restricting the entry of black and Asian people, governments have reinforced the view that such people are undesirable'.[19]

Because immigration rules do not have an equal bearing on all communities in Europe they are instrumental in perpetuating the second class citizenship status of the ethnic population and impairing the institutionalization of a civic culture of anti-discrimination. Inclusion and respectful belonging of Europe's ethnic population is thus inextricably linked with immigration. Intensification of internal controls in order to curb unregulated immigration (i.e., the use of identity cards or other proof of legality to control access to a range of public and private services, 'random' stop and search documentation checks) damages community relations and often endangers the security of settled migrants and citizens. Racism and xenophobia breed on such a negative portrayal of the Other. 'Fortress Europe' erects internal walls too; 'walls of hatred around a substantial number of Europe's own inhabitants'.[20]

Polycentric Sovereignty

Sovereignty has been regarded as the ultimate value in immigration matters, and the state's right to exclude as only exceptionally conditional (for example, on humanitarian grounds or to facilitate family reunification). Convincing the Member States on the merits of a different way of thinking about and responding to immigration, requires the 'de-centring' of sovereignty from what tends to be an unassailable position in immigration discourse and policy.

The state-centred notion of sovereignty appears to be apposite more to jurisprudence than to contemporary political reality. Large scale structural transformations in economic, social and technological processes and the perforation of sovereign borders by persons, products, pollutants, power have necessitated states' participation in institutional arrangements designed to tackle issues that are either too large or too small for states to handle. The emergence of new collective actors both below and above the national level has exposed the legal fiction of a political universe consisting of states only. As a result, claims made by the state should not always be conflated with the needs of the community, and citizens' allegiances can no longer be confined within national borders.

The development of the Community legal order is a concrete manifestation of border-transcending communities on a transnational scale, as well as of the relativization of the state as the overarching object of political allegiance. Union citizens have multiple identifications and increasingly realize that sovereignty is something that can be both limited and shared. In theory, this is congruent with the 'transfer of powers' approach: that is, the idea that Member States have

[19] S. Spencer, 'The Implications of Immigration Policy for Race Relations', in S. Spencer, *Strangers and Citizens*, pp. 306–21, p. 309.

[20] Spencer, *States of Injustice*, p. 121.

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agreed to restrict their own sovereign powers, albeit in limited fields, by transferring them to the Community which is endowed with its own institutions, its own personality, its own legal capacity, and power to enact laws which bind both the Member States and their nationals. This, by no means, implies that the Community is sovereign in the traditional sense, for there is no single political centre within which power is vested.[21] Both the Community and the Member States are empowered to enact binding laws.

Those who believe that there can be no viable political framework beyond the nation state, and who view the process of the uniting of Europe through the lens of the nation state, regard polycentric sovereignty (the existence of many centres of collective decision making) as some kind of pathology. The European Community is accounted for on the grounds that the Member states have merely delegated some powers to the EC (in Britain via the 1972 Accession Act) without ceasing to be sovereign. Sovereignty remains vested in the Member States – albeit limited in certain areas–and is 'pooled' or 'collectively exercized' by an association of states from which a state has the right to secede. A chief weakness of this approach is its failure to appreciate fully the reality of the Community legal order as well as to identify the scope and the nature of the powers vested in the Community.

Adherence to the dogma of the indivisibility of sovereignty conceals what is at stake in the EU: namely, the institution of co-ordinate and strategically interacting levels of government. Polycentricity captures this loosening of the state's monopoly of jurisdiction and the vertical dispersion of competences both upwards and downwards.[22] This opens up possibilities for 'partnership arrangements' and for novel institutional designs. Sovereignty is no longer viewed as a zero-sum game. Nor does it ultimately efface state authority.[23] States shift functions and conditions; they do not disappear.[24]

This means that states are no longer distinguished by the scope of their operation but by the character of their operation. States will continue to perform a wide variety of functions, and to make choices within a more constrained, but simultaneously more flexible, environment. They may participate in joint projects with other units, but their decisions are increasingly circumscribed by an interlocking network of both vertical and horizontal spheres.

The novelty lies more in the interlocking, and less in the overlapping, of national, supranational and subnational environments. Sovereignties are nested within each other. Interlocking augments bargaining, increases input and multiplies constraints. The multiplication of constraints is bound to generate tensions as national executives translate this into losses of national sovereignty. But it is also likely to enhance freedom, increase accountability by providing checks and balances, and enable subnational actors to have an input in matters that affect them directly. All these may have a significant bearing in both the procedure and substance of immigration policy.

[21] 'Judging the European Union', *Justice* (October 1996), 21–4.

[22] T, Pogge, arguing from the standpoint of institutional cosmopolitanism, has proposed a 'multilayered scheme of sovereignty'; 'Cosmopolitanism and Sovereignty', *Ethics*, 103 (1992), 48–75.

[23] Compare Philippe Schmitter, 'If the Nation-State Were to Wither Away in Europe, What Might Replace It?', *ARENA Working Paper*, 11 (1995).

[24] W. C. Muller and V. Wright, 'Reshaping the state in Western Europe: the limits to retreat', *West European Politics*, 17 (1994), 1–11. See also N. MacCormick, 'Liberalism, nationalism and the post-sovereign state', *Political Studies*, XLIV (1996), 553–67.

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Removal of immigration from the states' exclusive domain of jurisdiction would not make states 'less sovereign' – in the same way that removal of religion has not done so. Relieved from sole responsibility for this task, states could shift their powers in other sectors (tackling international crime, illegal trafficking of women and children and so on.) The claim that such an arrangement would damage parliamentary sovereignty or the sovereignty of the people appears unconvincing too, for immigration has, traditionally, been the prerogative of the executive. It would weaken, though, the 'sovereignty' of the executive. But if the goal is to design a fair and humane immigration policy which encourages many voices and is subject to judicial supervision, shifting immigration to the Community's domain of jurisdiction makes sense.

Would such an immigration arrangement be in the national interest? Political realists regard national interest as the most important yardstick for policy making. By so doing, however, they take the national interest as 'given'. But it may be argued that there exist various conceptions or interpretations of national interest within society at large, even among state bureaucracies. Instead of subscribing to an essentialist view of the national interest, it might be more fruitful to examine the dynamics of its articulation by national elites, or how a particular interpretation of national interest becomes hegemonic even among elites, at a historically specific political conjuncture.

Such an exercise is pertinent for the understanding of the current immigration regime in the EU, in so far as ideology and nationalist modes of thinking may be the critical factor in portraying further immigration as undesirable. Subjecting any given construal of national interest to the normative test would open up space for a more enlightened debate on immigration: valuing diversity instead of replicating mythological narratives about the 'purity of the national body'; facilitating family unity rather than subjecting children wishing to re-join their parents to DNA tests; welcoming scarred people into safe heavens; protecting the vulnerable ethnic members of the polities and not exacerbating racist fears of 'being swamped by people with alien cultures'; meeting international human standards; developing a healthy economy and appreciating migrant labour's contribution to this end: all could be defended as legitimate 'national interests' on behalf of which 'action becomes an ethical imperative'.

What is the Alternative?

The deficiencies of the current intergovernmental approach within the context of the Union have increased calls for a coherent, efficient, Union immigration policy which respects international human rights standards and the Conventions signed by the MS.

On a micro-level, there are three options. First, full transfer of Justice and Home Affairs (JHA) to Community competence. Full-grown 'Communitarization' would lead to increased prerogatives for the European Parliament, judicial control by the European Court of Justice, directly effective measures, and, probably, to qualified majority voting. Second, partial transfer of Third Pillar matters to Community competence via the activation of Article K9 or by Treaty amendment. This approach has the advantage of separating matters such as immigration, asylum and visas from international crime, police and judicial co-operation, but it allows only a consultative role for the EP (under 100c) and requires a unanimous Council decision. Several member states are in favour of a

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partial transfer for reasons of efficiency and consistency and not because it would increase accountability. The draft Treaty submitted by the Irish Presidency (December 1996) reflects this: it suggests a new title on Free Movement, Asylum and Immigration (police co-operation and judicial co-operation remain in JHA), but fails to incorporate this in Community legal order.[25] 'The draft Treaty suggests consultation with the UNHCR on asylum policy, a phased approach towards granting the Commission an exclusive right of initiative in this area, but leaves for the IGC to decide further what role the EP and the ECJ will play in these areas. The Schengen and other conventions will remain in force until replaced by measures adopted pursuant to this Title. Finally, the third, modest, option would be modify the Third Pillar by strengthening the role of Union institutions and giving the Presidency an active role in the implementation process. Strengthening judicial monitoring could take the form of either a weak 'opting in' to ECJ's jurisdiction in relation to third pillar conventions (e.g., as in EUROPOL) or a higher level of judicial control over all legally binding third pillar instruments.[26]

Welcome as these initiatives may be, modifications to procedures do not always lead to substantive amendments. Would such reforms, designed to tame the arbitrariness of decision-making in immigration, transform immigration rules and standards themselves? Or, given the current political climate, would EU institutions have to give their assent to what has already been agreed thereby legitimizing the present restrictive regime? Even Communitarization of immigration may not be the expected 'leap forward', if, indeed, the emphasis continues to be on how to control migratory flows, how to tackle the 'root causes' of migration, to curb illegal immigration,[27] or to facilitate the repatriation of qualified African nationals residing in industrialized countries.[28] Institutionalizing forms of better and more democratic management of limited migration does not undercut the prevailing definition of immigration as a security threat and a problem. Nor does it question the legitimacy of the Schengen Convention as the model for the development of a European immigration policy. A radical rethinking of immigration and the 'de-legitimation' of the law-enforcement approach is needed.

On a macro-level, a principled and non-restrictive immigration policy would require: (i) assigning to the Union responsibility for drawing the programmatic principles, and creating the basic juridicopolitical framework for immigration and asylum policy; (ii) co-ordinating the involvement of Union institutions, national and subnational political units, be they regional/local, ethnic communities or churches and voluntary organizations.

A European charter on Immigration and Refugee Policy, agreed at the Community level, could furnish the principles and guidelines required for a common immigration and asylum policy.[29] The articulation of a legally binding, constitutional framework for immigration would free immigration from the

[25] Chapter 2.

[26] 'Judging the European Union', *Justice*, (October 1996), 21–4.

[27] Commission's Communication on Immigration and Asylum COM (94) 23 Final 23 February, 1994.

[28] This is the subject of a project financed by the Commission; see O'Keeffe, 'The Emergence of a European Immigration Policy', p. 31.

[29] On the principles guiding a European Refugee Policy, see A3-0402/93 EP Resolution O. J. EC No. C44/106, Wednesday 19 January 1994.

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whims and prejudices of transient majorities and promote a fairer understanding of migration movements – of their structural causes as well as of their global character. Further, it would ensure that an individual's status as 'alien' is morally irrelevant in many contexts where discrimination between citizens and aliens is sanctioned. A new institution called 'European Committee on Immigration and Asylum Affairs', consisting of representatives of the EP, the judiciary, migrant communities and NGOs, in conjunction with the Council of Ministers, would be in a position to propose amendments, give opinions to the Commission, and provide feedback concerning the administration of the relevant agreements.

The role of national parliaments could be enhanced by bridging national and Community agendas on immigration, setting up Immigration Boards and linking them institutionally with the EP; strengthening the accountability of national ministers and civil servants. European committees could scrutinize and debate all substantial Community proposals, and 'summon national ministers, national civil servants and Commission members and staff to give evidence.[30] To Immigration Boards, municipalities wishing to revitalize their drained agricultural sector or their declining industrial plants, could put forward proposals concerning settlement and accommodation of immigrants. Ethnic communities, having special ethnic, religious or cultural ties with prospective newcomers, could also have a say in the immigration process and facilitate the admission of such persons. Similar initiatives could be taken up by interest groups, the Church, or even ad hoc relief committees with or without an established inter-European or international network, which possess funds and have the organizing capacity to accommodate and support migrants and refugees.

Such a multivocal design of immigration policy has a twofold attraction. First, it gives a fair chance to all those legitimately affected by admissions policies to have a say and influence the design of such policies. Second, it is likely to yield a more positive approach to immigration, measured in human rights fulfilment and more liberal admission policies. This is because checks and balances could be provided among the units involved, thereby ensuring the constitutional compatibility of their acts with the guidelines set by the European Parliament. The ECJ could have mandatory jurisdiction over legislative instruments, thereby ensuring consistency in interpretation via the preliminary reference procedure (177 EC) and enforcement. Institutional guarantees could also be provided at the national level in order to block exclusionary policies and decisions taken by subnational units. Judicial review of local official acts would hinder abuses of authority by local politicians and administrators.

This would alleviate fears that greater involvement of subnational political units may actually yield more restrictive admissions policies. True, non-governmental organizations and voluntary associations, organized on a local, ethnic or religious basis, have proven to be more eager than politicians and administrative officials to ensure protection of migrants and refugees, to raise awareness about particular situations and to implement assistance programmes. One may recall the initiatives taken by the Jewish community in Britain in 1933 in order to secure refuge, settlement, accommodation and employment for Jewish people fleeing Nazi Germany, despite the Government's invocation of

[30] S. Williams, 'Sovereignty and accountability in the European Community', *The Political Quarterly*, 6 (1990), 299–327, pp. 315–7.

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the powers under the 1905 Aliens Act in order to 'protect this country from the undesirable flux' of Jewish people.[31] Church groups in England and the Society of Friends had also established similar funds. Generally speaking, churches have been particularly active in welcoming migrants and refugees, providing effective assistance, resettlement, training, as well as in building bridges between communities of newcomers and established communities.[32]

The sharing of responsibility over immigration and its 'constitutionalization' would act as an important counterbalance to the 'fortress logic' and the 'invasion syndrome' which lie at the heart of the present regime. By undercutting the logic of power and the potential for ideologically-led action to immigration, the proposed immigration design is not merely consonant with the fundamental norms underpinning both the European Union legal order and the Member states constitutional traditions, but it may be required by them too.

Why the Commitment to Inclusiveness?

The design outlined above rests on the premise that a positive obligation on behalf of a polity to admit strangers may be defended in terms of democracy itself. Democracy in contemporary plural societies requires inclusiveness in terms of flexible membership[33] and porous boundaries. How can this be defended philosophically?

Making the states 'right to admit and exclude aliens an issue of democratic self-determination has probably been the most credible justification of the states' right to exclude. Walzer's defence of 'legitimate' closure is that democracy entails the right of the community to determine its membership as well as to maintain its distinct identity and the integrity of 'shared understandings'. Like clubs, democratic communities are marked by the present members' power to control admission of new members. Unlike private clubs, however, democracies must, on the grounds of justice, grant full membership (citizenship), irrespective of nationality, to resident participants in the local economy and refrain from expelling existing inhabitants.[34]

Walzer's analogies of political community with clubs, neighbourhoods, and families have received much critical attention, and hence I will not repeat them here. What I draw attention to is the discrepancy between internal membership decisions, which are subjected to principled constraints, and admissions decisions, in which the present citizens' alleged power of control appears unconditional.[35] What has escaped Walzer's notice here is that commitment to democratic ideals may require subjecting a community's competence on immigration to the same constitutional constraints that limit the exercise of other political competences.

[31] A. Dummett and A. Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (London, Weidenfield and Nicholson, 1990), p. 155.

[32] E. Ferris, *Beyond Borders: Refugees, Migrants and Human Rights in the Post-Cold War Era* (Geneva, World Council of Churches, 1993).

[33] R. Dahl, *Democracy and its Critics* (New Haven, Yale University Press, 1989), pp. 121–9.

[34] M. Walzer, *Spheres of Justice* (New York, Basic, 1983). European football clubs, however, cannot restrict the number of foreign players in national league matches, for nationality clauses contravene Article 48 EC; C-415/93 ASBL v. Bosman [1996] 1 CMLR 645.

[35] Walzer's external principle of mutual aid places weak obligations only which may be overridden by citizens' fears that admission of aliens might imperil their existence; *Spheres of Justice*, pp. 40, 44–5, 47–8.

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Conceiving community in terms of the nation state impedes this, by projecting boundaries as barriers (stopping points) and not as permeable membranes (meeting points). It is thus often assumed that internal freedom of movement depends on some form of external closure: that neighbourhoods can take shape as 'indifferent' associations and have open membership only because they are part of the sovereign nation-state with legally enforceable admissions policies, and that in the absence of a larger protective unit neighbourhoods would turn into 'little states' (petty fortresses).[36] However, evidence drawn from French municipal councils disputes this. French councils, encouraged by restrictive national immigration policies, introduced the quota or 'threshold of tolerance' system, in the 1980s, thereby denying migrant children education and housing if their number surpassed a certain threshold – somewhere between 10 and 30% of the local population.[37] It is also assumed that closure, partial or otherwise, is needed in order to protect the distinctiveness of cultures and groups. To tear down the fortresses would create 'a world of radically deracinated men and women without cohesion'.[38]

The projection of boundaries as barriers contradicts the reality of global systems of communication and the constant perforation of boundaries by messages, cultural images, money, and people. There is no reason to suppose that the physical presence of immigrants has a more far-reaching effect in 'eroding the distinctiveness of a culture of a group' than all the above. Moreover, in a world of fluid, overlapping and interwoven cultures, distinctiveness and vitality in cultures and societies is the product of contact, communication, the flow of ideas, cultural exchanges and cultural collisions

Theorists could still defend cultural interchange to the extent that it does not threaten the survival of a culturally distinct society. Kymlicka, for example, argues that changes in the character of a culture must be the result of the choices of its members, and must not threaten the existence of a culture 'as an intelligible context of choice'.[39] Whilst it is true that individuals' pursuit of worthwhile life plans take place only within a cultural-societal context, Kymlicka fails to show that the narratives and resources needed for making meaningful choices must come from a single, unified, fully constituted and secure cultural matrix. Nor is the congruence between society and culture so unproblematic as Kymlicka himself assumes.

Perspectives which take membership and community as 'given' and thus hesitate to subject the meaning and conditions of membership in modern territorial democracies to the normative test, have not examined whether restrictive immigration policies may compromise democratic ideals by perpetuating fictions of internal homogeneity and promoting nativist narratives of belonging. It has been traditionally assumed that polities are empowered to restrict immigration without compromising their internal process of democracy.

[36] Walzer, *Spheres of Justice*, pp. 38–9.

[37] M. Silverman, 'Citizenship and the nation state in France', *Ethnic and Racial Studies*, 14, 3 (1991), 339–49, p. 338.

[38] Walzer, *Spheres of Justice*, pp. 38–9.

[39] W. Kymlicka, *Multicultural Citizenship* (Oxford, Clarendon, 1995), pp. 84–106. For a critique of Kymlicka's thesis, see D. Lenihan, 'Liberalism and the problem of cultural membership: a critical study of Kymlicka', *The Canadian Journal of Law and Jurisprudence*, IV, No. 2 (July 1991), 401–19; J. Waldron, 'Minority cultures and the cosmopolitan alternative', *University of Michigan Journal of Law Reform*, 25 (1992), 751–93.

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As noted above, it is impossible to separate the 'outside' from the 'inside'. Restrictions on family reunification have a detrimental effect on community relations. The way ethnic members are perceived and treated also depends on how immigrants are perceived. Accordingly, strangers are perceived as a 'threat' for the liberty, welfare or the culture of the host group only in relation to certain ideological conceptions as to what constitutes a member.

Immigration is inextricably linked with how political communities respond to diversity itself. One of the most important yardsticks by which to judge the quality of democracy is how the Other is treated. Adherence to supposedly unified, single and homogeneous nation-states or cultural frameworks impairs the cultivation of an ethic of the Other. It precludes a deeper understanding of the 'dynamics of distancing and relating' in contemporary societies; that is, the possibility of togetherness in apartness (the creation of border transcending communities) and apartness in togetherness (the various forms of diversity existing even within the most supposedly homogeneous group). Immigration may be a 'blessing', precisely because it forces a rethinking of community itself and exposes the artificiality of binary oppositions between 'us' and 'them'.

The impact of restrictive immigration policies upon a political community's scale of values has also been somewhat overlooked by Habermasian theory – notwithstanding the fact that Habermas himself has been quite critical of the 'boat is full' mentality and the asylum reform in Germany.[40] According to Habermas, 'every legal community and every democratic process of rights is ethically patterned, informed by the contingent conception and composition of nation of citizens'. Because 'immigration affects this ethico-political understanding of nation', Habermas concedes that the right to democratic self-determination includes a nation's right to assert its identity in the sense of preserving its specific political culture. On this basis, immigrants should be 'willing to accept the political culture of their new home', as it has been interpreted by the majority culture, but not to become acculturated.[41] Habermas clearly seeks to foreclose the intensity of critical exchanges by confining them within the culture of the constitutional state.

Acknowledging the particularistic anchoring of constitutional principles, however, is a good reason to expose them to critical exchanges by other interpretative communities,[42] not to insulate them from the very forces and challenges that could allow them to operate in a more universalist context. Critical exchanges and collisions enhance the possibility for reflective self-awareness by showing the limits and relativity of one's political culture. Exposure of the limits leads to a better understanding of the whole and its potential. A strong democracy needs a strong critique.

There is also another reason why one should hesitate to make protection of political culture a ground for imposing 'legitimate' closure. American history has taught us that 'distrust and fear of persons with different cultural backgrounds usually finds expression in language emphasizing a conflict of

[40] J. Habermas, 'Struggles for recognition in constitutional states', *European Journal of Philosophy*, 1, 2 (1993), 128–54, pp. 149–53.

[41] J. Habermas, 'Struggles for recognition in constitutional states', pp. 139, 144, 147; 'Citizenship and national identity: some reflections on the future of Europe', *Praxis International*, 12 (1992), 1–19, p. 17.

[42] For Bader, this may be 'the best and most legitimate argument from a democratic point of view, in a defence of politics of fairly closed borders'; *Citizenship and Exclusion*, pp. 231–2.

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values'.[43] EC-wide discourses on fundamentalist cultures and the 'inassimilibility' of 'Arabs' attest this. This is perhaps why Carens insists that the threat to liberal institutions must not be a hypothetical possibility; it must be supported by 'evidence and ways of reasoning acceptable to all'. The difficulty in establishing this distinction in reality forces Carens to concede that 'non-ideal theory provides more grounds for restricting immigration than ideal theory'.[44]

Public order furnishes such grounds. Whereas hardly anybody would disagree with Rawlsian inspired restrictions on immigration for the sake of protecting another similarly important liberty, or to strengthen the overall system of liberties, I believe that the scope and terms of the public order constraint must be defined strictly. Carens fails to place the 'serious threat to national security' justification under qualifications such as: the decision to exclude must be based on the individual conduct of the person concerned; past membership of associations should not in itself be a reason to exclude; previous criminal convictions should not in themselves constitute grounds for refusal of entry, and so on. Carens considers legitimate also the exclusion of those 'who come from non-liberal societies even though they have no subversive intent', on the basis of the 'presumed cumulative effect of their presence' on liberal institutions.[45] But this could only serve as a pretext for discriminating against larger groups and contravenes the principle of equal respect by improperly penalizing individuals for where they belong, not for their personal deeds.

Another objection to my case, implicit in the public order argument as discussed in political philosophy, is the 'numbers issue'. If Europe were to open its borders the number of those coming might overwhelm the capacity to cope, leading to a breakdown of public order. Despite the lifting of internal restrictions to free movement in the EU, however, there has been no mass scale migration from the poorer Mediterranean countries to the richer North. The process of uprooting oneself is both painful and lonely. In addition, the problem is often in the process and not in numbers. Dummett and Nicol correctly point out that on the occasion of massive arrivals much would depend on organizing capacity, economic organization and the spirit in which the newcomers were received.[46] The case of German reunification verifies their argument.

Preservation of a community's distinctive way of life is yet another 'legitimate' restriction on immigration conceded by Carens. Cherishing a distinctive way of life, seeking to pass it on to the children as unchanged as possible are seen as legitimate concerns; a multicultural Japan would be a very different place.[47] What is striking in this argument is its monistic and over-simplified conception of culture. A closer inspection of the dynamics of any specific culture, however, reveals that cultures are crossed by the most diverse and contradictory currents. There may be 'many Japans' within Japan, in the same way that there are many

[43] K. Karst, *Belonging to America* (New Haven, Columbia University Press, 1989), p. 29.

[44] J. Carens, 'Aliens and citizens: the case for open borders', *The Review of Politics*, 49 (1987), 251–73 at pp. 259–60. But compare this (p. 260) with his 'Migration and morality: a liberal egalitarian perspective' in *Free Movement*, pp. 25–47 at pp. 36–40. Baubock defends the right to migrate in the cases of refugees and close family members only; R. Baubock, *Transnational Citizenship* (Aldershot, Edward Elgar, 1994), p. 318.

[45] Carens, 'Migration and morality', pp. 37–8.

[46] A. Dummett and A. Nicol, *Subjects, Citizens, Aliens and others: Nationality and Immigration Law*, p. 279.

[47] Carens, 'Migration and morality', pp. 37–8.

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'Europes' within Europe. By questioning the 'authoritative' interpretation of Japanese culture, one may unravel the selectiveness of the featured characteristics, and unearth the existence of other, marginalized, accounts of what Japanese culture is or what it should be. In opposition to the idea of monocultural Japan, for instance, one could invoke the image of the fifteenth and sixteenth century Japan shaped by the merchants of Kyoto and of other towns, or the writings of Confucian scholars in order to question the former narrative and ground a different immigration policy.

Arguments that justify legitimate closure in order to preserve collective identity are also underpinned by a static conception of identity. They tend to locate identity in some existing, inherent attributes of an entity, thereby overlooking the fact that identities (both personal and collective) are complex-entities in process. Identities evolve, develop, become negotiated and re-negotiated within a context and in response to that context. Events, policies, laws and practices have a significant bearing upon identity formation.

Whilst identities are not possible without processes of differentiation, the way we relate to the Other becomes part of our identity. It defines who we are. Slavery, for example, has shaped the identity not only of African Americans but of all Americans. Similarly, the kind of immigration policies a polity articulates in time t will bear a significant mark upon both its collective identity and citizens' identities in $t + 1$. A law-enforcement and restrictive regime which institutionalizes exclusion and discrimination, as the present immigration framework does, cannot but affect citizens' identities negatively. White hegemonic identities are forged in a racist society. Ethnic identities are also forged in such a juridico-political context. By pursuing illiberal admissions policies, polities risk fostering an ugly identity and placing democratic achievements in jeopardy.

Membership rules convey important messages for the nature and quality of the polity and, in turn, affect perceptions about membership and shape attitudes about democratic citizenship. Because many problems stem from overreliance upon executive discretion in this field, constitutionalization of immigration along the lines suggested above is likely to enhance democratic legitimacy by making immigration the subject of proper public debate and scrutiny. The shift of official discourse and policy from law-enforcement towards welcoming the Other could help fashion a public ethic of the Other. This may be essential for combating racism and xenophobia. But such a public ethos is unlikely to grow unless the status of the third-country nationals in Europe is improved.

Although my focus here has been on what happens at the external gate, it follows that the principles guiding entry do not warrant ascriptive barriers for belonging in a polity. Particularistic definitions of nationality should not bar people from becoming full members with a say in the design of the polity.[48] But would the proposed immigration policy clash with other principles, particularly those underpinning the welfare system? Many believe that any redistributive system cannot keep unrestricted access to its benefits; free migration is seen to contradict social citizenship rights.[49] The social rights-protectionist argument,

[48] I have discussed this in 'Towards a theory of constructive citizenship in Europe', *The Journal of Political Philosophy*, 4, 4 (1996), 337–58.

[49] See R. Baubock, *Immigration and the Boundaries of Citizenship* (Warwick, Centre for Research in Ethnic Relations, 1992), pp. 121–2; 'Legitimate Immigration Control' in H. Adelman (ed.), *Legitimate and Illegitimate Discrimination: New Issues in Migration* (Toronto, York Lanes Press, 1995), pp. 3–40.

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in its various forms, overlooks the fact that immigrants are not merely poor. Similarly, refugees are not just scarred people and vulnerable dependants. They are people with talents, skills, energy and determination to build a better life and contribute to economic growth. Many migrants are entrepreneurs, ready to start their businesses. All are consumers as well as investors, creating a greater demand for manufactured goods. As actual or potential participants in socio-economic life, they are entitled to welfare, and trade unions could well be strengthened by taking up their case. True, migrants often have access only to contributory benefits and they risk non-renewal of their permits if they rely on state resources. So claims concerning their alleged non-entitlement seem to rest on the national boundedness of welfare systems, rather than upon principles of redistribution *per se*.[50]

The positive economic contributions made by migrant labour have gone largely unrecognized in Western Europe. Recent research has set out to dispel some common myths associated with immigration. For example, migrants are often accused of drawing more from public funds as recipients of public services (housing, education, social insurance, job training and language courses) than they contribute in taxes. But most studies confirm that both documented and undocumented migrants pay more in taxes than they receive in social security. This is to be expected since the great majority of them are working and do not have elderly parents receiving social security. Research conducted by the Rheinish-Westfälische Institute, in 1991 found that refugees, economic migrants and family members contributed substantially to Germany's affluence: the RWI also calculated an increase in economic growth of between 0.5% and 1.0% per annum which was attributed to the increase in foreign labour.[51] Economists also seem to agree that supply of cheap labour not only reduces costs, promotes lower prices, stimulates growth and boosts productivity, but may be crucial to survival of certain businesses.[52] Butcher and Card have found no statistically significant impact of immigration on the rate of increase of wages for the least skilled workers.[53] Others object that immigration threatens existing labour standards, but blaming the victims and not the transgressors of labour law and culprits of exploitation is hardly appropriate. Finally, immigration may complement existing employment rates. The 'displacement' claim is predicated on the incorrect assumption that labour markets are highly homogeneous and that domestic labour can fill all occurring vacancies. But most markets are highly segmented, meaning that gaps and labour shortages always appear on various levels (i.e., on both lower unskilled and higher skilled) irrespective of existing levels of unemployment.

My argument here should not be taken as advocating a single world polity and the elimination of borders. A liberal immigration policy in the EU is still

[50] For the opposite claim that the realization of redistributive justice depends upon the affective ties and bonds of co-nationals, see D. Miller, 'In defence of nationality', *Journal of Applied Philosophy*, 10 (1993), 7–8; Yael Tamir, *Liberal Nationalism* (Princeton, Princeton University Press, 1993), p. 118.

[51] A. Findlay, 'An Economic Audit', pp. 186, 200–1.

[52] See G. Borjas, 'Immigrant participation in the welfare system', *Industrial and Labor Relations Review*, 44 (1991), 195–211; Julian Simon, *The Economic Consequences of Immigration* (Oxford, Blackwell, 1989).

[53] K. Butcher and D. Card, 'Immigration and wages: evidence from the 1980s', *The American Economic Review*, 81 (1991), 292–6.

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an immigration policy. However, it does suggest that a willingness to put a community's self-understanding to a normative test, as far as the admission of 'aliens' is concerned, is an integral part of democracy.

Given the profound effects of the current immigration regime upon democratic principles and citizens' identities, a positive commitment to inclusiveness in the EU is needed. Immigration should no longer be seen as an anomaly or a threat, but, instead, as an opportunity: an opportunity for internal reflection and self-assessment; for rethinking what belonging in community means in European polities and the EU, and whether this is all it ought to be; for acknowledging weaknesses in the implementation of principles and to devise procedures to improve them; to fashion a new democratic political sensibility in the EU which respects the Other and responds positively to their plight.

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