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The State Strikes Back: Immigration Policy in the European Union

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Abstract

Scholars have argued that the dynamics of immigration control have changed. Unlike previous waves of immigration which were controlled by national law and administration, this wave would be more difficult to control. Because of the constraints imposed by international agreements, international institutions, and national judicial authorities, controls would be embedded in international institutions and law that were assumed to be inclined to be less restrictive than national institutions and law. Looking at these patterns over the past 20 years, it now appears that international constraints on immigration control have been highly exaggerated. Indeed, international relations have become an important context for understanding the enhanced ability of states to control immigration, and to develop more muscular policies for integration. For this reason, international constraints may be less important for understanding the development of immigration policy than neo-nationalism, enhanced through intergovernmental relations in the international system. Therefore, what began as a scholarly discussion of the limits on restrictionist policies because of international constraints has developed into a discussion of the use of international relations to strengthen the effectiveness of restrictionist policies.

About 30 years ago the first academic literature on the 'new' wave of immigration in Europe had just begun to appear.[1] These early comparative studies placed this immigration in the context of post-World War II economic recovery, and were cautiously optimistic about the possibility of integration through social and political structures in place. In addition, they tended to see immigrant workers as 'an emerging political force'. Scholars seemed to be generally in agreement that this wave was 'different' from those that had preceded it, in the sense that these immigrants were arriving

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[1] M.J. Miller, *Foreign Workers in Western Europe: An Emerging Political Force* (1981); G. P. Freeman, *Immigrant Labor and Racial Conflict in Industrial Societies: The French and British Experiences, 1945–1975* (1979).

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disproportionately from North Africa and Turkey, but that the dynamics of integration were more or less sound.

Within a decade, many of these assumptions were brought into question. The postwar context was basically altered by the economic crisis of the 1970s, and then by the end of the Cold War in the 1990s. As it turned out, the large immigrant-worker populations had become ethnic family populations by the 1990s, and had become objects of politics, rather than a political force or important actors within European political systems.

In addition, scholars argued that the dynamics of immigration control had changed, and they began to focus on the changing patterns of international relations, and their impact on immigration control. Unlike previous waves of immigration which were controlled by national law and administration, this wave would be more difficult to control. Because of the constraints imposed by international agreements, international institutions and national judicial authorities, controls would be embedded in international institutions and law that were assumed to be inclined to be less restrictive than national institutions and law. In addition, for many of these same reasons, the new immigration was a challenge to the more conventional notions of citizenship. New immigrants developed new patterns of 'post-national' citizenship, characterized by dual citizenship, or residence in one country and citizenship in another, patterns protected by rights regimes under international treaties and law. Finally, because both immigration controls and citizenship standards had become more transnational, integration too would become weaker as a result.

In this article, I will argue that, looking at these patterns over the past 20 years, it now appears that international constraints on immigration control have been highly exaggerated. On the other hand, international relations have become an important context for understanding the enhanced ability of states to control immigration, and to develop more muscular policies for integration. For this reason, international constraints may be less important for understanding the development of immigration policy than neo-nationalism, enhanced through intergovernmental relations in the international system. Therefore, what began as a scholarly discussion of the limits on restrictionist policies because of international constraints has developed into a discussion of the use of international relations to enhance the effectiveness of restrictionist policies.

1 Embedded Liberalism and the Issue of State Control

Attempts to define and establish controls over immigration, over who has a right to cross national frontiers and settle in space within those frontiers, have often evoked impassioned debate and conflicting politics. Such issues raise basic questions about the nation-state, the control over the frontiers of the state, and the identity of the nation. The core question is whether and how the capability of the state in liberal democracies to control immigration has been eroded by a combination of international agreements and the increased role of courts in establishing individual and collective rights.

In 1992, James Hollifield developed a highly pessimistic thesis on the ability of liberal democracies to exercise control over the large-scale immigration from outside the European Community ('third-country nationals') that had grown in Europe since the 1960s, despite efforts of most European countries to impose draconian controls, even to develop policies that would lead to 'zero immigration'. The puzzle was that European borders had been closed in the early 1970s, but legal immigration had continued, at somewhat reduced levels, but had continued nevertheless. Moreover, what had been a pattern of immigration for work before the attempts to close the borders had now developed into a pattern in which family immigration for settlement was dominant. Therefore, policy outcomes appeared to be in direct contradiction to policy intentions.

Even when their stated goal appears to be strong and restrictive, immigration control policies may be difficult to enforce, Hollifield has concluded.[2] Control over frontiers – that essential aspect of sovereignty – he argued, has been weakened by legal and judicial controls, both on the national and the international levels. What has been referred to as 'embedded liberalism' in the legal and political systems – values that protect individual and collective rights – makes it difficult to pass legislation that restricts immigration, and makes it even more difficult to enforce legislation that has actually been passed.

Why have liberal states had difficulty controlling immigration? Are there hidden constraints that prevent governments from implementing restrictionist policies? If so, what are the constraints, and what do they tell us about the relation among immigrants, markets and states?[3]

The constraints, he argues, are both national and international, but are related by the concept of 'embedded liberalism'.[4] 'Such basic rights as simple constitutional protections and equality before the law and due process … are doubly important for aliens, who, as noncitizens, are among the most vulnerable individuals in liberal societies.' These rights are magnified, of course, when they are further embedded in the international system through law and treaties.[5]

Policies decided through the political or administrative process, then, may be less important than they appear to be when rights that derive from treaties and court decisions take precedence. The example that is usually given is the fate of attempts to impose immigration controls in Europe in the 1970s. Ultimately these attempts were unsuccessful in part because of court reversals of attempts to restrict family unification; decisions that were ultimately linked to the development of an impressive range of immigrant rights.[6] In France, after much ambivalence, the centre-right government finally made a decision in September 1977 to suspend family unification for

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[2]   J. Hollifield, *Immigrants, Markets and States: The Political Economy of Postwar Europe* (1994).

[3]   *Ibid.*, at 7.

[4]   Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order', 36 *Int'l Org* (1982) 379.

[5]   Hollifield, *supra* note 2, at 27.

[6]   Guiraudon, 'Citizenship Rights for Non-Citizens: France, Germany, and the Netherlands', in C. Joppke (ed.), *Challenge to the Nation-State: Immigration in Western Europe and the United States* (1998), at 280–286.

three years. The following year, this decision was reversed by the Council of State, the highest administrative court, thus setting the stage for continuing immigration.[7]

The German Federal Constitutional Court made similar decisions (based on the protection of 'normal family life') in 1973, 1978, and 1988.[8] As early as 1973, in what became known simply as 'The Arab Case', the court recognized a constitutional restriction on the ability of the state to deport resident aliens. In 1978, the FCC went further in 'The Indian Case', recognizing a 'constitutionally protected reliance interest in continued residence that could not be overridden by the ideal that Germany is not a country of immigration'.[9] Finally, in 'The Turkish and Yugoslav Cases' a decade later, the court found that the Basic Law required that – in the name of the protection of marriage and family life – there be 'proportionality' between the family rights of settled immigrants, and those who wish to bring foreign spouses into the country. Although this ruling recognized the right of the state to forbid entry to foreign spouses of second generation aliens, it could not impose onerous requirements for entry and residence if it did permit entry.

These judicial decisions were important because they limited state action, but also because they defined and shaped state action in important areas of immigration policy. When Germany finally passed the long-debated Foreigners Act in 1990, the legislation codified most of the stipulations of the court decisions that had preceded it. Indeed, the law abandoned some of the restrictions on family unification that had been approved by the FCC.[10] Similarly, the actions of the French Council of State were important for the same reason. The unintended consequence of these decisions was to transform what had been labour migration that was often temporary into family migration with permanent settlement. A larger consequence was to more or less guarantee a continuing flow of immigration into countries that had otherwise decided sharply to reduce these flows.

The augmented role of the courts in Europe has been somewhat startling, not so much because of the range of rights that have been established for resident immigrants during the past 20 years, but because these rights have been contrary to the stated policies of governments, and because they have supported a continuing flow of immigration. In the United States, where the role of judicial decision-making has been better established, courts have also been important in establishing limited rights for immigrants (legal and illegal) already in the country, but far less successful in altering or limiting the core government policies of entry and immigration control. Thus, efforts to secure the entry of Haitian asylum-seekers in the early 1980s were generally unsuccessful,[11] but court actions against the exclusion of the children of illegal immigrants from schools succeeded. In *Plylor v. Doe* in 1982, the United

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[7]   The decision of the Conseil d'Etat was on 8 Dec. 1978 (GISTI, CFDT, et CGT [1978] Rec. Lebon 493), on an action brought by a rights group and two trade union organizations.

[8]   Neuman, 'Immigration and Judicial Review in the Federal Republic of Germany', 23 *NYU J Int'l L and Politics* (1990) 35.

[9]   C. Joppke, *Immigration and the Nation-State: The United States, Germany and Great Britain* (1999), at 72–73.

[10]   *Ibid.*, at 84.

[11]   *Jean v. Nelson,* 472 US 846 (1985).

States Supreme Court ruled that efforts by the state of Texas to exclude the children of undocumented Mexican workers were a violation of the US Constitution. The decision did not focus on questions of a universal right to education, but on questions of racism, and moved immigrant rights into the broader framework of the struggle against discrimination.[12]

Although the role of courts can be seen (and has been seen) in Europe as important in defining policy, in the United States the courts are more clearly part of the policy-making process. Indeed, on both sides of the Atlantic they have been used by political actors as part of an on-going process. In this sense, 'embedded liberalism' can also be seen more simply as one political and legal resource, among others that have determined the effectiveness of legislation on immigration control.

Christian Joppke argues that diagnoses of constraints on the state's ability to control immigration into the EU are highly overrated, either because they are based on erroneous assumptions of strong sovereignty that never was, or because the limits on frontier controls are more obviously domestic than international.[13] Although notions of state sovereignty have been linked to control over frontiers since the 16th century, effective control of borders through military and administrative mechanisms goes back only to the late 19th century.[14] Ever since state capabilities began to catch up with theories of sovereignty, the struggle to maintain the frontier has been a balance between what the state is capable of doing and contradictory interests that support a more open or closed border.[15]

2 Citizenship and the Nation-state

A similar argument about the weakening of the state has been used to understand and analyse changes in the meaning of citizenship. The concept of 'post-national' citizenship has been related to the weakening of the correspondence between citizenship rights and the frontier of the nation-state. This concept focused on the development of a new set of rights linked to people rather than place, making citizenship protections guaranteed by a single state less important than they had previously been.

Questions of immigration often become politicized around the issues of citizenship and naturalization. Immigration has always posed a challenge to citizenship in the sense that, while states have 'transformed' immigrants into citizens, the very nature of citizenship has been influenced by the process of integration, and by the way that the state has conceptualized the nature of citizenship and naturalization. In the politics of identity, immigrants have often been the objects of politics for purposes of political mobilization. In the politics of citizenship, however, the literature argues that the presence and behaviour of immigrant communities has had an active impact on citizenship. Indeed, scholars have argued that policies on

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[12] J.G. Gimple and J.R. Edwards, *The Congressional Politics of Immigration Reform* (1999), at 156.
[13] Joppke, *supra* note 6, 'Introduction'.
[14] J. Torpey, *The Invention of the Passport* (2000).
[15] D. Bigo and E. Guild, *Controlling Frontiers: Free Movement into and within Europe* (2005), at 55–57.

citizenship and naturalization have always been related the needs of state construction and development.[16]

More recently, however the domination of national models has been challenged by analyses that focus on pressures created by transnational migrant communities and what is frequently referred to as 'postmodern' citizenship.[17] Citizenship, in the more traditional sense, this literature argues, may matter far less than it used to in determining rights and obligations, as well as protections in law. As Yasemin Soysal has argued:

> This new model, which I call postnational, reflects a different logic and praxis: what were previously defined as national rights become entitlements legitimized on the basis of personhood. The normative framework for, and legitimacy of, this model derives from transnational discourse and structures celebrating human rights as a world-level organizing principle. Postnational citizenship confers upon every person the right and duty of participation in the authority structures and public life of a polity, regardless of their historical or cultural ties to that community…. It is such postnational dictums that undermine the categorical restraints of national citizenship and warrant the incorporation of postwar migrants into host polities.[18]

In this analysis, 'the logic of personhood supersedes the logic of national citizenship'. The same human rights previously secured by national constitutions and national institutions are now globally sanctioned norms, protected by international agreements and institutions. In this context, non-nationals advance claims and achieve rights 'in a state not their own'.

From a slightly different point of view, Saskia Sasson has presented an even stronger case for post-national citizenship. 'The state finds itself caught in a broader web of rights and actors that hem in its sovereignty in decisions about immigrants', she writes. Indeed, '[t]here is an emerging de facto regime often centered in international agreements and conventions as well as in various rights gained by immigrants, that is limiting the state's role'.[19]

Nevertheless, at the end of the day, it is still the states themselves that decide whether and how they will abide by international norms, and it is unclear how much influence these norms have on decisions that are reached by political authorities. It is through the domestic institutions that transnational ideas and understandings – on economics and human rights, for example – are mediated, filtered, and interpreted, often with very different outcomes.[20]

This is critical to explaining why residence in a state is consequential in securing various rights. The world is still largely organized on the basis of spatially configured political unites; and topographical matrices still inform the models and praxis of national and international actors. Hence the nation-state remains the central

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[16] R. Brubaker, *Citizenship and Nationhood in France and Germany* (1992); A. Zolberg, *A Nation by Design* (2006), at Ch. 4.

[17] Y.N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (1994).

[18] *Ibid.*, at 3.

[19] S. Sassen, *Guests and Aliens* (1999), at 54.

[20] P. Hall, *The Political Power of Economic Ideas: Keynesianism across Nations* (1989); J. Goldstein and R. Keohane (eds), *Ideas and Foreign Policy* (1993).

structure regulating access to social distribution. The material realization of individual rights and privileges is primarily organized by the nation-state, although the legitimacy for these rights now lies in a transnational order.[21]

The criticism of the post-national literature has noted that transnational communities in Europe are neither new,[22] nor are they well protected by international regimes. Although some scholars have made a convincing case for the emergence of a post-national citizenship – at least in the case of Europe – others have argued that the advantages of national citizenship may be underestimated. As Peter Schuck states so eloquently, post-national citizenship rights possess only a limited institutional status, protected mostly by judicial institutions, and can be easily swept away by tides of tribalism and nationalism.[23] Since rights and claims – even if they are judged by international courts – are still enforced within bounded national systems, advantages of national citizenship may very well remain. Moreover, similar multiple memberships and patterns of transnational loyalties were evident in Europe before World War II, and were not seriously undermined except during periods of extreme nationalism and war. In the more recent case of Europe, Miriam Feldblum has demonstrated that post-national citizenship has run up against what she calls 'neo-nationalist' tendencies to reassert bounded national citizenship requirements.[24]

Even Sassen questions if the overall effect of postnational patterns has been 'to constrain the sovereignty of the state and to undermine old notions about immigration control'. She acknowledges that both in Europe and the United States there has been a reaction of 'renationalizing' immigration policy-making that has varied considerably in Western Europe. There may be trans-national processes and trans-national regimes that influence and constrain the national process, but has this not always been the case with regard to immigration control? The point that Sassen makes – that the conditions within which immigration policy is being made and implemented today are imbedded in pressures of globalization and human rights accords – may be important, but not necessarily in the ways that are usually asserted. Thus, if there is an ascendance of 'agencies linked to furthering globalization and a decline of those linked to domestic equity questions', the impact on the immigration agenda may be negative rather than positive, in part because the enforcement of immigrant rights supported by trans-national human rights regimes is closely tied to agencies that deal with domestic equity questions.[25]

3 Slow Movement towards a Common Immigration Policy

Does this mean, then, that immigration policy has been untouched by a broader web of actors on the European or the international level, and remains simply domestic policy

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[21]   Soysal, *supra* note 17, at 143.

[22]   M. Feldblum, *Reconstructing Citizenship: The Politics of Nationality Reform and Immigration in Contemporary France* (1999), at Ch. 1.

[23]   Schuck, 'The Reevaluation of American Citizenship', in Joppke, *supra* note 6, at Ch. 6.

[24]   Feldblum, *supra* note 22, at Ch. 7.

[25]   Sassen, 'The de facto Transnationalizing of Immigration Policy', in Joppke, *supra* note 6, at 68.

and policy-making? I would argue that in fact the international arena has become increasingly important, but for restriction of immigration rather than for the development of post-national rights regimes.

Co-operation on the development of a more harmonized immigration policy has been very limited in Europe. Since the Tampere summit of 1999, the European Commission has made the case for a more expansive European immigration policy. In Tampere, a five-year mandate was developed to harmonize policies around *common practices*. This was an important emphasis, since in all countries in Europe there is a considerable gap between policy statements and commitments, on the one hand, and practice on the other. However, Tampere also recognized two widely discussed needs in Europe for immigrant labour: labour market needs in such areas as technology, agriculture, construction, and services and demographic needs posed by pressures on the welfare state. Through its reports and recommendations, the European Commission has emerged as an important agenda-setting force.[26]

The Commission has also made numerous recommendations for a common asylum and immigration policy that would include a partnership with the countries of origin for the development of skills necessary for the EU labour market. In addition, the Commission proposed directives to the Council that would harmonize criteria for family unification, the key source of third country immigration for most EU countries. These proposals have met with some success (Council Directive 2003/86/EC of 22 September 2003[27] on the right to family reunification, for example) but the directives have been limited to agreement on general principles, leaving criteria for admission to the Member States themselves:

1. 'Family reunification should apply in any case to members of the nuclear family, that is to say the spouse and the minor children.'

But:

2. 'It is for the Member States to decide whether they wish to authorise family reunification for relatives in the direct ascending line, adult unmarried children, unmarried or registered partners as well as, in the event of a polygamous marriage, minor children of a further spouse and the sponsor. Where a Member State authorises family reunification of these persons, this is without prejudice of the possibility, for Member States which do not recognise the existence of family ties in the cases covered by this provision, of not granting to the said persons the treatment of family members with regard to the right to reside in another Member State, as defined by the relevant EC legislation.'

In an address summarizing the work of the Directorate since 1999, Justice and Home Affairs Director-General Jonathan Faull noted that there was no progress at all on the development of co-ordinated policies on economic immigration, some progress

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[26] 'Communication from the Commission to the Council and the European Parliament On a Community Immigration Policy', 22 Nov. 2000, COM(2000)757 final.

[27] [2003] OJ L251/12.

on harmonization on the treatment of long-term residents, and just the beginning of information sharing on problems of integration. On the other hand, there was considerable progress in the fight against illegal immigration, and on the control of external borders.[28]

The positive mandate of the Commission was reinforced at The Hague in 2004. While reiterating that decisions on the numbers of labour migrants would remain the prerogative of the Member States, the Hague Programme requested that the Commission present a policy plan on legal migration and admission procedures before the end of 2005. This plan was finally presented by the Commission in June 2008.[29]

It is now becoming clearer that an important challenge to the exclusionary framework that has been driving policy-making at the EU level is the growing need for immigrant labour in specific sectors of the economy, as well as the benefits of this kind of labour for problems in financing the welfare state. Although it is difficult to raise this issue at the national level in many countries because of the challenge of the extreme right,[30] it may be easier to address within the arena of the EU.[31] Nevertheless, at least for the moment, security concerns appear to have overwhelmed any tentative move in that direction.[32]

Thus, although European policy-makers are clearly beginning to accept the implications of the impact of low fertility rates on the labour market and on pension programmes, it appears that they are determined to deal with these problems at the Member State, rather than the EU, level. While instruments of immigration control and exclusion, as well as instruments for regulating asylum, continue to be developed at the EU level, any plan for the admission of immigrants continues to be stalled in the Council.

Why was there so little progress on immigration policy? One simple answer is that harmonization of immigration policy at the European level – the mandate that was accepted at the EU summit in Tampere in 1999 – is limited by the fact that few EU countries have legislated immigration policy of any kind that would specify levels of permitted immigration. Therefore, although Europe appears to be edging towards a more open immigration policy, it is not a policy that can be easily harmonized or developed into European directives.

A second answer is more complicated: the process militates against co-operation for harmonization of more open immigration policies. In the development of immigration policy at the European level, national representatives have maintained strong control over the policy process. 'Problem-solving deficits', that have made it more difficult for any one country to control entry from third countries while dismantling internal

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[28] J. Faull, 'An Immigration Policy for Europe', Keynote address to a Joint conference of the Centre for European Studies at New York University and the European University Institute in Florence (2005).

[29] IP 08/948: *Taking forward the common immigration and asylum policy for Europe.*

[30] See, e.g., the failed trial balloon floated by Alain Juppé in October 1999: Bernard, Saux, and Zappi, 'Alain Juppé veut sortir du "conflit idéologique" sur l'immigration', *Le Monde*, 1 Oct. 1999.

[31] European Commission, Communication from the Commission to the Council and the European Parliament On a Community Immigration Policy, 22 Nov. 2000, COM(2000)757 final.

[32] Working Group X 2002 (Freedom, Security and Justice), Final Report, CONV 426/02, 2 Dec. 2002, at 5.

borders within the EU, have encouraged a greater move towards the centre.[33] The problem has been understood, however, as a need to reinforce the external border, and strengthen the will of countries which had been less prone to maintain restrictive rules. This is not markedly different from the development of restrictive policy at the end of the 19th century in the United States. With far weaker presidential leadership, appointed representatives of the states took the lead in generating restrictive legislation in a relatively protected arena.[34]

Within the European Union, the arena of policy development was and remains relatively protected space, space chosen by ministries of the interior and justice to avoid many of the national constraints which had become evident by the 1980s. This narrowly-structured inter-governmental lobby[35] has dominated policy-making on immigration at the EU level since the 1980s. Therefore, the emphasis on exclusion and restriction – the 'securitization' of immigration policy at the EU level – is no accident, and directly reflects the preferences of the ministries that control the process and their ability to dominate institutional space. The arena within which they have chosen to develop these policy preferences is also not an accident; it is a classic case of policy preferences (those of the ministry representatives) driving the political arena, and hence the political process.

In summarizing the literature on immigration policy-making at the EU level, Terri Givens and Adam Luedtke focus on a proactive process through which strategic opportunities are actively developed for state actors at the European level to control and restrict immigrant entry. The point is that constraints on restriction at the national level have been evaded by actors through 'one particular strategy called "venue shopping" in which state actors use EU level organization to pursue national policy goals'.[36]

Pro-immigrant NGOs that have battled for access to the decision-making framework of the EU have been forced to seek a different decision-making arena – the national arena (the courts in particular), and the Commission and the Parliament, which have been more open to the rights-oriented framework of 'social exclusion'. This framework may very well benefit migrants already in the EU, but will have little impact on immigrants into the EU. Their strongest support at the EU level comes from within the equivalent of the technocracy.[37] However, in the case of Europe this is a technocracy without significant executive leadership capacity.

Virginie Guiraudon supports this analysis in a comprehensive study of the development of this arena. She links national and EU politics by analysing the movement of the immigration issue to the EU level as initiated by key national ministries in search of an arena within which they could gain more autonomous action. She describes

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[33]   Scharpf, 'Problem Solving Effectiveness and Democratic Accountability in the EU', presented at the Hauser Seminar: *Theorizing Europe*, New York University, Mar. 2004.

[34]   Schain, 'Immigration Policy', in A. Menon and M.A. Schain (eds), *Comparative Federalism: The European Union and the United States in Comparative Perspective* (2006).

[35]   Beer, 'Federalism, Nationalism and Democracy in America', 72 *American Political Science Review* (1978) 9.

[36]   Givens and Luedtke, 'EU Immigration Policy: From Intergovernmentalism to Reluctant Harmonization', in T. A. Börzel and R. A. Cichowski (eds), *The State of the European Union*, Vol. 6: *Law, Politics, and Society* (2003), at 300.

[37]   Geddes, 'Thin Europeanisation: The Social Rights of Migrants in an Integrating Europe', in M. Bommes and A. Geddes (eds), *Immigration and Welfare: Challenging the Borders of the Welfare State* (2000).

how justice and interior ministry civil servants gained monopoly control over the implementation of the Schengen accord between 1985 and 1990, primarily by defining priorities that linked immigration to combat against transnational crime.

During the 1980s, ministries of justice and the interior were increasingly constrained by domestic forces from carrying out policies of immigration restriction. Court decisions prevented wholesale restriction of family unification, and made expulsions far more difficult to implement. They also faced conflicts with bureaucracies charged with the integration of immigrants already in the country. As Guiraudon explains:

> The incentive to seek new policy venues sheltered from national legal constraints and conflicting policy goals thus dates from the turn of the 1980s…. It thus accounts for the timing of transgovernmental cooperation on migration but also for its character: an emphasis on non-binding decisions or soft law and secretive and flexible arrangements. The idea is not to create an 'international regime,' i.e. a constraining set of rules with monitoring mechanisms but rather to avoid domestic legal constraints and scrutiny.[38]

Although the establishment of the High-level Working Group on immigration (1998) resulted in pressures for a more substantial cross-pillar approach to immigration which would effectively integrate the interests of foreign affairs, Guiraudon argues that the dominant influence is still that of justice and home affairs. As Dietmar Herz has noted, working groups preparing the work of the Justice and Home Affairs Council are dominated by civil servants from national ministries of the interior, with participation of staff from foreign affairs ministries only at the full COREPER meetings. Perhaps more to the point, the working groups reflect the concerns of ministries of the interior, and 'officials concerned with regular immigration are as yet seldom involved in networks of dense intergovernmental cooperation'.[39] Thus, the key indication of the failure of immigration policy to take off at the European level is that no structure has been established which would provide policy-makers with a framework for co-operation. Generally speaking, where there are co-operative frameworks, they tend to support control and exclusion, rather than harmonization and expansion of immigration policy.

The statement issued at the Edinburgh summit of 1992 emphasized the importance of removing the 'root causes' of migration, and called for a comprehensive approach to move towards this objective, which would include conflict prevention in the third world, development aid, and enhancement of trade. This approach was dominated by the fear first engendered by the 'asylum crisis', which started in the early 1990s and has continued since then. Despite the more positive view expressed at the Tampere Council in 1999, the general view of immigration at the European level as a problem to be combated has endured in various ways through the decade of the 1990s, and has been reinforced by periodic surges in electoral strength of the extreme right in France, the Netherlands, and Austria. The Seville Council, just after the French elections of 2002, reiterated much of the rhetoric of Edinburgh a decade earlier.

[38] V. Guiraudon, 'The EU "Garbage Can": Accounting for Policy Developments in the Immigration Domain', Paper presented at the 2001 Conference of the European Community Studies Association, Madison, Wisconsin, 29 May–1 June 2001, at 7.

[39] D. Herz, 'European Immigration and Asylum Policy: Scope and Limits of Intergovernmental Europeanization', Paper presented at 8th EUSA Conference, 27–29 Mar. 2003, Nashville Tennessee, at 13.

Thus, the most effective actions on immigration taken at the EU level have been strongly oriented towards intergovernmental co-operation for immigration control (visa, asylum, and border control), and exclusion. The Schengen Information System, now moving into its second stage, and the initiation of the European Border Agency for the co-ordination of the border police around external EU borders, are counted among the most notable achievements of Justice and Home Affairs during the past five years.

Looking back over the past decade, it is clear that there has been little progress in harmonization of immigration policy, and where there has this harmonization has favoured more restrictive policies. Givens and Luedtke have demonstrated that the politicization of questions of immigration in Europe has meant that:

> this new, high conflict mode of immigration politics concerning TCNs [Third Country Nationals], which sees restrictionist national executive protecting de facto national sovereignty over immigration to maximize political capital, by either blocking supranational harmonization of immigration policy, or ensuring that the harmonization that does occur is weighted in favour of law and order and security, and is not subject to the scrutiny of supranational organizations and courts.[40]

In fact, they demonstrate that the only Commission proposals that managed to be adopted by the Council between 1999 and 2002 were those that were restrictive in content. In addition, there are increasingly dense networks of international co-operation within Europe to enhance immigration restriction at the margins of the European Union. The periodic meetings of ministers of the interior of the six largest EU countries (the G6) have met on security issues and, more recently, on questions of immigrant integration. In March 2006, the G6 initiated discussions among the larger group of EU interior ministers about the development of an EU policy on civic integration contracts for immigrants entering the EU.[41]

Finally, there is also a less-discussed aspect of the structural framework of the European Union, the division of the Council of Ministers into functionally-specific councils militates against tension (or conflict) between pressures for immigration harmonization and expansion, on the one hand, and pressures for harmonization of restriction, on the other. Indeed, with advocacy for restriction concentrated in the Council and advocacy for expansion in the Commission, the 'European level' is structurally biased towards restrictive policies linked to security considerations in the absence of executive leadership. The approach of the European Union to the harmonization of immigration policy has focused on the efforts to enforce exclusion first initiated at the Member State level.

4 The Development of Stronger Policies on Citizenship and Civic Integration

We see a similar pattern in citizenship and integration policy, where there has been a striking movement towards the development of international standards for citizenship

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[40]   Givens and Luedtke, *supra* note 34, at 297–299.
[41]   H. Williamson, 'EU Six Consider Introduction of 'Integration Contracts' for Immigrants', *The Financial Times*, 24 Mar. 2006.

and integration at the European level. On the one hand, these standards tend to support national policies on civic integration that are far more demanding than those which had existed before; on the other hand, standards have also pressurized Member States to develop new and more exacting policies that deal with discrimination.

The Commission has made considerable progress in developing a common approach to standards of integration. A list of 'Common Basic Principles for Immigrant Integration Policy in the European Union' was agreed to in the Hague Programme in 2004 as part of a common programme for integration. Among the 11 agreed-upon principles, the following are the most important:

- *Employment* is a key part of the integration process and is central to the participation of immigrants, to the contributions immigrants make to the host society, and to making such contributions visible.
- Efforts in *education* are critical to preparing immigrants, and particularly their descendants, to be more successful and more active participants in society.
- *Access* for immigrants to institutions, as well as to public and private goods and services, on a basis equal to national citizens and in a non-discriminatory way is a critical foundation for better integration.
- The *participation* of immigrants in the democratic process and in the formulation of integration policies and measures, especially at the local level, supports their integration.
- Integration is a dynamic, *two-way* process of mutual accommodation by all immigrants and residents of Member States.[42]

Although the programme has only provided guidelines for best practices, it has arguably provided criteria for success and failure as well.

Christian Joppke has made a persuasive case that there has been a convergence of integration policy in Europe around civic integration and anti-discrimination policy:

> there is an acute sense that European societies have failed to integrate their immigrant and ethnic minority populations. Not by accident, in the past few years governments across Western Europe have engaged in general stocktaking about their past immigration and integration policies, while trying to chart new directions. [For this reason] distinct national models of dealing with immigrants are giving way to convergent policies of civic integration and anti-discrimination.[43]

However, both the development and the content of civic integration policy have been quite different from those of anti-discrimination policy. The new trend tends to emphasize civic integration policies which create an obligation for immigrants who wish to attain the rights of citizens individually to demonstrate that they have earned those rights. The first of these programmes was the year-long obligatory integration course, inaugurated in 1998 in the Netherlands, which emphasized language instruction, civics, and preparation for the labour market. The key was the set of examinations

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[42] Council of the European Union, Justice and Home Affairs, Press Release, 2618th Council Meeting, 19 Nov. 2004, at 19–24.

[43] Joppke, 'Transformation of Immigrant Integration: Civic Integration and Antidiscrimination in the Netherlands, France and Germany', 59 *World Politics* (2007) 243.

at the end. The integration policy was then linked to immigration control, through a requirement that applicants for family unification first take the course and pass the examination before they arrived. This programme was particularly important, because it was a dramatic departure from a longstanding multicultural integration programme which had been in place for 15 years.

Perceptions of policy failure are widespread in Europe, both in countries which had developed multicultural programmes, such as the Netherlands and Britain, and countries, such as France, which have depended on programmes with a stronger emphasis on a national identity.[44] The one notable result of this perception has been the development of programmes of civic integration, programmes in which the emphasis is heavily on identity. As Joppke points out, the Dutch programme has now become a model for the rest of Europe, and various versions of civic integration programmes have been initiated in France, Germany, and Britain. Although the actual policy requirements in place in Britain and Germany by 2008 were not as coercive as those in France or the Netherlands, they were moving in the same direction.[45] None of this movement toward policy harmonization, however, was initiated at the EU level.

The development of a policy of civic integration was moved to the EU (intergovernmental) level at the initiative of Nicolas Sarkozy, (then) French Minister of the Interior. In March 2006, the interior ministers of the six largest EU countries (the G6) agreed to pursue the idea of an 'integration contract', using the French model as a starting point. The initial step was to create a committee of experts to investigate the procedures used in all Member States. They then planned to propose such a policy to the other 19 countries of the EU.[46] Indeed, one of the first initiatives of the French presidency in 2008 was to propose a comprehensive, compulsory EU integration programme. The compulsory aspect was finally dropped in June, but a 'European pact on Immigration and Asylum' was passed by the European Council in October 2008. Three criteria were accepted for acceptance and integration in Europe (according to the French Government): language mastery of the receiving country; knowledge and commitment to the values of the receiving country; and access to employment.[47]

Thus, the European context, rather than constraining states in Europe, has enhanced their abilities both to control immigrant entry and to develop more forceful policies on integration, essentially defined at the Member State level. These policies

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[44] Maussen, 'The Netherlands', in J. Césari *et al.*, *Securitization and Religious Divides in Europe: Muslims in Western Europe after 9/11: Why the term Islamophobia is more a predicament than an explanation*, Challenge Project Report: The Changing Landscape of Citizenship and Security, 6th PCRD of the European Commission (2006), at 114–117.

[45] Brighton, 'British Muslims, Multiculturalism and UK Foreign Policy: "Integration" and "Cohesion" in and beyond the State', 83 *International Affairs* (2007) 1; Independent Commission on Migration to Germany, 'Structuring Immigration, Fostering Integration', report by the Independent Commision on Migration to Berlin, 4 July 2001; German Federal Ministry of the Interior, *Migration and Integration: Residence Law and Policy on Migration, and Integration in Germany* (April 2008), available at: www.bmi.bund.de.

[46] Williamson, *supra* note 39.

[47] See www.euractiv.com, 2 July 2008. European Pact on Immigration and Asylum (13440/08), approved by the JHA Council on 25 Sept. and adopted by the European Council. Statement issued by the French Council of Ministers, 12 Nov. 2008.

have then spread through Europe through increasingly institutionalized intergovernmental consultations.

5 Anti-discrimination Policy in an International Context

Yet, there is one area for which policy developed at the European level has resulted in policy initiatives that have generally eased the life of immigrants already in residence.

First initiated in Britain in 1965 (and influenced by American legislation of the same period), anti-discrimination legislation was given a major push by the Treaty of Amsterdam and two directives of the European Council in 2000. On the basis of the framework of the Treaty of Amsterdam, questions of immigration, and to some extent integration (particularly the revised Article 6a on the combat of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation), were brought into the EU structure. Policy would be harmonized on the basis of proposals made by the Commission and actions of the Council of Ministers. Two directives of the European Council in 2000[48] then obliged all EU countries to constitute commissions that would both monitor and act against patterns of racial discrimination. Since immigrant communities have been racialized in Europe, the emerging institutions have begun to offer them a measure of recognition and protection.

France offers an important case study of the development of anti-discrimination policy. In 2001 and 2002, a conservative government in France passed legislation banning discrimination in employment and housing,[49] but it did not pass legislation authorizing an active anti-discrimination agency until 2004. The High Authority Against Discrimination and for Equality (the HALDE) was established in 2005, and issued its first report in May 2006. During its first year, it received more than 2,000 complaints from individuals, 45 per cent of them complaints of employment discrimination. Although the commission lacks the financial resources to investigate discrimination, as well as strong legal means to pursue complaints and enforcement, it represents a new departure to deal with immigrant integration in terms of discrimination.[50] The HALDE, however, has been free to set its own programme and its own standards for pursuing cases on discrimination.

The process in the United States (the model for Britain) and Britain rests on the ability of the state to obtain statistics on employment and housing by ethnic and religious categories. There has been some movement in France to enable the French state to collect such data, to pursue studies, and to recommend legislation. The new term

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[48] The Racial Equality Directive: Council Directive 2000/43/EC, 29 June 2000 [2000], OJ L180/22; and Council Directive 2000/78/EC, 27 Nov. 2000 [2000], OJ L303/16.

[49] The Law of 16 Nov. 2001 goes well beyond the minimum requirements of the Race Directive, banning discrimination in salaries and promotion, as well as hiring and firing. See Joppke, 'Transformation of Immigrant Integration: Civic Integration and Antidiscrimination in the Netherlands, France and Germany', 59 *World Politics* (Jan. 2007).

[50] See the extensive article in *Le Monde* on 4 May 2006 by M. Schweitzer: 'Prévenir les préjudices, c'est mieux'.

that is often used is 'visible minorities'. In 2006 a French Senate committee (on Laws and Social Affairs) adopted an amendment that would have established 'a typology of groups of people susceptible to discrimination because of their racial or ethnic origins'. The amendment, which would have been used to measure diversity of origins in the civil service and some private companies, was rejected by the government (and the HALDE), although it was supported by the minister of the interior, Nicolas Sarkozy.[51] After Sarkozy's electoral victory in 2007, he supported a provision of the *Loi Hortefeux*, which contained a provision that would permit the census and researchers to pose questions on race and ethnicity; the provision, however, was declared unconstitutional by the Constitutional Council.[52]

Thus, the application of European standards on anti-discrimination was embedded in the French domestic political process, through which the idea of anti-discrimination was somewhat redefined. Nevertheless, the French approach to dealing with discrimination is clearly converging with that of the British. In this case, EU standards have promoted similar policies for dealing with integration, standards that have expanded the rights of resident immigrants. We can usefully compare this more positive outcome with convergence on civic integration, which has resulted in policies that have reduced the rights of immigrants.

How can we explain this difference? The difference can probably be attributed to the fact that by 2000 there was already an emerging consensus that more muscular action against discrimination was a necessary component of any integration policy, but programmes in place varied considerably. In Britain and the Netherlands, there had been strong and effective programmes in place for many years. In comparison with these programmes, France had done very little.[53]

In France, failure of integration had been related to problems in education and employment for many years, and the French state has been dealing with some of these problems since the 1980s.[54] More recently, however, these failures have been linked to the existence of patterns of discrimination. By the 1990s, even before the directives of 2000, there was a lively French discourse on what was now referred to as 'the French invention of discrimination', and the Haut Conseil à l'Intégration had recommended proposals that were quite similar to the 2000 directives. In fact, before 2000, the UK model was understood by policy-makers as 'good practice'.[55]

For these reasons, France supported the development at the EU level of anti-discrimination programmes, programmes that have grown in importance and that

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[51] See *Le Monde*, 3 July 2006. The legislation which authorizes the prohibition against the collection of ethnic data is the *Loi No. 78–17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés*. However, this law was modified in 2004, and the National Commission on Computers and Liberty lists seven criteria which could be used to measure 'diversity'. See www.cnil.fr/index.php?id = 1844, last accessed 7 June 2008.

[52] 'Immigration Les juges de la Rue Montpensier encadrent strictement le recours aux tests' and 'Le Conseil constitutionnel invalide les statistiques ethniques', *Le Monde*, 17 Nov. 2007, at 9.

[53] E. Bleich, *Race Politics in Britain and France: Ideas and Policymaking since the 1960s* (2003).

[54] M. Schain, *The Politics of Immigration in France, Britain and the United States* (2008), at 81–82.

[55] Fassin, 'L'Invention française de la discrimination', 52 *Revue française de science politique* (2002) 395; Joppke, *supra* note 41, at 262–263.

have increasingly benefited those immigrants who have made it past the door. The movement towards civic integration, generated at the state level, has used European inter-governmental relations to leverage these policies throughout the European Union. The movement towards anti-discrimination, on the other hand, has used European Union dynamics to leverage these policies at the Member State level.

6 Conclusion

On balance, the Europeanization of immigration policy and policy-making has worked in ways that had not been anticipated by the academic literature two decades ago. While embedded liberalism has constrained European states in some important ways, these constraints have been domestic, rather than European or international. Rights and protections for immigrant populations have been developed primarily by domestic courts and institutions, and national NGOs have used these instruments to constrain the actions and behaviour of European states which have attempted to control and restrict immigration.

On the other hand, European institutions and processes have been effective means for Member States to develop more restrictive policies, and avoid the pressures of NGOs and other domestic political forces. They have done this through intergovernmental co-operation, for the most part, and have effectively used European Union institutions to their advantage.

Although pro-immigrant NGOs have worked closely with the European Commission, they have been far less effective on the European level than they have been on the domestic level. While it is true that the Race Relations Directives of 2000 represent a considerable victory for immigrant advocates, it is also true that there seems to have been little Member State opposition to overcome. Therefore, all in all, the suggestion that more expansive rights imposed by international accords, courts, and institutions, which would severely limit the ability of the state to control immigration and which would change citizenship, have proven to be mostly wrong.