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The 'Protective Union': Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe*

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Abstract

The partial *Communautarization* of the Third Pillar of the Treaty on European Union will enable the Community to expand its so far modest *acquis* in migration-related issues, but it has also opened the way for the installation of exclusive categories and the security paradigm which characterized the Third Pillar within the body of Community law. Unless active interventions by the Commission and the European Court of Justice subvert structural determinants and the logic of securitization, *Communautarization* offers the Member States the opportunity to reinforce their restrictive and law-enforcement approach to migration flows, and to construct new forms of power which do not only increase their regulatory capacity within a geographically contained structure, but also enable them to impose their security agenda beyond the confines of the Union.

I. Introduction

The partial *Communautarization* of the Third Pillar of the Treaty on European Union (Justice and Home Affairs (JHA) Co-operation) was one of the most

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important innovations of the Treaty of Amsterdam (signed on 2 October 1997, entered into force on 1 May 1999). 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.

During the first phase (1985–91) national governments embarked upon a process of ad hoc and informal co-operation in immigration and asylum matters which left their sovereign prerogative intact. The second phase of Justice and Home Affairs Co-operation (1992–98), introduced by the Treaty on European Union, institutionalized a form of 'diluted' intergovernmentalism; although migration-related issues were pronounced matters of common interest, and institutional links (albeit weak) with the other Community institutions were established, it accorded leading actor status to national governments.

The absence of Community competence during the first phase and the marginal role accorded to Community institutions in the second phase[1] allowed the JHA ministers of the Member States to put in place an institutional framework which lacked coherence, consistency, democratic accountability, respect for the rule of law and for human rights, and effectiveness (Collinson, 1993; O'Keeffe, 1995; Spencer, 1995; Bieber and Monar, 1995). Embedded understandings and prevailing societal assumptions about the 'problem' of immigration flourished within such an institutional framework. Instead of responding to the challenge of immigration by elaborating a principled, coherent and integrated policy, national executives chose to build upon past domestic experiences and national restrictive laws, and to adopt an EU-wide restrictive and law-enforcement policy. The implications of such a recontextualization of domestic policy options for the nature of the European polity, its citizenship agenda and for the project of European identity formation were not seriously considered.

The praxis of post-Maastricht JHA co-operation highlighted the shortcomings of the intergovernmental method; namely, the ineffectiveness of policy-making due to unanimity and the over-cumbersome five-tier decision-making structure; the absence of clearly defined objectives; the secretive negotiations; the absence of Parliamentary involvement and judicial supervision; the ab-

[1]The Commission had limited input in the process, and the European Parliament's right of consultation usually took the form of reports submitted to it *ex post facto*. The various ad hoc groups were subsumed by the Co-ordinating Committee (the K4 (now Article 32) Committee) and its three senior steering groups (on immigration and asylum; police and customs co-operation; and judicial co-operation). A system of judicial review was only optionally provided for under Art. K3(2) TEU for Third Pillar Conventions (but compare C-170/96 *Commission* v. *Council* [1998] ECR I-2763).

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sence of binding legal instruments and the lack of enforcement mechanisms. It also heightened the substantive deficiencies of many of the agreed policies (Korella and Twomey, 1995; Spencer, 1995; Tuitt, 1996). During the same period, the Commission prepared the ground for a gradual shift to supranationalism, a position endorsed by the European Parliament (1995a, b) and supported by the majority of the Member States. The Commission's proposed *Communautarization* of migration-related areas (1995) formed the basis of a new Title 'Free Movement of Persons, Asylum and Immigration' devised by the Irish Presidency (European Council, 1996). The Dutch Presidency, which took over in January 1997, produced a similar draft which was debated at the Amsterdam summit.

The transfer of migration-related areas from the Third Pillar to the First is a welcome development if only because it promises to introduce a single constitutional basis and more democratic control in areas where civil liberties are at stake. However, the structural shift from the intergovernmental pillar to the Community method has not been accompanied by a more basic debate on the dialectic of inclusion and exclusion which sets apart EU nationals/Union citizens from non-EU migrants. The transfer will enable the Community to expand its so far modest *acquis* in migration-related issues, but it has also opened the way for the installation of the logic of exclusion and the security paradigm which characterized the Third Pillar within the system of Community law.

The main thrust of this article is not to explain why *Communautarization* happened, thereby testing a given theory of integration against this case study. Instead, it addresses the question of how the Amsterdam Treaty will be followed up by reflecting on the Amsterdam reforms with the aid of a post-empiricist political theoretical approach. Such an inquiry is both timely and important. It is timely because the creation of 'an area of freedom, security and justice' is seen as a major challenge facing the Union and, consequently, features at the top of the European political agenda (European Council, 1999a).

It is also important for two main reasons. First, external membership rules (i.e. migration and asylum policy) have an important bearing on notions of membership in the European polity, its scale of values, its concept of citizenship, and its future orientations. Second, as the question concerning the future of the nation-state features centrally in the debates about the nature of European integration and the forces which shape it, students of European integration would be amazed by the fact that 'more Europe', that is, the extension of the frontiers of the Community's jurisdiction into the areas of JHA co-operation, ensures continuity in the basic orientations of European immigration policy and may indeed enhance national executive power. This should not be seen as an endorsement of intergovernmentalism as a theory about how European integration has proceeded. European integration is not a 'tool' in the

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hands of national governments. Nor is it a device for enhancing the supranational institutions' absolute autonomy.

Far from being a monolithic system (conceived of as either a 'tool' or an agent), the EC/EU constitutes a complex strategic field. Within this field there exist several and distinct sites of power, a multitude of relatively independent and yet interdependent agencies having special and variable relations to each other and to other external sites of power. The density of their interconnections means that each of them cannot be studied in isolation from the rest. The field may give the impression of being homogeneous and unitary but, in reality, it is heterogeneous, 'anisomorphic' and uneven. Acknowledging this enables us to disaggregate the EC into its various component parts in order to investigate the complex and variable interconnections of the various forces in play. As regards the new Immigration Title, for example, such a focus shows that the question, 'who governs?' loses its significance when the Member States and supranational actors share the same cognitive framework and intersubjective understandings. In this respect, Sandholtz and Stone Sweet (1997, 1998) are correct in suggesting a turn of current theorizing on European integration away from the formal characteristics of institutional actors toward processes of interaction and policy characteristics. Such a focus will highlight that European integration is a 'dynamic process which yields divergent outcomes over time across policy domains' (Sandholtz and Stone Sweet, 1998, pp. 1–26; 1999, p. 139), and can lead to the replacement of agent-centred explanations and teleological accounts with more relational, process-oriented and contextual perspectives.

The discussion in this article is structured as follows. Section II assesses the Amsterdam reforms, while Section III discusses the ways in which the security paradigm which characterized the JHA framework has permeated Community law and the Community concept of an 'area of freedom, security and justice'. The implications of this for the Community itself, the Member States and their evolving security agenda and for migration law and policy in post-Amsterdam Europe will be considered in Section IV.

II. The Amsterdam Reforms: 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 matters.[2] Police co-operation and judicial co-

[2] Hailbronner (1998, 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 Art. 63 EC, thereby excluding measures against clandestine immigration and the integration of asylum-seekers and migrants. The principle of parallelism could be applied to expand the Community's legislative competence and, in the absence of

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operation in criminal matters remain in the Third Pillar which has been extended to include action against racism and xenophobia, and offences against children.[3] The partial communautarization of the Third Pillar will yield legally binding measures. Supranational legal instruments will take precedence over conflicting national law. Their provisions may also have direct effect if they satisfy the criteria for direct effect according to EC law, that is, if they are sufficiently clear and precise, unconditional and legally perfect (i.e. leaving no room for discretion in their implementation). In addition, the Court's jurisdiction over enforcement actions, annulment, failure to act and non-contractual liability actions apply to Title IV (Peers, 1998).

Title IV sets out a five-year transitional period from the entry into force of the Treaty during which the Council will take decisions by unanimity and the Commission will share the right of initiative with the Member States. After this, the Commission's right of initiative becomes exclusive, but it will have to examine requests for submission of proposals made by the Member States. This initial strengthening of the integrationist features of the decision-making procedure may be followed by the Council's unanimous decision to move to full supranationalism, that is, to qualified majority voting and codecision with the European Parliament (Art. 67 EC). The transitional period does not apply to measures concerning 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 (ex Art. 100c EC). After the transitional period, the remainder of visa policy will be subject to qualified majority voting and codecision.[4]

Although the *Communautarization* of immigration and asylum policy could be seen as a sign of state retreat in the face of vocal and concerted opposition, this observation must be judged in light of the relevant provisions of the Title. 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 (Art. 69 EC) which allow them to maintain a 'common travel area' and to exercise frontier controls on persons at their

express provisions in the Treaty, Art. 308 EC might be invoked to cover gaps in the new areas of competence.

[3] Customs co-operation and the protection of the financial interests of the Community are now within the Community domain: Arts. 116 and 209a EC respectively. However, the intervention of the Community is limited by the fact that measures adopted 'shall not concern the application of national criminal law and the national administration of justice'.

[4] A special procedure for the adoption of provisional measures in emergency situations is provided for under Art. 64(2) EC.

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borders ('Protocol on the Application of Certain Aspects of Art. 7a (now 14) EC'). Britain and Ireland have opted out from the provisions of the Title. Ireland does have the right to waive the protocol at any time (Art. 8),[5] and both the UK and Ireland could decide to opt in during or after decision-making in the Council. Under Arts. 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, subject to certain conditions.[6] Apart from rules on visas, similar provisions apply to Denmark which has resisted any possibility of opting in during or after decision-making in the Council. As a party to the Schengen Convention, Denmark may decide to implement Council decisions taken under this title that build upon the Schengen *acquis* within six months, but this will create only international law, not Community law, obligations.

These Protocols were 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* (Art. 4 of the Protocol).[7] The integration of the Schengen acquis required the identification 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), and was completed in May 1999.[8]

[5] Ireland made a declaration to the final Act of the Amsterdam Treaty, stating that it would participate in all Title IV measures that do not affect the common travel area with the UK.

[6] On 12 March 1999, Jack Straw, the UK Home Secretary, announced in the House of Commons that Britain is interested in participating in all areas of Schengen and the new free movement chapter which do not conflict with the British frontier control policy: 'We are interested in developing co-operation with European Union partners on asylum and in the civil judicial co-operation measures of the Free Movement Chapter … . We shall also look to participation in immigration policy where it does not conflict with our frontiers-based system of control' (House of Commons Hansard Written Questions, 12 March 1999, Col. 381). UK and Ireland have opted into the service of documents regulation, Eurodac and the insolvency regulation. By its letters of 20 May, 9 July and 6 October 1999, the UK requested to participate in certain provisions of the Schengen *acquis*. This participation covers the provisions concerning the establishment and operation of the Schengen Information System. The UK will not participate in the frontiers provisions of the Convention (European Council, 2266th Council Meeting, Justice and Home Affairs, Brussels, 29 May 2000, 8832/00, Presse 183).

[7] If they wish to participate in any measures of the *acquis*, they must gain the approval of the 13 EU Schengen states. The British government's White Paper, *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum Policy* (CM 4018, July 1998) mentioned the possibility of partial opt-in to the Schengen *acquis*.

[8] 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. On this point, see also Hailbronner and Thiery (1997). The two decisions on integrating the Schengen *acquis* into the European legal order were published in *OJ* L 176. It is noteworthy here that Justice and the Standing Committee (1998, p. 10) had recommended that

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Furthermore, immigration policy and measures concerning the rights of residence of long-term resident third country nationals do not fall within the Community's exclusive competence. Under Art. 63 EC, 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. Moreover, as regards a Member State's unilateral decision to reinstate border controls by derogating from the provisions of Art. 14 EC and thus Art. 62(1) EC, the European Court of Justice has no jurisdiction to review such measures or decisions relating to the maintenance of law and order and the safeguarding of internal security. The European Court of Justice (ECJ) will 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 infringes the principle of respect for the rule of law underpinning the Union. In addition, this provision creates the prospect of divergent case law and variance in juridical protection of individuals (Simpson, 1999, p. 114).

National delegations have circumscribed the role of the ECJ and restrained its integrative dynamic by restricting requests for preliminary reference rulings to courts of last instance (Art. 68(1)). National courts and tribunals will be unable to seek the Court's guidance, and requests for references from last instance courts are discretionary, not mandatory (unless the *acte clair* principle applies), as Art. 234 EC requires. These inhibitions on the ECJ's jurisdiction 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 who will 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 Arnull, 1997, p.10). Finally, the Council, the Commission or a Member State 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 judgments of courts or tribunal of the Member State which have become *res judicata* (Art. 68(3) EC). According to

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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.

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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 jurisdiction[9] is that the Member States 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 are thus apparent. If this is the case, just how will the new reforms and the security management of migration lead to different policy output? 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 flourish within the new institutional setting and shape the content of future policy outcomes? And if this proved to be the case, would not the reliance on the Community-method help legitimize past policy options? Interestingly, the integration of the Schengen *acquis* into the Union has not been accompanied by further discussion on the substantive merits of each provision or on the more general political implications of the 'Schengenland' vision for Europe.

True, the expansion of the Community's competence in migration-related areas could lead to an increase in depth and qualitative change. By taking advantage of its new role, the European Court of Justice may mitigate the apparent constraints of the new Title and create new openings. Similarly, the Commission could exercise its new responsibilities in ways that may be unintended.[10] 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.

Too much remains unsettled for anyone to predict confidently the course or outcome of these developments. However, the fact that the partial *Communautarization* of migration-related areas has not been accompanied by a full communautarization of procedure is a cause for concern. The institutional deficiencies of the Third Pillar have not been remedied: retention of unanimity; the Commission's shared right of initiative; the consultative role of the EP; the regression in the ECJ's jurisdiction. In this respect, the Member States could also use the new institutional and procedural framework to extend the forms of social control, strengthen their regulatory capacities, and reinforce the

[9] As Dashwood (1998, p. 215) has observed, '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 worst will follow?'.

[10] The Commission has proposed a decision on establishing a convention on rules for the admission of third country nationals to the Member States 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.

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culturally constructed representation of immigration as both a 'problem' and a 'law and order' issue.[11] Indeed, a rather worrying development is the permeation of the securitization ethos[12] which characterized the framework of intergovernmental co-operation into the Community concept of an 'area of freedom, security and justice'.

III. The Securitization Ethos and the Evolving Doctrine of Immigration Control

As already noted, the pre-Amsterdam institutional pattern of co-operation in immigration and asylum matters was structurally and culturally thick: formal rules in the context of JHA co-operation co-existed with informal rules, practices of interaction and procedures originating in the previous para-Communitarian phase of co-operation, and many of the Schengen rules were transplanted into the JHA framework.[13] It was also culturally thick insofar as it was imbued by a 'double interpretative logic', that is, the belief that a security problem exists in a Europe without internal border controls and the perception of immigration as a security threat and/or a problem.[14]

On a macro-level, the former belief led the Member States to demand compensatory powers of control at the external frontiers. On a meso-level, the requirement of stringent policing of external frontiers and internal police surveillance has also given police and customs agencies the opportunity to construct a new role for themselves within an enlarged Europe. These agencies have been given the task of identifying specific categories of security risk at the borders, and dealing with them efficiently by developing European-wide law-enforcement structures.

From the outset, the main security risks to be tackled through co-ordinated action and techniques of control and surveillance across a borderless Europe

[11] The discussion here is based on structuration theory's insight that structures, depending on the circumstances and actors in question, can be either constraining or empowering (Giddens, 1984, 1993; see also Betts, 1986).

[12] The term 'securitization' refers to the removal of an issue from the normal political arena and to its articulation as an issue of national security and/or as an existential threat justifying measures outside the normal bounds of political procedure (Buzan *et al.*, 1998, pp. 23–4; 1990; Wæver, 1995a, b). When the agenda is dominated by security concerns, then the range of policy options becomes quite narrow.

[13] See Norgaard's (1996, p. 39) definition of institutions as 'legal arrangements, routines, procedures, conventions, norms and organisational forms that shape and inform human interaction'. For a discussion on how prior institutional commitments condition further action and limit the scope of change, see Bulmer (1994); Pierson (1996); Armstrong and Bulmer (1998).

[14] The discussion draws on sociological institutionalism, thereby espousing Hall and Taylor's (1996) distinction between sociological, historical and rational-choice institutionalisms. By examining the impact of norms, intersubjective understandings and procedures on actors' identities, interests and behaviour, sociological institutionalism uncovers policy-makers' reasons for action and accounts for their choice of specific institutional outcomes. On sociological institutionalism, see March and Olsen (1984, 1986, 1989), Powell and Di Maggio (1991).

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were identified as drug-trafficking, organized crime and immigration. 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 restrictive stance aimed at reassuring voters that states were still capable of managing migration and of 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 racism (Castles and Miller, 1998; Favell, 1997; Freeman, 1998; Geddes, 2000). Though distinctive and driven by their own dynamics, national immigration policies were neither immutable nor immune to pressures of convergence. The convergence in restrictive migration and asylum policies was officially justified by presenting immigration as uncontrollable and thus as a potential security threat. Since immigrants 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), restricting immigration (with the exception of family reunification) was often portrayed as an exercise of the right to self-defence, that is, an attempt to redress a balance that allegedly had been disrupted by the settlement of the first wave of post-war immigrants.

These environments were the crucial institutional matrices within which perceptions and the strategic preferences of national decision-makers were formed. However, these perceptions and strategic preferences could only be acted upon with respect to policy formation towards third country nationals. 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 can refuse entry, the issue or renewal of residence permits and order expulsion of EC nationals on the grounds of public policy, public security or public health (Art. 39(3) EC), but these derogations must be strictly interpreted and are subject to review by the European Court of Justice. So, whereas policy towards intra-EU migration has been increasingly liberal and expansionist due to the ECJ's judicial activism and the rights-based approach to free movement, policy towards extra-EC migration has become increasingly controlled and restrictive.

In pre-Amsterdam Europe, these parallel (albeit contradictory) trends were kept apart. In theory, both are instrumental in creating an area without internal frontiers within which the free movement of goods, persons, capital and services is ensured (Art. 14 EC). However, the general approach and philosophy underpinning them are very different. Indeed, it was this inconsistency in EU migration policy (i.e. the securitization ethos characterizing extra-EU migration policy *v.* the liberalization ethos of intra-EU movement) that

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provided ammunition for the critique of the intergovernmental methodology, and had raised normative expectations that 'more Europe' may yield more liberal migration policies and the inclusion of long-term resident third country nationals in the Euro-polity.

The Amsterdam summit ruptured the membrane separating the two migration policies and general approaches. The amended Art. 2 TEU states that the Union shall set itself the objective of developing and maintaining an area of freedom, security and justice. This 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 Communitarized 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 between the different aspects of this overall objective is confirmed by Art. 61 EC which mentions Art. 31(e) TEU. In addition, official discourses emphasize 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. As the Council and the Commission's *Action Plan on how best to implement these provisions of the Amsterdam Treaty* (1998, pp. 1–2) 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.

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 and from anxiety or fear.[15] 'Security' has an individual dimension: 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 the Copenhagen School (Buzan *et al.*, 1998, Wæver, 1995a, b). Rather, the Community worries about Union citizens who are seen as vulnerable to threats

[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 (*Bull EU 5-1995*, p. 92).

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and thus in need of security.[16] 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).

What is problematic here is that the Community inherits from the Member States the tendency to treat security threats and vulnerability as objective, that is, as independent realities which are not subject to verification and to critical inquiry. By so doing, it overlooks the political process of articulating and defining security threats, that is, the political aspects of discourses concerning 'security problems'. After all, maintenance of security may not be a purpose distinct from law enforcement; it may be subsidiary to it.[17] The Community has adopted the Member States' own discourse on the 'securitization' 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 reduced.[18] The significance of this should not be underestimated, for the framing of an issue defines and confines the terrain on which actors forge preferences, devise policy strategies, and act to maintain or reform the law.

Communautarization has thus not only left the conceptual parameters of the security paradigm which characterized the Third Pillar intact, but the latter have now come to define the terms of the free movement of persons in Community law. The Community has welcomed the Schengen project of creating a unified European migration area surrounded by a uniformly controlled border. The states' evolving security agenda and their restrictive approach to immigration and asylum has gained a legitimate foothold in the debate. Far from being an interaction effect between the Third and First Pillars, security has now become 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?

[16] In her speech at the Tampere European Council, the President of the European Parliament, noted that the EC must take into account people's day-to-day feelings of insecurity: «http://www.europarl.eu.int/president/speeches/en/sp0003en.htm»

[17] As Kate Hoey (MP) submitted to the Select Committee on European Communities (Seventh Report) 'systematic controls at the frontiers of the United Kingdom are important not only for immigration control purposes, but also to help with law enforcement (Q 327): «http://www.publications.parliament.uk/pa/Id199899/Idselct/Ideucom/37/3702.htm».

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

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IV. The 'Protective Union', the Mutating State, and the Common EU Migration Policy

In light of the foregoing discussion, it may be argued that Title IV EC is unlikely to undercut the prevailing definition of immigration as a security threat and a problem. Nor will the restrictive and law enforcement approach to migration-related issues be reversed, despite its negative impact on the formation of a European identity and the principles underpinning the European project. An alternative approach would question the securitization of migration and reflect critically on the meaning and terms of membership in the European polity. For although it is generally assumed that polities are empowered to restrict migration without compromising their internal process of democracy, failure to respect existing international obligations in the fields of human rights, asylum provision, the rights of the child, and protection of migrant workers, undermines the principles underpinning democratic polities. In addition, restrictions on family reunification have a detrimental effect on community relations. Moreover, strangers are seen as a 'threat' for the liberty, welfare or culture of the host group only in relation to certain ideological conceptions as to what constitutes a member. Since immigration cannot be disentangled from its cultural and ideological definition, the way in which ethnic minority citizens are perceived and treated depends on how immigrants are perceived. Unfortunately, these issues have escaped the attention of policy-makers who are primarily interested in winning votes by assuring the mass electorate that they are tough on immigration. As a result, the positive contributions made by migrant labour have gone largely unrecognized in the EU.

Instead of setting out to dispel the common myths associated with immigration and giving a coherent normative response to the problems of membership and citizenship in the EU by adopting a relaxed, positive, liberal and enlightened approach to migration flows,[19] the Community has uncritically adopted the Member States' definition of 'who the Europeans are' and their preoccupation in securing national identities.[20] By so doing, it risks replicating the deficiencies and contradictions inherent in the nation-statist paradigm at the European level. Union citizenship also risks being transformed into to a 'neo-national' form of citizenship by failing to take seriously the claims of long-

[19] For a full exposition of an alternative paradigm to immigration and its defence against objections, see Kostakopoulou (1998a). See also AGIT's (Academic Group on Immigration – Tampere) proposal for a positive, humane and comprehensive approach to migration: 'Efficient, Effective and Encompassing Approaches to a European Immigration and Asylum Policy'. Final Draft, 9 June 1999.

[20] On the constitutive act of the drawing of boundaries for creating sense of belonging, see Weiler (1997).

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term resident third country nationals for inclusion and recognition (Kostakopoulou, 1996, 1998b).[21]

Indeed, in Community official discourses the logic of exclusion is 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. As the Tampere Presidency Conclusions state, 'the challenge of the Amsterdam Treaty is now to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all. It is a project that responds to the frequently expressed concerns of citizens and has a direct bearing on their daily lives' (European Council, 1999b).

Although this may well be a 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 their own anxieties or their national governments' anxieties about 'unmeltable ethnies'. A silent value judgement is being 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 would not such a protective Union be a defective Union?

What are the likely implications of the *Communautarization* of migration-related issues for the Member States? Several interpretations may be offered here depending on the conceptual frame used to theorize the relationship between the Community legal order and national jurisdictions. Federalists would argue that the transfer of immigration policy to the Community represents a step closer to supranational statehood (Mancini, 1998). Neofunctionalists would also welcome this as evidence of incremental systemic growth: from informal co-operation to formal intergovernmental co-operation and, finally, to Community activity (even though this may not actually come around 2004). Whereas some state-centrists might regret the Community's encroachment on national sovereignty, others would point out that it was in the states' interest to cede sovereignty over immigration in order to achieve more

[21] In the Tampere Conclusions, the Council (1999, p. 1) stressed the need for a common approach to ensure the integration of third country nationals into the Member States. The legal status of third country nationals (TCNs) should be approximated to that of Member States' nationals: 'A person who has resided legally for a period of time to be determined and who holds a long-term resident residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens' (1999, p. 5); they should also have the opportunity to obtain naturalization in the host Member State. For a critical reflection on such a policy and on other possible strategies of inclusion, see Kostakopoulou (1998b).

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credible and Pareto-efficient outcomes than would be possible through intergovernmental co-operation[22] (Taylor, 1996; Moravcsik, 1998; Moravcsik and Nicolaïdis, 1998). After all, diffusion of state authority becomes a problem only 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). This line of reasoning, however, overlooks the process of incremental evolution of co-operation in the migration field, and the Commission's crucial input in that process. And although liberal intergovernmentalists will be quick to observe that the powers conferred on the Community are not exclusive in the sense of precluding state action, and that the 'leakage of authority' is contained and preserved during the transitional period (e.g. unanimity, the Commission's shared right of initiative, limitations on the ECJ's jurisdiction), the fact that aggregation of domestic national preferences in this policy area is often the result and not the precondition of interstate bargaining, will pose problems for this theory.

Notwithstanding the divergence in explanations, a point of convergence is that states will lose their power of autonomous action in this domain. This is not to suggest that states become unable to control migration flows. An alternative hypothesis may be that states are carving out a new role for themselves and, in this respect, could well be expanding and becoming more influential. After all, the transfer of immigration and asylum policy to the Community would only be a sign of state decline, if it were shown that competence over these areas is in itself a determinant of statehood. The fact that the Member States agreed to transfer these areas to the Community indicates that immigration policy is only contingently necessary to the character of the state. Additionally, states continue to be the chief interpreters of security: the vocabulary may change, the discourse of security may evolve, but states, acting individually or collectively, still remain in control of this discourse.

Interestingly, the Member States' commitment to stringent border controls leads them beyond the outer frontier of the EU into a virtual outward projection of borders. This outward shift and the corresponding shift in operational strategies is attested to by three key aspects of the Union's migration policy. First, an idea that is gaining momentum is that more effective management of migratory movements in the EU requires activities to counter migration pressure at source.[23] Action to reduce the push factors or to tackle the root

[22] Compare the opinion of the Select Committee on European Communities Seventh Report, fn. 17 above.
[23] The idea of 'root causes' emerged in early 1980s in the context of refugee flows, and was adopted in the EU circa 1989. Although the need 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: 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'. Goodin had anticipated this: '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' (1992, p. 9). Similarly, Hathaway (1995), Harvey (1998) and others

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causes of migration is viewed as a possible 'solution' to the 'problem' of migration. This entails the elimination of the economic causes of migration from the Third World through economic schemes of co-operation and development aid, action to prevent crises and intervention to contain conflicts and restore normality. The need for such interventions was discussed in the Commission's Communication on immigration and asylum policy (1994). The strategy paper on Immigration and Asylum policy submitted by the Austrian Presidency to the K4 Committee (1998) suggested the development of a co-ordinated approach to reduce migratory pressure that extends beyond the narrow field of policy on asylum, immigration and border controls by incorporating international relations and development aid (paras. 51–7): 'all the EU's bilateral agreements with third States must incorporate the migration aspect. 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' (para. 59). Convinced that co-operation with countries of origin is an important means of deterring future migrants, the High Level Working Group on Asylum and Migration, set up by the General Affairs Council on 7–8 December 1998, drew up cross-pillar action plans for selected countries of origin and transit of asylum-seekers and migrants (European Council, 1999a).[24] In the Tampere meeting, the Council reiterated its commitment to address the root causes of migration and stated that action in external relations must be used 'in an integrated and consistent way to build the area of freedom, security and justice. JHA concerns must be integrated in the definition and implementation of other Union policies and activities' (European Council, 1999b, p. 13). This represents a major adjustment of traditional migration policy management patterns since it requires policy design parallel with Common Foreign Security Policy and development aid. What is important to remember, however, is that 'keeping the migrant out' is the basic rationale of the 'root causes' approach.

A second feature is the emphasis on 'more efficient management of migration flows at all their stages' (European Council, 1999b). This leads to the replacement of 'Fortress Europe' by a model of 'concentric circles of migration'. According to this model, the circle of Schengen EU members would be surrounded by a second circle consisting of prospective members and associated states. The latter would have to bring their migration policies in line with the first circle's standards in the areas of visas, border controls and

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have argued that the new-found concern for the enforcement of human rights is underpinned by a desire to restrict the numbers of asylum-seekers coming to Europe. As Harvey (1998, p. 579) notes, 'there has been a paradigm shift in international refugee law away from the "exilic bias" and towards root causes'.

[24] Such Action Plans have been drawn up for Afghanistan and the neighbouring region, Iraq, Morocco, Somalia and Sri Lanka. They were approved by the Council in advance of the special session in Tampere.

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readmission policies in return for their admission to the EC (European Council, 1998, paras. 60–1). Notably, such a policy alignment in migration-related issues has taken place in central and eastern Europe. Despite concerns about EU interference in domestic internal and foreign affairs since these countries have to conform to principles, standards and requirements that have been negotiated by EU ministers without their participation, CEEC states have aligned their policies in exchange for financial transfers and future EU membership[25] (Lavenex, 1998; Muller-Graff, 1997). A third circle of states in the former Soviet Union and North Africa would have to focus on transit checks and on combating illegal immigration networks. Co-operation could be achieved by linking migration policy objectives with European funding programmes. Finally, a fourth circle of states in the 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 the development aid that these countries would receive. 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 (para. 134) thus features centrally on the European political agenda.

The third aspect of the European migration policy concerns the formulation of an overall concept of control of legal entry aimed at shifting the focus from illegal apprehension after entry to deterrence before entry. According to the strategy paper, an effective entry control concept is not based simply on controls at the border, but centres on 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 departure to arrival at his/her 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 (European Council, 1998, paras. 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' (para. 89).

The strategy paper (European Council, 1998) noted that an effective European migration policy must be based on: (a) the reduction of migration pressure at the source; (b) combating illegal immigration; (c) immigration control; (d) an overall concept of control of legal entry at all stages of the

[25] Compare PHARE (Poland, Hungary Aid for Reconstruction) which complements the work of the Structured Dialogue. The latter was introduced by the European Council at Essen (December 1994) in order to prepare the associated countries of central and eastern Europe for EU membership (Eisl, 1997).

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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. Building on this, JHA ministers participating in the Tampere European Council (1999b) made explicit their commitment to develop a comprehensive immigration and asylum policy based on partnership with the countries of origin, the development of a common European asylum system, fair treatment of third country nationals, and management of migration flows. And although the Tampere Conclusions are mostly indicative, and not prescriptive, national delegations have expressed a determination to implement them fully.[26] All this suggests that far from being the end or the beginning of the end of an era, Title IV represents a new phase of more effective management of immigration control.

V. Conclusion

European immigration politics have not received much attention in EU studies. Assuming that this was due to the intergovernmental character of JHA co-operation, the *Communautarization* of migration-related issues may bring about change. However, the break from the past is not complete and the uneasy relationship between the two is bound to give rise to changing patterns of fusion and tension. Indeed, *Communautarization* of migration and asylum policy does not imply the erosion of state power. It offers states 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 not only increase their regulatory capacity within a geographically contained structure, but also enable them to impose their security agenda beyond the confines of the Union. In this respect, it is unlikely that the existing restrictive and law enforcement approach to migration flows will be reversed unless the ECJ's and Commission's involvement profoundly affect the nature of the migration regime. This is bound to disappoint many people who had hoped for more, and genuinely believed that Community competence over migration-related issues would profoundly transform the restrictive and law-enforcement character of the European migration regime. What they had underestimated was that control over processes (i.e. the form of co-operation) is not the only means of controlling policy outcomes. As shown above, policy outcomes can be controlled by controlling cognitive frameworks and discourse.

That Title IV fails to deliver in this regard is not surprising. The structural shift from the intergovernmental pattern of co-operation in the context of the

[26] See 2211th Council Meeting, 29 October 1999, Luxembourg, 12123/99 (Presse 320-G).

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Union to the Community framework, has not been accompanied by a cognitive shift which challenges the securitization of immigration and reflects critically on the meaning and terms of membership in the EU. AGIT and other academics have sought to introduce such an interpretative turn[27] by arguing 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 requires, instead, a new conceptual paradigm which views migration in a positive manner, thereby reducing the scope for ideologically led action in this area. One can only hope that such normative expectations, coupled with future interventions by supranational actors, will subvert tendencies towards restriction and exclusion and will prevail over notions and approaches associated with the security paradigm of JHA Co-operation I. Alternatively, the 'protective' Union risks being transformed into a restrictive and exclusive Union.

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[27] See fn. 19 above.

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