UNIVERSITY OF SOUTHAMPTON

TOWARDS A COMMON EUROPEAN IMMIGRATION POLICY?
A COMPARATIVE ANALYSIS OF GERMANY, FRANCE AND THE UNITED KINGDOM

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ABSTRACT
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TOWARDS A COMMON EUROPEAN IMMIGRATION POLICY? A COMPARATIVE ANALYSIS OF GERMANY, FRANCE AND THE UNITED KINGDOM

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The policies of western European governments towards immigrants have undergone a period of change, from a period which emphasised the economic benefits of immigration as an enabler of growth prior to the 1980s, policy has switched to one which sees immigration as a problem, as a threat to the national polity and society. Most recently, the opening of the borders between east and western Europe has enabled more people to migrate to the member states of the European Union, and stimulated an even more urgent attention to policy. This thesis examines the ways in which the three largest European Union economies have addressed these issues over the recent period, illuminating differences and identifying commonalities. These national-level policy processes are then related to the level of the European Union itself.

A number of factors, both external and internal to Europe, have affected immigration policy, and these vary from country to country, as will be demonstrated through the three national case studies. Closer European integration has led to measures to tighten immigration controls at the Union's external borders as a common reaction to the new challenges.

The argument turns around a contrast between the processes of exclusion and inclusion which are the twin faces of immigration policy. The interaction between the demarcation processes of the nation state, on the one hand, and European integration and processes of globalisation, on the other hand, have led to the re-affirmation of the national prerogative of immigration policy making. This is demonstrated here with the example of two demarcation processes: the political control of immigration as an example of an external demarcation process and naturalisation policies as an example of an internal demarcation process.

CONTENTS

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Abbreviations

Annals	The Annals of the American Academy of Political and Social Science
APuZ	Aus Politik und Zeitgeschichte
BGBl.	Bundesgesetzblatt
BMI	Bundesministerium des Inneren
BNA	British Nationality Act
CCME	Churches' Council for Migrants in Europe
CNF	Code de la Nationalité Française
CIREA	Centre for Information, Reflection and Exchange on Asylum
CIREFI	Centre for Information, Reflection and Exchange on the Crossing of External Frontiers and Immigration
COREPER	Comité des Représentants Permanents des États Membres
DPM	Département de Population et de Migration
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EP	European Parliament
EU	European Union
EUROPOL	European Police Office
GISTI	Groupe d'Information et de Soutien de Travailleurs Immigrés
GG	Grundgesetz
JORF	Journal Officiel de la République Française
HC	House of Commons
HL	House of Lords
ILPA	Immigration Lawyers and Practitioners Association
IGC	Intergovernmental Conference
ILO	International Labour Office
IPPR	Institute for Public Policy Research
JHA	Justice and Home Affairs
NGO	Non-governmental organisation
OJ	Official Journal of the European Communities

OMI	Office des Migrations Internationales
RIIA	Royal Institute for International Affairs
RPR	Rassemblement pour la République
SCEC	Select Committee on the European Communities, House of Lords
SCEL	Select Committee on European Legislation, House of Commons
SEA	Single European Act
SOPEMI	Systèm d'observation permanente des migrations (OECD's continuing reporting system on international migration)
TEC	Treaty on the European Community
TEU	Treaty on European Union
TREVI	Terrorisme, Racisme, Extrémisme et Violence Internationale
UK	United Kingdom
WWW	World Wide Web

CHAPTER ONE

INTRODUCTION

1.1. THE CONTEXT OF THE RESEARCH

The question of immigration is high on the agenda of the European Union (EU) and its member states, often approaching the level of a moral panic. The end of the Cold War and the breaking up of the Soviet Union and Yugoslavia have meant that Europe has experienced the largest movement of migrants since World War II. Since the mid-1980s, migration movements in Europe and the policy reactions on the national and European level towards it have been affected by two main developments. The first is the result of changes to the geopolitical order in Europe, and the fear in western Europe that there would be large population movements across the former Iron Curtain. The second, and in many ways related development, was the European Community's campaign to establish a Single Market.

The establishment of the Single European Market in 1992, seeking to create "an area without internal frontiers in which the free movement of goods, persons, service and capital is ensured", highlighted the importance of control at the external borders of the European Community (EC).[1] The abolition of internal borders has raised fears of a Europe at the mercy of international criminal organisations, including organised trafficking in people, unhindered by border controls. The debate over immigration and asylum became rapidly embroiled in non-immigration issues to compensate for the so-called security deficit. This is reflected in a marked shift in the general security discourse on Europe. The security discourse, which predominated during the 1970s and 1980s focused largely on inter-state relationships and military aspects. Since the end of the Cold War migration has moved up the security agenda in line with other non-military

[1] Article 13 of the Single European Act 1986 amended Article 8A of the Treaty of Rome 1957. This Article was renamed Article 7A by the Treaty on European Union (and is the new Article 14 of the Amsterdam Treaty).

issues such as organised crime.[2]

The growing concern over immigration is associated with the increase in the number of immigrants coming to western Europe as a result of the fall of the Iron Curtain, economic stagnation or decline and political instability in eastern Europe, the Balkans, and the former Soviet Union. Population growth, poverty, underdevelopment and military conflicts in the South also indicate continuing mass population movements. At the same time, west European countries are trying to tackle economic recession and high structural unemployment. Governments and citizens of west European states often feel threatened not only because of the numbers of migrants but also because of the likelihood that they will need to be housed and otherwise cared for. They have become fearful that migrants will not only take their jobs and live off their welfare system but even threaten their way of life and their polity.

In times of full employment, millions of labour migrants were recruited by west European states. Almost three million immigrants came to France from the Maghreb, while about five million migrant workers came to Germany during the 1950s and 1960s. Immigration was not only tolerated, it was wanted and welcomed. The conflicts that arise from large-scale migration only intensified when unemployment became chronic in the receiving countries, with average levels of unemployment in the European Union reaching over ten per cent, with little prospect of a significant reduction. Although the mass migration from the former Soviet Union did not materialise[3], there is still great concern among

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[2] J. Zielonka, 'Europe's security: a great confusion', *International Affairs*, 1992, Vol. 67, No.1, pp. 127-37. Huysmans argues that the removal of the military threat left a vacuum in Europe which led to the conceptualisation of non-military problems in security terms as a stabilizing strategy: J. Huysman, 'Migrants as a security problem: dangers of "securitizing" societal issues', in R. Miles et al. (eds.), *Migration and European Integration: The Dynamics of Inclusion and Exclusion*, London, Pinter, 1995; see also O. Waever et. al. (eds.), *Identity, Migration and the New Security Agenda in Europe*, London, Pinter, 1993; D. Bigo, 'Europe passoire et Europe forteresse: la sécuritisation/ humanitarisation de l'immigration', in A. Rea (ed.) *Immigration et racisme en Europe*, Brussels, Editon Complexe, 1998, pp. 203-41.

[3] See for example F. W. Carter et. al., 'International migration between East and West in Europe', *Ethnic and Racial Studies*, 1993, Vol. 16, No. 3, pp. 467-91.

west European governments about the potential for large scale population movements to the relative affluence of the EU member states. The extreme reaction within member states of the EU to the perceived threat of mass immigration has been the rise of extreme right political groups acting both within and outside the established political system.[4]

The response of European governments has been a technocratic solution - closer intergovernmental co-operation, leading to a plethora of working groups composed of civil servants seeking to prevent an influx of economically impoverished migrants into the Community. Mediated by the Coordinators Group, working groups were set up at the Rhodes European Council in 1990 to co-ordinate 'compensatory measures' being developed by the police, customs and immigration agencies, against the background of the abolishment of internal border controls from 1993 on.[5] Efforts to enhance co-operation between the member states were directed both at the efficiency of border controls to create a 'hard outer shell', and at the development of internal controls to prevent unwanted transnational mobility of immigrants and asylum seekers within the territory of the EC. This was a response to the perceived common need to restrict - after the opening of Europe's internal borders - the *free entry and free movement of those who did not belong there.*
The restrictions of immigration at the national as well as on the European level can be interpreted as an expression of a changed treatment of immigration, including asylum, by western European governments. Its features can be described as a deterrence of migrants and asylum seekers. Measures include the imposition of visas, detention, severe restrictions on access to employment,

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[4] See for example G. Ford, *Fascist Europe: the Rise of Racism and Xenophobia*, London, Pluto, 1993.

[5] Cf. Coordinators Group, 'Palma Document: Free Movement of Persons. A Report to the European Council by the Coordinators Group', June 1988, Section III.A, 1989, reprinted in House of Lords: *1992: Border Control of People*, 22nd Report of the Select Committee on the European Communities with Evidence, Session 1988-89, 7 November 1988, London, HMSO, Appendix 5, pp. 55-63. TREVI, 'TREVI Programme of Action: Relating to the Reinforcement of Borders', June, Dublin, 1990, reprinted in House of Lords: *Practical Police Cooperation in the European Community*, 7th Report of the Home Affairs Committee, House of Commons, Session 1989-90, HC 363-I, Vol. I, 20 July 1990, London, HMSO, p. i-iiv.

welfare benefits and on the right of residence.[6] This culture of deterrence is in crucial points different from earlier and much stronger nation state determined models of treatment of immigrants which could be reduced to the common denominator of a culture of discrimination. Without denying the racist and xenophobic ideas and practices of immigration control, the aspect of an above all state-institutional discrimination of immigrants for the purpose of economic exploitation was a central feature of the treatment of immigrants until the 1980s. A further characteristic of that period was that in west European states immigration was primarily perceived as a social-political problem. Questions of national identity, cultural or ethnic homogeneity of the society played only a secondary role in the politics of the governments and main political parties. Here, a radical change has taken place since the early 1980s. Without losing its social dimension, the immigration question has been perceived more and more in terms of national, cultural and ethnic identity. Immigration has come to be understood as a synonym for threat to society and state, while at the same time governments had to accept that the settlement of migrant workers and their families was permanent. The rise of racist movements and ideologies, the reactivation of cultural enemy images and xenophobic resentments, and the politicisation of immigration policy as one of the major domestic and EU issues cannot be understood without this change.

Immigration policy today is not only marked by calculations of economic exploitation but is also dictated by national homogeneity and cultural identity, notions to which most European governments feel bound. This development is not new but builds upon structurally existing racism in west European societies which have developed regimes of discrimination after 1945, and adapted them to the present requirements. Yet, this is not only about a sealing off as effectively as possible and the defence of privileges. The motive of enforcing a 'European model' of immigration is also of an ideological nature - it is about the formation of a relatively homogenous European identity, which is an essential

[6] Loescher points out that western governments themselves refer to their restrictive policies towards potential refugees as 'humane deterrence', G. Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis*, Oxford, Oxford University Press, 1993, p. 8.

prerequisite as an 'ideological glue'. It serves as legitimacy for the functioning and the holding together of a common economic area of about 300 million people. In the process of European integration, the expression 'Fortress Europe' came to describe first economic policies. From the late 1980s on, 'Fortress Europe' has been used to refer to immigration and asylum policies of the European Community. While abolishing internal border controls and introducing freedom of movement for EU citizens, the EU member governments have been erecting high barriers of entry for non-EU nationals and have denied rights to free movement and unrestricted labour market access to those non-EU nationals already present.

1.2. THE FOCUS AND FORMAT OF THE RESEARCH

Since the 1970s, official channels of immigration into western Europe have been gradually closed off. Yet migrants continued to arrive during a period of economic recession and rising unemployment. Especially the rise in asylum seekers has led to demands for stricter entry controls. Electoral success of right-wing parties in several European countries, high unemployment and curbs in welfare benefits have contributed to an anti-immigration rhetoric and increased pressures on west European governments to show that they can control migration flows. Yet, there are more and more voices who are sceptical about the possibility of individual nation states to intervene successfully in migration processes and argue that states' capacity to control immigration is declining.[7] The flows of migrants like the flows of capital seem to have become

[7] See for example the contributions in W. A. Cornelius et al. (eds.), *Controlling Migration. A Global Perspective*, Stanford, Stanford University Press, 1994; and in M. Baldwin-Edwards et al. (eds.), *The Politics of Immigration in Western Europe*, Ilford, Frank Cass, 1994; J. F. Hollifield, *Immigrants, Markets and States*, Cambridge/Ma., Harvard University Press, 1992; D. Jacobsen, *Rights Across Borders: Immigration and the Decline of Citizenship*, Baltimore, John Hopkins University Press, 1995; S. Sassen, *Losing Control? Sovereignty in an Age of Globalization*, New York, Columbia University Press, 1996b. For the contrary argument see R. Brubaker, 'Are immigration control efforts really failing?' in Cornelius et al (eds.), 1994, op. cit., pp. 227-31; G. Freeman, 'Can liberal states control unwanted migration?', *AAPS*, 1994, No. 534, pp. 17-30.

so global in character that the ability of individual states to intervene and regulate successfully migration processes has been questioned. This development has led to the assumption that a wider frame of reference at the supra-national level such as the European Union should offer better possibilities for an effective regulation. There is much debate on the scope of such a European immigration policy. A common assumption seems to be that there is a common European immigration experience that demands a common European policy response. Since the mid-1980s, the member states of the European Union have moved gradually towards common policies concerning the entry of non-EC nationals. The general assumption in the literature seems to be the idea that the governments of the EU member states are striving to formulate a common European immigration policy. The debate on the scope of a European immigration policy is dominated by a formal approach focusing on legal rights, procedural issues and the possibilities of approximation of national legislation.[8] Other publications examine the state of co-operation in immigration matters at the European Union level but treat the European Union as a separate unit from the member states.[9] Edited collections of articles on single countries are popular but lack an agreement on the topics to discuss or a common conceptual framework for analysis. The country studies provide interesting discussions of specific national problems but not a comparative analysis.[10]

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[8] For a predominantly legal approach see for example J. Monar et al. (eds.), The *Third Pillar of the European Union. Cooperation in the Fields of Justice and Home Affairs*, Brussels, European Interuniversity Press, 1994; C. Klos, *Rahmenbedingungen und Gestaltungsmöglichkeiten der europäischen Migrationspolitik*, Konstanz, Hartung-Gorre Verlag, 1998; G. D. Korella et al. (eds.), *Towards a European Immigration Policy*, Brussels, European Interuniversity Press, 1993; H. Meijers et al. (eds.), *Schengen: Internationalisation of central chapters of the law on aliens, refugees, security and the police*, Kluwer, Amsterdam, 1991. For a general overview see W. Weidenfeld (ed.), *Das europäische Einwanderungskonzept. Strategien und Optionen für Europa*, Gütersloh, Verlag Bertelsmann Stiftung, 1994.

[9] For example S. Collinson, *Europe and International Migration*, London, RIIA,1993b; D. Schnapper, *L'Europe des immigrés*, Paris, Francois Bourin, 1992.

[10] Recent examples are H. Heinelt (ed.), *Zuwanderungspolitik in Europa*, Opladen, Leske + Budrich, 1994; D. Cesarani et al. (eds.), *Citizenship, Nationality and Migration in Europe*, London, Routledge, 1996; F. Heckmann et al. (eds.), *Migration Policies: A Comparative Study*,

There are two key issues in the debate on immigration on the European level. Firstly, determining an appropriate policy response to the movement of migrants across national boundaries is one of the key questions on which European governments are experiencing difficulties, and secondly, the regulation of immigration of non-EU nationals, i.e. the question of admission policy. With regard to the first issue, the interpretation of the free movement provisions of the Single European Act (SEA) is the current focus of attention as member states, particularly the United Kingdom (UK), resist pressure to implement the SEA. The crucial question is if free movement should also apply to non-EU nationals who are long-terms residents in the European Union. This raises questions of social and political rights for non-EU immigrants and attempts to find a common EU position on the status of third country nationals resident within the Union.

This study focuses on the latter question of admission policy towards non-EU nationals. The aim of the study is to establish to what extent a cross-national convergence of policies has occurred and to analyse the development of common policies on immigration at the EU level. The analysis is based on a comparative study of immigration policy in the Federal Republic of Germany (hereafter called Germany), France and the United Kingdom focusing on admission policy and labour migration. The special interest of the study lies in the relationship between the national policy-formulation processes and decision-making on the European Union level. The analysis is not designed to address the consequences of implementation of certain policies for third country nationals resident in the EU nor will the study deal with integration policy. The EU member states have adopted several measures regarding the admission of non-EU nationals, while reasserting at the same time the national prerogative to determine integration policies and nationality laws. Common social and political rights of immigrants across the EU are provided only

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Stuttgart, Enke, 1995; H. Fassmann et al. (eds.), *European Migration in the late Twentieth Century*, Aldershot, Edgar Elgar, 1994; see also F. Bovenkerk et. al., 'Comparative studies of migration and exclusion on the grounds of "race" and ethnic background in western Europe: a critical appraisal', *International Migration Review*, Vol. 25, No. 2, 1991, pp. 375-91.

"accidentally" by provisions in Cooperation and Association Agreements.[11] Otherwise, policies regarding the cultural, social and political integration of immigrants are outside the EU's competence, and are decided entirely by the receiving state.

The focus of the study is on labour migration. While migration and flight are interrelated and need to be brought together in comprehensive policy conceptions,[12] both also need to remain distinguishable, particularly since there are time and again attempts in public discussions to play one problem off against the other problem. In this complex field the priorities of a study must be clear. The humanitarian field of flight and asylum will not be addressed, not because it is considered to be less important, but because it is too important to intermingle these questions with different questions of immigration legislation and immigration policy. [13] In the case of refugee issues help in the form of international protection and political asylum, questions of international human rights and the fight against the causes of flight are at stake. In issues concerning immigration, however, the interests and problems of the receiving countries are addressed; the right of entry is subject to the discretion of sovereign states. According to Jonas Widgren the distinction is a question of where state sovereignty is applicable:

> "Asylum is a question of enlightened humanitarian action: providing protection to vulnerable human beings who are in grave and urgent need of safety. Immigration policies by contrast, are largely based on

[11] M. Baldwin-Edwards, 'The socio-political rights of migrants in the European Community', in G. Room (ed.), *Towards a European Welfare State?*, Bristol, SAUS Publications, 1991, pp. 189-215.

[12] Cf. J. Widgren, 'Europe and international migration in the future: the necessity for merging migration, refugee and development policies', in G. Loescher et al. (eds.), *Refugees and International Relations*, Oxford, Oxford University Press, 1989, pp. 49-61.

[13] Although it is recognised that refugee policy cannot be purely humanitarian or a-political. Migration and asylum policies have always been part of other policies. Cf. A. Zolberg, et. al., (eds.), *Escape from Violence*, Oxford, Oxford University Press, 1989.

principles relating to state utilitarianism. Immigration policies are part of state sovereignty."[14]

Nonetheless, an analysis of current attempts to formulate a common immigration policy on the European Union level must recognise the widespread blurring of immigration and asylum issues in policy making and public debate. As Layton-Henry points out, despite the theoretical distinction "European governments tend to view their asylum policy as part and parcel of their immigration policy."[15]

This study deals mainly with the period since the mid-1980s when decisions on immigration and asylum policy were taken on both the national and European level which created the framework and conditions for the future development after the establishment of the European Union in 1993. Moves to establish free movement and to create an internal market were accompanied by high expectations of developing joint policies on immigration control, the status of political refugees, and the position of foreign residents. Against this background the main questions guiding this study are as follows:

i) What are the similarities and dissimilarities in the immigration histories and policies of the three case countries - Germany, France and the UK?
ii) Given the similarities and dissimilarities, is a common European policy on immigration is possible?
iii) and to analyse the relationship between national policies on immigration and European co-operation in immigration matters.

The study follows two objectives. The first objective is to analyse the different starting points, interests, objectives and expectations of Germany, France and the UK with regard to a common European policy on immigration. This includes the impact of national characteristics, such as concept of citizenship, geopolitical situation and origin of the main immigrant groups, on the

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[14] J. Widgren, 'Movements of refugees and asylum seekers: recent trends in a comparative perspective', in OECD, *The Changing Course of International Migration*, Strasbourg, OECD, 1993, p. 89.

[15] Z. Layton- Henry, *The Politics of Immigration*, Oxford, Blackwell, 1992, p. 230.

formulation of admission policies. The second objective is to identify the parameters of the national positions which determine the national interests and objectives of the case study countries with regard to a European immigration policy. Academics as well as politicians have often claimed that national sovereignty remains a crucial impediment to developing a common policy response, yet this relationship is more complex than the usually quoted fear of loss of sovereignty.[16] On the basis of the specificities of the different national factors determining the case study countries positions regarding a common European immigration policy, the respective governments' room for manoeuvre within the European 'bargaining' can be examined.

Organisation of the study

From this twofold objective results the following structure of the study. Chapter two establishes the conceptual framework of the case studies' analysis examining some of the issues surrounding the study of immigration policy. First, the concept of migration systems is introduced as a framework to analyse migration processes and the mechanisms binding receiving and sending countries. The purpose is to explore and understand the constraints the relationship between emigration and immigration countries puts on the latter's immigration policy formulation. Secondly, the changing role of the nation state and its implications for the formulation of national immigration policies are addressed. While states continue to play the most important role in immigration policy formulation and implementation, the role of the state itself has changed due to the growth of a global economic system and other transnational processes.[17] Finally, the chapter turns to the concept of citizenship as it forms the ideological base for state intervention in the movement of people. Norms underlying the concept of citizenship determine specific national characteristics of immigration policy formulation. Crucial for immigration policy is the question of who belongs to the people and how does a nation state define its people. The boundaries of a polity, that is, of membership in a political community, are

[16] See for example A. Gimbal, 'Die Zuwanderungspolitik der Europäischen Union: Interessen - Hintergründe - Perspektiven', in W. Weidenfeld (ed.), 1994, op.cit., pp. 76-104.

[17] Cf. footnote 7.

defined by citizenship status. For the purpose of this study, this section focuses on the discussion about legal access to citizenship and citizenship as a legal form of membership in a polity and less on the ideational and cultural factors that are closely linked to formal legal definitions of citizenship.

Chapters three and four analyse the political-institutional systems dealing with immigrants in the case study countries with regard to two main processes of demarcation: external demarcation and internal demarcation. The first refers to border controls whereby people, grouped according to administrative categories, are admitted or refused entry. This includes controls carried out in other states, such as visa applications. The latter refers to internally defined processes. This includes, for example, the granting of different forms of residence and work permits, acquisition of citizenship, access to welfare or voting rights. Both processes are found in all three case study countries but in historically specific forms. As the focus of this research is on the interaction between national policies and European developments, the political control of immigration as an example of external demarcation processes will be analysed in chapter three. The focus is on labour migration and on patterns of admission which have been developed for different immigrant groups with regard to time of immigration and origin, and shows how an ethnic hierarchy of migrants has been established. Through immigration and nationality laws, governments and administrations have ranked different groups of a population into hierarchies of assimibility in which some groups are regarded as more likely to fit into a society than others.[18]

As an example of a demarcation process which is specifically internally defined, it seems strategic to concentrate on one dimension of legal status which constitutes an act of inclusion within the nation state and the European Union. For the purpose of this study, as explained above, the policies of citizenship acquisition offer a useful example of an internal demarcation process. This is

[18] This process of ranking people on the basis of allegedly fixed characteristics has been described by Miles as 'racialisation' whereby people are structured by the signification of cultural and biological attributes in such a way as to define different social collectivities as 'race' collectivities; R. Miles, *Racism*, London, Routledge,1989.

analysed in chapter four. Chapter four looks at the process of political inclusion, expressed in the national citizenship laws, which implies decisions about who is a member of the state and who is not. There is a wealth of studies on the respective countries' immigration and citizenship policies, and it is not the aim of this study to add anything to the voluminous literature but to provide a comparative base to understand the different (ideological) starting points of the case study countries that allows the questions formulated above to be answered. The case study chapters conclude with an appraisal of the similarities and dissimilarities of the immigration experiences, the national policies on immigration and citizenship and assesses the implications for common European policies.

Chapter five turns to the policy developments on the European level. The analysis focuses on the development within the European Union and does not include other regional or international organisations such as the Council of Europe or the United Nations Organisation and their respective evolving regulations on migrant workers. The chapter starts with an overview of intergovernmental decision-making and examines the specific institutional structure of Justice and Home Affairs cooperation. The following analysis of policy developments on the European Union level mirrors the framework of the case study countries. The first part looks at the external demarcation process and examines the legislative instruments which have been adopted or are under discussion with regard to admission and immigration control. The second part examines the concept of European Union citizenship, created by the Maastricht Treaty in 1992, as an example of an internal demarcation process on the EU level. The study concludes with an assessment of the extent of coordination and nature of co-operation on the EU level and considers the obstacles in developing common policies on immigration within the European Union. Answering the questions formulated above, the final chapter looks at the prospects for and limits of concerted action in migration matters in the EU.

1.3. THE CASE STUDY COUNTRIES

The countries examined in this study are central to post-war European history and are affected in different ways by current developments. It is believed that these case study countries have enough features in common for a comparison to be meaningful and they have been chosen for three main reasons.[19]

Firstly, they have all experienced large-scale post-war immigration and exemplify a range of policy responses. Significant immigration to France and the UK begun during the second half of the nineteenth century, unlike the case of Germany where - with the exception of workers from Prussian occupied Polish territories in the industrialising *Ruhrgebiet* after German unification in 1878 - labour migration did not begin until the 1950s with the recruitment of workers from southern Europe, North Africa and Turkey. The case study countries provide examples of a *guestworker* system as well as policies aiming at permanent settlement. Migration movements have included substantial post-colonial immigration as well as recruitment of foreign labour through explicit state programmes and consequent family immigration, and migration of a more spontaneous nature. All three countries have also accepted a large number of refugees.

Secondly, each of these cases is distinguished historically. Citizenship in Germany has been understood in terms of an exclusive, ethnic sense of nationality. This predominance of ethnic nationality, however, is now being challenged. Developments over the last forty years, connected in part with immigration and European integration, have forced a reconsideration of the ethnic basis of citizenship. France developed after the revolution in 1789 the concept of an active citizenship that was inclusive of all who accepted the

[19] For a discussion of the criteria for selection of case studies in cross-national comparisons see for example Bovenkerk et. al., 1991, op. cit.; Hammar, 1985, op. cit.; P. Ireland, *The Policy Challenge of Ethnic Diversity: Immigrant Politics in France and Switzerland*, Cambridge/Ma., Harvard University Press, 1994; Z. Layton-Henry, 'The challenge of political rights', in ibid. (ed.), *The Political Rights of Migrant Workers in Western Europe*, London, Sage, 1990, pp. 1-26.

principles of the Revolution and French culture. French citizenship has been available to the children of immigrants on the condition that they are educated in and identify with French culture. Yet the presence of immigrants who demand the right to be different, against the universalism of the rights of citizens, has led to a reassessment of the nexus between citizenship and nationality. The UK has a rather weak notion of citizenship and a confused definition of nationality. Throughout the history of immigration into the UK, nationality and citizenship laws have been used to define what form of immigration was wanted.

Thirdly, these three countries reflect different degrees of commitment to the development of the European Union, with the German government playing a very active role, while the UK government, at the other extreme, remains very reluctant to commit itself to the 'European project'. Whereas political debate on further European integration, in particular on the development of a political Union, centres on issues of sovereignty in the UK, it is over threats to culture and sovereignty in France, whilst Germany is most worried about economic issues such as a common currency. Typically, however, the division exists in pairs, with the UK often the odd one out. For example, the legal-constitutional tradition of common law and parliamentary sovereignty in the UK is perceived to contrast with continental Roman law and notions of 'the people'. Likewise, the UK, a reluctant and late member to the European Community, by its abstention from the Social Chapter or the Schengen Agreement was at odds with the Franco-German axis. Both France and Germany support a deepening of the EU and a strengthening of its decision making capacity while the UK wants a more flexible Europe and mutual recognition rather than a Brussels-mandated harmonisation of policies. Interestingly, however, these pairs can switch. Both France and the UK want a stronger role for the national parliaments rather than an extension of the powers of the European Parliament as favoured by Germany. The UK government has been particularly adamant that matters of immigration and asylum were for national governments and favoured a intergovernmental approach to policy issues in justice and home affairs. But as one of the larger members of the EU its role in a further

developing political Union cannot be ignored, even if - or because – the UK has often been portrayed as the political misfit in European politics.

1.4. THE QUESTION OF TERMINOLOGY

A variety of terms is used in this study and it is necessary to define these in advance. *Third-country nationals* are nationals of countries which are not member states of the EU or the European Economic Area Agreement (EEA).[20] As used here, *immigrant* refers only to third-country nationals, not to citizens of EU member states (EU citizens) or EEA member states moving within the EU. The terms *foreign workers* and *immigrant workers* are used interchangeably to describe this labour force. *Foreigners, foreign population* and *immigrant* or *immigrant population* refer to these workers and their families in general.

The term *migrant worker* refers to third country nationals who come to the EU for a relatively short period for the purpose of work. These persons usually do not intend to bring their families whereas immigrant refers to third country nationals who have settled in the EU or come with the intention of settlement to the EU. The official definition of an immigrant, used in statistics for example, is of a person who moves to a country and resides there for longer than a specified period, usually from three to six months or there may be no defined period as in Germany.[21] Obviously, a migrant worker may decide to settle in a EU country and become an immigrant, and an immigrant may prefer to leave the EU after a relatively short stay. This distinction is important as admission rules differ with regard to the purpose and length of stay. In the case of third country nationals, a three month stay is the cut off point beyond which a residence permit is required in all EU member states. Migrant workers are also

[20] Membership of the EU and EEA is now almost identical. Only Switzerland, Liechtenstein, Norway and Iceland are not also EU member states but have concluded Association Agreements with the EU. The right of free movement of persons applies to these countries identically.

[21] On the problems of definitions and the difficulties this poses for cross-national comparison of data see J. Salt et. al., *Europe's International Migrants*, London, HMSO, 1994, pp. 6-8.

described as seasonal workers, contract workers etc. These terms refer to the legal status of their work, the rights the workers are entitled to, and emphasises the temporary nature of their work. Another group of migrants is highly skilled professionals and managers. They often work for international corporations or organisations and their move is organised by the employer. Socially, they constitute an invisible group of immigrants in western Europe. Most countries place few barriers on their entry and they can relatively easily acquire work permits which are usually a precondition to long term settlement in the receiving country. This group is excluded from the considerations in this study as special provisions apply to them. Business migration of third country nationals is partly dealt with under the EC Treaty and partly in agreements between the Community and third countries.

Many have pointed out the importance of clarifying the meaning of key terms in any study, and particularly in comparative research.[22] There are several terms used in the literature describing the immigrant population in Europe which require clarification as their use and significance may vary from one speaker to another. Apparent similar terms may conceal differences in meaning and cannot be translated directly. Hammar stresses that "terminology ... influences the way in which immigration policy is conceived and understood in each country." He points out that there is an "obvious relation between a country's immigration policy and terminology", the language used to name the categories of people excluded from full civil and political rights in the receiving state.[23] The different terms used to describe immigrants and their descendants convey political statements about their status in the receiving society. This can be understood as part of a process of inclusion and exclusion which is connected to ideas about who are the objects of certain policies.[24]

Particular terms also have a specific meaning in each case study countries. Saggar shows how the term immigrant has been used more and more

[22] Cf. Bovenkerk et. al., 1991, op. cit.; Hammar, 1985, op. cit.; Layton-Henry, 1990, op. cit., pp. 5-10.

[23] Hammar, 1985, op. cit., pp. 12-13.

[24] Bovenkerk et. al., 1991, op. cit., p. 384; Layton-Henry, 1990, op. cit.

restrictively to apply particularly to black people in Britain.[25] *Immigrant* refers to people from the Commonwealth who settled in Britain but not to Irish immigrants. In Germany, immigrants have been mainly seen as labour force, as foreign workers (*ausländische Arbeitnehmer*). The use of the term immigrant (*Einwanderer*) is controversial in Germany as its use would imply the acceptance of foreign workers, euphemistically called 'guest workers' (*Gastarbeiter*), as permanent immigrants as opposed to a temporary labour force. *Gastarbeiter* denotes usually Turkish workers. *Gastarbeiter* as well as the use of *Mitbürger* (co-citizen), often used by politicians or in news reports to express sympathy with the immigrant population, is perceived as negative and patronising by the immigrant population. This expression *Mitbürger* glosses over the fact that foreigners are discriminated against because of an inferior legal status. The official insistence that Germany is not a country of immigration is also reflected in the use of the terms foreigner's policy (*Ausländerpolitik*) and foreigner's law (*Ausländerrecht*) rather than immigration policy or immigration law. None of the two main parties, the conservative or the social-democratic party, use the term *Einwanderung* but the term *Zuwanderung*.[26] This denial attitude has become almost absurd with the creation of the term *Zuwanderungsfolgengesetz* (law on the implications of immigration) instead of the simple term integration. On the European Union level, the German government insisted until the early 1990s on the use of the term *Arbeitsrestzuwanderung* instead of immigration. Similar in France, the terms *immigré* and *étranger* are used according to particular discourses. Grillo explains that in the early 1980s *immigré* (immigrant) was seen as a more progressive term used by the left rather than the term *étranger* (foreigner) which has been used by the right to emphasise the alienness of the immigrant population and people of immigrant origin, often without distinguishing their legal status. The word *étranger* is stronger than the English foreigner. It refers to concepts of nationality and culture, and to ideas of the insider/outsider.[27]

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[25] S. Saggar, *Race and Politics in Britain*, London, Harvester Wheatsheaf, 1992.

[26] *Einwanderung* implies settlement, *Zuwanderung* a temporary stay.

[27] R. Grillo, *Ideologies and Institutions in Urban France: the Representation of Immigrants*, Cambridge, Cambridge University Press, 1985, pp. 72-3.

Immigré signifies Maghrebiens, especially from Algeria,[28] and is sometimes used to refer to settled migrant workers and their families even if they have French citizenship. Similar, descendants of immigrants in Germany are frequently called 'immigrants' in public debate whereas this would be unacceptable in the UK. The use of the term 'ethnic minority' in the manner accepted in the UK or the United States, however, is not meaningful in Germany and France and is not considered acceptable as a concept in public policy debates.

The specific use of the term immigrant in different countries is also a reflection of perceptions of the receiving society regarding different immigrant groups. Likewise, the definition of immigrants or illegal immigrants is closely connected to the process of defining a nation and its legitimate members. In all European countries the term illegal immigrant is widely used in public debate and in official documents. The terms *illegal immigrants* or *illegal immigration* are also used in this study as it describes the actual situation these migrants, sometimes also referred to in the literature as undocumented or irregular immigrants, find themselves in. Illegal immigration is defined as illegal entrance characterised by giving false reasons of entry, producing forged documents or forged visa with the aim of deceiving the immigration authorities in order to gain entry. However, 'illegality' is an ambiguous concept. It is the result of a certain policy and legislation but also the product of demand for particular work in western Europe. Illegality is not a condition, and may be changed according to the interests of those who define it. Notions of somebody 'being illegal' have a criminal connotation and the term illegal immigrant is often used to discriminate against immigrants. In most west European states illegal entry alone constitutes a criminal offence. In particular, 'illegal' immigrants are often linked in public debate to (organised) crime and drug trafficking.

Moves to tighten immigration and asylum laws in western Europe have led to increased efforts to define more precisely who qualifies for asylum status and who is to be deported as an illegal immigrant while critics have argued that

[28] Ibid., pp. 68-9.

governments and courts have narrowed down the refugee definition specified in the Geneva Convention.[29] The distinction between political refugees and principally economically motivated migrants has increasingly been at the core of west European governments' policy formulation towards immigration and asylum. The terms illegal immigrant, refugee, economic refugee and asylum seeker are often used interchangeably in public debate. The term economic refugee is used to denote those who, according to government authorities, are not genuine refugees and are suspected of seeking residence in western Europe primarily to find work. In that way, "a seemingly respectable bureaucratic term is used to conceal a negative political-legal judgement: They are only 'fake' refugees."[30] This brief excursion demonstrates that critical care need to be applied to inquire whether analysts and politicians are referring to the same thing in different countries when they speak of immigration.

1.5. METHODOLOGICAL ISSUES AND RESEARCH STRATEGY

The objective of this study is to cast light on a key area of public policy in the European Union - the admission of third country immigrants - by, firstly, comparing and contrasting the political responses of three members states: Germany, France and the UK. Secondly, by examining more closely the formulation of common policies in immigration matters on the EU level. Comparable problems related to immigration have been treated in each country in public policy and political debate in distinct, nationally specific ways. Yet, there is also a developing transnational debate on immigration policy on the level of the EU that cuts across national discussions. To recapitulate the basic research question: the aim of the study is to establish to what extent a cross-national convergence of policies has occurred and to analyse the development of common policies on immigration at the EU level. Is there a development towards a common immigration policy in the European Union?

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[29] Cf. G. Loescher, *Beyond Charity*, Oxford University Press, Oxford, 1993, pp. 80-1.

[30] T. Van Dijk, 'Analyzing racism through discourse analysis: some methodological reflections', in J. H. Stanfield et. al. (eds.), *Race and Ethnicity in Research Methods*, London, Sage, 1993, pp. 92-134, here p. 107.

An important assumption in the literature seems to be the idea that the governments of the EU member states are striving to develop a common European immigration policy. As shown above, much of the literature utilises a single conceptual lens, focusing on case studies without considering the broader context. It is believed that a comparative approach offers considerable advantages for the study of policy developments and outcomes on the EU level. Rather than attempt a comprehensive review of the policies of the case study countries, the aim is to identify, analyse and interpret similarities and dissimilarities in the immigration histories and policies of the case study countries. A cross-national comparative research strategy offers a more comprehensive picture than would have been extracted by using a single national case study to assess the extent of cooperation on immigration matters on the European Union level.

Reliance on a single national case to explain policy-making and policy outcomes in the EU can be misleading. Single national case studies pose difficulties to deduce particularities or to generalise because member states exhibit too many different features. In order to analyse country-specific patterns of immigration policy distinctive features and influential factors need to be identified. The so-called *historical-contextual research strategy* looks at the particularities of case studies and at the same time also attempts to determine common factors across the case studies.[31] Such an approach implies two things: on the one hand, the move away from mono-causal explanations; on the other hand, the need to emphasise the importance of overlapping factors. The different and interdependent factors in the field of immigration policy are quite evident and underline how appropriate it is to move away from the expectation of mono-causal explanations of country-specific policy patterns. However, because of the context dependence, some of the identified factors might only be effective in one case study and not others. Moreover, the identified factors might have a very different impact on the individual case study

[31] D. E. Ashford (ed.), *History and Context in Comparative Public Policy*, Pittsburgh/London, University of Pittsburgh Press, 1992.

country. The question that arises is: what are the factors or variables with which different patterns of national immigration policy could be explained?

Four major theories have dominated the field of cross national research on public policy in democratic states.[32] These approaches to comparative political science have been developed in different phases but, in practice, they are linked. One approach focuses attention on the impact of socio-economic variables on state activity. This theory understands state activity above all as a reaction to structural social and economic developments and has been mainly applied in studies on public expenditure and social policy research. The weakness of this approach is its disregard of political institutions, actors and the relative autonomy of politics with regard to society and economy. The weaknesses of this approach become particularly evident in comparisons of countries with similar levels of socio-economic development.[33]

Second, the theory of party rule which predicts a causal relationship between the substance of public policy and the party composition of governments. According to the 'parties-do-matter-view', large differences in policy output are expected from left, right or centre parties. In contrast to the theory of socio-economic determination, the room for manoeuvre is seen as a variable which depends on political conditions such as constitutional constraints.

A third approach explains variations in public policy results mainly in relation to differences in power resources available to organised interests. Neo-corporatist arrangements between the state, trade unions and employer organisations have been used in international comparative policy research as a relevant

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[32] M. G. Schmidt, 'Theorien in der international vergleichenden Staatstätigkeitsforschung', in A. Héritier (ed.), *Policy-Analyse. Kritik und Neuorientierung*, Opladen, Westdeutscher Verlag, 1993, pp. 371-93; see also A. J. Heidenheimer, et. al., *Comparative Public Policy. The Politics of Social Choice in America, Europe and Japan*, 3rd ed. New York, 1990, who distinguish between six approaches: socio-economic theories, cultural value approach, party government framework, political class struggle model, neo-corporatist framework, and institutional-political process perspective.

[33] Schmidt, 1993, op. cit., pp. 372-74.

explanatory variable and have led to attempts to distinguish between different national models of interest intermediation.[34] However, it is debatable if the generalised classifications of national interest intermediation in the neo-corporatist discussion take equally into account the structures in all policy fields.[35] So both Germany and the UK are ranked in the category 'medium corporatism', but immigration and integration policies of these countries differ considerably.[36] Furthermore, a generally similar modus of interest intermediation can lead to very different outcomes because it is the result of different kinds of social arguments.[37]

According to a fourth school of thought, differences in political and economic institutions are largely responsible for policy differences. Schmidt defines institutional conditions as

> "... interpersonale, formelle oder informelle Regeln und Normen, die historisch-kulturell kontingent und variabel sind und aufgrund ihrer Dringlichkeit nur in begrenztem Masse zur Disposition zweckrationalem Handelns stehen."[38]

The political-institutional theory takes into account actors, interpretations of situations and emphasises the cultural variability and contingency of institutional arrangements. It includes informal and formal rules and norms as well as institutions and actors in politics and economy. In order to explain specific national patterns of immigration policy, an analysis of political-institutional structures of political processes is helpful. Such structures can be distinguished as causal factors according to their institutional stability, i.e.

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[34] Cf. G. Lehmbruch, 'Introduction. Neo-corporatism in comparative perspective', in ibid., et al. (eds.), *Patterns of Corporatist Policy-Making*, London, Sage, 1982, pp. 1-28; F. Lehner, 'The political economy of distributive conflict', in ibid., et al. (eds.), *Managing Mixed Economies*, Berlin/New York., 1988, pp. 54-96.

[35] Cf. Lehner, 1988, op. cit.

[36] Lehmbruch, 1982, op. cit., p. 19

[37] Cf. G. Therborn, 'Does corporatism really matter? The economic crisis and issues of political theory', *Journal of Public Policy*, 1987, No. 3, pp. 259-84.

[38] Schmidt, 1993, op. cit., pp. 378-79.

according to the possibility to change them through political decisions. According to Kiser and Ostrom, the 'world of action' can be subdivided into different levels. First, the *constitutional choice level*; second, the *collective choice level*; and third the *operational level*, i.e. the individual level.[39] *Constitutional decisions* are not only reflected in the material-political area of constitutional regulations, but also in the signing of international conventions (which may regulate legal rights for immigrants, e.g. right to family reunification). Furthermore, they affect elemental structures of welfare state benefits, which might constitute a reference point for integration assistance to immigrants. Political-institutional structures defined by constitutional decisions can only be revised in highly controversial decision processes. This has become very clear regarding decisions about access to full political rights for third country nationals in the EU or the changes in the asylum law and the privileged status of *Aussiedler* in Germany. The situation is different concerning political-institutional structures which fall within the sphere of *collective decisions*. Here, solutions are sought within the framework of given arrangements. These solutions can range from an adaptation policy to partial reforms of, for example, immigration possibilities and integration regulations, where the fundamental structures remain unchanged but still extensive changes are carried out. Political-institutional structures that push policy processes in certain directions depend in fact on constitutional decisions, and reflect socially embedded political orientations which have been established and handed down in a historical process.

Changes of political orientations embedded in society require a long erosion process. They represent cultural values which influence decisively the perception of problems and the choice of options of action. Thus, they can constitute a constant with regard to the course of political decisions. Cultural values are embedded in legal and administrative institutions and the latter in turn buttress these cultural values, making them so enduring. They determine political-institutional structures - in the form of constitutional provisions as well

[39] L. Kiser, E. Ostrom, 'The three worlds of action', in E. Ostrom (ed.), *Strategies of Political Inquiry*, London, Sage, 1982, pp. 179-222.

as regulations and instruments of socio-political systems - to an extent that these structures are fairly resistant to radical changes. However, political-institutional structures are in principle changeable, as well as cultural structures are always subject to new interpretations and re-formulation because of changes in context and political disputes. Change in political culture arises out of instability between central values and structures. These changes on the macro-level have important implications on the level of both the individual and the local community. Demands for change can be perceived as threats to the individual's sense of identity and can be experienced as a moment of political uncertainty, if not crisis. The introduction of new policies needs a wide public consent to be carried out successfully but the public consent lies with the ideas and language established to found the policy consensus of the past and this is not going to change overnight.

Table 1.1. below illustrates the policy and country specific variables which may have an impact on national policy formulation with regard to European policy-making. In order to identify those elements that are central determinants of policy making, how and where they are reflected in the EU context are the crucial issues. Although the model in Table 1.1. has been designed with deregulatory policies in mind (i.e. Community policies) it provides a useful framework to help grasp the various factors relevant in policy making in justice and home affairs (i.e. inter-governmental decision making) and to identify similarities and differences of state activity in a cross national comparison. The classification of determinants can only have an analytical character. In practice, they often interact closely. Depending on the policy field studied, the determinants are of different importance. Thus, this study does not analyse systematically each of the factors but within the analytical framework for the case study countries (chapters three and four) and an analysis of EU policy-making in immigration matters (chapter five) identifies the relevant factors determining national approaches to immigration policy on the EU level. The determinants are distinguished between relatively stable and relatively changeable ones. Again, this can depend to a certain extent on the policy field. Particularly at the EU level the policy dimension plays an important role.

Table 1.1.: Parameters of national policy making

	Relatively stable	relatively changeable
	I	II
country specific	i) socio-economic stage of development ii) political culture, normative basis, attitude towards European integration iii) institutional framework iv) political style: manner of formulation and implementation of policies	i) economic situation (inflation, unemployment rate etc.) ii) current opinions and beliefs iii) government iv) current relations between actors
	III	IV
policy specific	i) dominant 'doctrine' ii) fundamental patterns of relations between actors (state and non-state) iii) degree of interwoveness with other policies	i) experience ii) current conflict and consensus processes in the policy field iii) current 'problem pressure' in the policy field

source: adapted from Feick et al.[40]

Determinants in the first quadrant relate to country specific characteristics and are relatively stable. Hence, they have a formative influence on the interest of the member states and their position in negotiations. They are rooted in nationally specific legal and political institutions which have been outcomes of historical processes and which have been persistent over time. They are essential in questions of institutional reform of the EU or the transfer of competencies from the national to the EU level, in particular in sensitive areas such as justice and home affairs. The national policy style reflects often deeply rooted values of a society. For example, the way in which decisions or solutions are reached touches issues of transparency, informality, or willingness to compromise. Policy style affects speed and participation or influencing possibilities for interest groups.

The third quadrant helps to identify relatively stable factors within a policy field which determine policies and behaviour of states. These policy specific factors

[40] J. Feick, W. Jann, '"Nations matter" – Vom Eklektizismus zur Integration in der vergleichenden Policy-Forschung?', in M. Schmidt (ed.), *Staatstätigkeit. International und historisch vergleichende Analysen*, Opladen, Westdeutscher Verlag, 1988, pp. 196-220, here p. 199.

can interrelate with the country specific factors of the first quadrant, to either accentuate certain determinants or keep them in the background. In supra-national cooperation, the consequences can be either more or less compatible national preconditions with regard to the policy specific factors compared to the more general values of the country specific factors. Ideas are influential and decisive in the political decision making process precisely when interest-based agreement cannot be achieved, and can be observed most evidently when policy change has been rapid and transformative.[41] For example, cooperation in a policy field characterised by fundamental differences in national approaches can lead to conflicts and obstructions on the supra-national level which can also spread into other policy fields.

The second and fourth quadrants deal with factors which are relatively changeable and reflect a current status or situation. Thus, government changes in western Europe in the early 1980s, changes in the economic situation and a sufficiently large 'problem pressure' led to several successful initiatives within the EC.[42] Similarly, the events of 1989/90 in Europe gave the 1991 Intergovernmental Conference on political union, and in particular cooperation in justice and home affairs, new momentum.

Research Strategy

The primary data sources have been documentary research and interviews. The documentation consists of national parliamentary committee reports, national legislation, reports by the European Parliament's Committee on Civil Liberties and Internal Affairs and publications by the Commission of the European Communities. Many of the Council documents (K4-Committee, Steering Groups, Working Groups) as well as documents on the pre-Maastricht era (before 1993) have been obtained and made available to the public by *Statewatch*; some documents have been given to the researcher during

[41] See contributions in Héritier, 1993, op. cit., chapter two: Argumente, Ideen und Überzeugungen als Faktoren des Policy-Prozesses, pp. 97-196.

[42] The successful initiation of the internal market project is analysed in detail in D. Cameron, 'The 1992 initiative: causes and consequences', in A. M. Sbragia (ed.), *Euro-Politics, Institutions and Policymaking in the 'New' European Community*, Washington, 1992, pp. 23-74.

interviews. Documents on the pre-Maastricht era have been particularly difficult to obtain as they have not been published in the *Official Journal of the European Communities*.[43]

The first stage of the research involved a review of documentary sources which included academic writing and official publications. These sources were used to construct an initial overview of policy developments and the main issues at stake in the case study countries and the EU. This literature and documentary review provided the basis for interview questions and also helped to identify potential interview partners. In addition, during the visits to Germany and France, further documentary sources were collected. The key categories of potential interviewees were senior civil servants in the relevant national ministries who are involved in European matters and are (or have been) seconded to the K4-Committee or to the steering group on migration. Due to the nature of the third pillar and its rather secretive decision-making procedure it has been more difficult than anticipated to carry out interviews. In particular in the UK, civil servants were very reluctant to give interviews. In Germany, it is part of the civil servant's function to respond to requests for information. Thus, it was relatively easy to make appointments but more than once a junior civil servant replaced at the very last minute the original more senior interview partner. In France, contacts to the Interior Ministry had to be established through a slow piece-meal approach through academics and members of non-governmental organisations.[44] In general, official interviews with civil servants did not provide new insights but were used to confirm information and to gather documents. The policy area is technical and secretive, in particular as migration issues are linked to the fight against international crime. New freedoms for EU citizens – such as unhindered travel within the EU – brought up issues of internal control and police cooperation. Writing on recent and contemporary

[43] A good source is T. Bunyan (ed.), *Key Texts on Justice and Home Affairs in the European Union, Vol.1 (1976-1993). From Trevi to Maastricht*, London, Statewatch, 1997.

[44] A representative of the French non-governmental organisation *MRAP* explained during an interview in June 1997 the difficulties even for NGOs to get appointments with the relevant French authorities. Neither were NGOs included in the consultations on the latest reform of the immigration law in 1997.

issues in this policy field involves problems of access to information and confidentiality.

Initially, the research strategy placed greater emphasis on interviews with civil servants in the relevant ministries. It was hoped to obtain information from the interviews on the inter-relationship between the national and EU level: how does European cooperation impact on national immigration policy formulation and how do different national policies influence EU decision-making? However, interviews proved not to be sufficient for this purpose. The main reason is that national administrative structures of cooperation in justice and home affairs are different from the structures developed for EC polices (first pillar).[45] The formulation of government positions occurs in intra- and inter-ministerial processes. National civil servants from the relevant ministries, usually the Interior Ministry, discuss the more technical issues in the working groups in Brussels. The political decisions are taken by the Coordinating Committee on Justice and Home Affairs (K4-Committee) and the Permanent Representatives (COREPER). These two bodies have a filtering role for Council meetings. COREPER members - senior national civil servants and the ambassadors to the EU agree most or all of the disputed points at their meetings. Meetings of COREPER II at the ambassador level prepare the JHA Council meetings.[46] Minutes of the meetings are not available to the public or to national parliaments nor are diverging positions of the member states revealed.

Justice and home affairs falls in all three case study countries under the *domain réservé* of the executive. EU affairs (including the Common Security and Foreign Policy) are not subject to the same parliamentary procedures as Community affairs. A report by the House of Lords Select Committee on the European Communities stated succinctly that the key to parliamentary control

[45] See for Community policies (first pillar) Y. Mény et al. (eds.), *Adjusting to Europe. The Impact of the European Union on National Institutions and Policies*, London, Routledge, 1996; S. Mazey et al. (eds.), *Policy Making, European Integration and the Role of Interest Groups*, London, Routledge, 1996.

[46] The working structure of justice and home affairs and the role of the EU institutions is explained in chapter 5.2.

is "the right to obtain the right documents, and to obtain them in time to influence the outcome".[47] Yet the legal basis for the duty of the government to inform the parliament during European negotiations does not include the area of intergovernmental cooperation.[48] The *European Community (Amendment) Act 1993* did not incorporate Title VI (justice and home affairs) into national law. The Home Office agreed that the parliament should receive the text of any Convention or proposal which will require primary legislation in the UK as well the drafts of common positions. However, there is no formal power of parliamentary reserve as for Community legislation. The then Home Office Minister Michael Howard stated clearly that "the procedures are nor identical because the decision making processes are not identical."[49] Drafts of conventions and common positions are accompanied by *explanatory memoranda* from the government, yet these documents are not publicly available.

The situation in France is similar. Since 1992 the parliament has a right to be informed by the government about Community legislation which will later require primary legislation.[50] A *réserve d'examen parlementaire* - comparable to the parliamentary reserve in the UK - was only introduced in 1994. However, this information and consultation procedure does not apply to justice and home affairs. Since 1990, the government has to submit to the EU committee of the French parliament all draft directives, regulations and other acts, including those falling under Title VI Maastricht Treaty (Justice and Home Affairs) though reports have only dealt with the implementation of the Schengen Agreement. The government has the option to withhold JHA documents for public security reasons, such as, for example, measures against terrorism or drug trafficking. There is no obligation for the French government to take into account the opinion of the EU Committee.

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[47] Select Committee on the European Communities (SCEC), *House of Lords Scrutiny of the Inter-Governmental Pillars of the European Union*, HL (1992-93) 124, 1993, p. 22.

[48] The most important one is the House of Commons Standing Order No.127.

[49] SCEC, 1993, op. cit., Evidence, p. 5.

[50] Loi constitutionelle no. 92-554 du 25 juin 1992, *JORF*, Lois et Décrets, 26 juin 1992, p. 8406.

The European affairs committee (*Europaausschuss*) of the German Bundestag is informed regularly by the Interior Ministry about meetings of the Justice and Home Affairs Council, including informal meetings. In addition, the Interior Ministry has offered informal briefings for Members of the Parliament on developments concerning 'Schengen' and more complex questions have been answered later in writing. The aim of the meetings was not to involve Members of Parliaments in decision making but solely for the purpose of information.[51] The documents of the *Europaausschuss* as well as the (informal) correspondence between the Interior Ministry and members of the *Europaausschuss* are confidential and cannot be quoted.

This excluded a second possible source of information, the interaction between national parliaments and governments with regard to immigration policy formulation on the EU level. National parliaments have not played a role in the formulation of measures adopted under title VI of the Maastricht Treaty. Only in the case of conventions are national parliaments asked by the governments to ratify these. However, the national parliaments cannot make amendments to conventions but can only accept them or refuse ratification.

More informal information was gathered from national and Brussels-based non-governmental organisations, Members of the European Parliament, in particular of the Civil Liberties and Internal Affairs Committee, and the political analysis benefited from these interviews. Interviews with non-state actors provided background information but trade unions, churches, immigrants organisations and other non-governmental organisations concerned with migrant issues which do play to varying degrees a role on the national level have no input whatsoever on their respective national governments' negotiation positions on the EU level. Interviews took place mainly in the respondents' place of work. Discussions ranged from around 30 minutes to over two hours, the most usual being around one to one and a half hours. Every interviewee was approached with a prepared list of questions according to the person's function. The list of

[51] Interviews with the members of the *Europaausschuss* of the Socialdemocratic Party and the Green Party, Bonn, June 1996 and June 1998.

questions was only to guide the interview and questioning was conducted open-ended. The substantive questions were suggested initially by the documentary analysis but increasingly by findings from previous interviews and initial analysis of the case studies. Often, the interview situation changed to an information exchange when an interviewee expressed interest in the other case study countries or in European developments. For the reasons outlined above and the necessary modifications in the main research questions, the interviews rarely show in the text but they nevertheless gave a feel for the country-specific immigration problems. The interviews provided a comprehensive body of information on the formal structures and policy formulation processes of the case study countries as well as a better understanding of the prevalent discourses.

European cooperation in justice and home affairs has not been well documented by the quality press. A number of articles in specialist journals has covered the period from circa 1985, the establishment of the *Ad Hoc Group on Immigration*, to 1990/91, the first intergovernmental conference, mainly retrospectively. The focus of early research on European integration has been on economic issues. Books on justice and home affairs have been appearing since the early 1990s but have tended to come from a legal perspective or to focus on police cooperation.[52] A number of non-governmental organisations monitor developments in immigration and asylum policy in Europe: the monthly *Migration News* (University of California)[53] and *Migration News Sheet* (Brussels), and the bi-monthly publications *Statewatch* (London)[54] and *Fortress Europe* (Lund/Sweden). A continuing chronological overview on legislative instruments adopted in the European Union is provided in the *European*

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[52] Cf. footnote 8; H. Busch, Grenzenlose Polizei? Neue Grenzen und polizeiliche Zusammenarbeit in Europa, Westfälisches Dampfboot, 1995; M. Anderson et al. (eds.), *Policing Across National Boundaries*, London, Pinter, 1994; *Bürgerrechte und Polizei/CILIP*, Europäisierung von Polizei und Innerer Sicherheit – eine Bibliographie, December 1991; B. Hebenton et al., *Policing Europe: Cooperation, Conflict and Control*, Basingstoke, Macmillan, 1995.

[53] Available from migrant@prmal.ucdavis.edu

[54] A searchable database is on http://www.poptel.org.uk/statewatch/

Bulletin, published by the European Commission. The publication *European Access* lists relevant articles from academic journals and the quality press with regard to the European Union politics. These have all been used extensively among other sources to up-date the research without detailed referencing.

Development and analysis of national immigration policy in the three case study countries is well covered in many publications. The material found on the inter-relationship between national and EU policy-making, however, is either in the area of Community policy making, i.e. deregulative policies, or in the intergovernmental field where it tends to focus on Common Foreign and Security Policy, on institutional arrangements, the role of national parliaments and issues such as the democratic deficit and accountability in the EU. With regard to policy-making in justice and home affairs, mainly police cooperation has been the subject of academic research. In immigration and asylum affairs, Germany has attracted most attention from researchers, in particular German policy vis-à-vis its east European neighbours or its use of the EU level for domestic purposes in asylum policy,[55] whereas there has been relatively little on France or the UK.

[55] The German government argued that a change of the national law on asylum, requiring a constitutional amendment, was necessary in order to fulfil its obligations under European agreements. Interestingly, constitutional amendments in France in 1993 required to change the asylum law attracted very little attention outside France. Cf. P. Henson et al., 'Endeavours to export a migration crisis: policy making and Europeanisation in the German migration dilemma', *German Politics*, 1995, Vol. 4, No. 3, pp. 128-44; B. Marshall, *British and German Refugee Policies in the European Context*, London, RIIA, 1996; Busch; 1995, op. cit., chapter three.

CHAPTER TWO

MIGRATION, CITIZENSHIP AND GLOBALISATION

2.1. INTRODUCTION

An important body of literature has developed arguing to what extent immigration constitutes a challenge to the nation state.[56] Immigration is not a separate process from other economic or political processes of globalisation but interactive and different processes may well reinforce each other.[57] The debates regarding the impact of processes of globalisation, and in particular of immigration, on the nation state and with it associated concepts centre around three main issues: the declining relevance of sovereignty; of citizenship; and the ability of states to control immigration. The state's prerogative to control entry into its territory and to regulate those permitted to enter raises important issues concerning the definitions of political community and national identity. The issue of states' ability to control their borders is frequently linked to the issue of sovereignty.[58] This takes on a significant (symbolic) importance in an era of increasing global interdependence and moves within the European Union to abolish internal border controls.

The perceived challenge that immigration brings to the existing political and social order is highlighted by Zolberg who notes that international migration is generally

[56] See for example the contributions in C. Joppke (ed.), *Challenge to the Nation State*, Oxford, Clarendon Press, 1998; Y. Soysal, *Limits to Citizenship*, Chicago, The University of Chicago Press, 1994; D. Jacobsen, *Rights Across Borders*, Baltimore, John Hopkins University Press, 1995; R. Bauböck, *Transnational Citizenship*, Aldershot, Edward Elgar, 1994; S. Sassen, *Losing Control? Sovereignty in an Age of Globalization*, New York, Columbia University Press, 1996b.

[57] In its strongest sense, globalisation goes beyond internationalisation. It implies a higher level of organisation where national entities are dissolving so that all major economic and political decisions will ultimately be transmitted globally. However, the term is generally used more loosely. Almost all international processes are considered as aspects of globalisation.

seen to constitute "a deviance from the prevailing norm of social organization at the world level" and that this norm is reflected

> "not only in the popular conception of a world consisting of reified countries considered as nearly natural entities, but also in the conceptual apparatus common to all the social sciences, predicated on a model of society as a territorially-based, self-reproducing cultural and social system, whose human population is assumed...to renew itself endogenously over an indefinite period. ...
> [T]he perennial intrusion of racial and ethnic considerations in the determination of immigration policies is not merely the consequence of prejudice ... but the effect of systematic mechanisms whereby societies seek to preserve their boundaries in a world populated by others, some of whom are deemed particularly threatening in the light of prevailing cultural orientations."[59]

The purpose of this chapter is to consider the theoretical background to the analysis of the case study countries' political response to immigration or, in other words, the restructuring of their internal and external boundaries. It reviews some of the implications of processes of globalisation for migration movements and national immigration policies. 'Post' something has become the catchword of modern times: post-modernity, post-liberalism, post-sovereignty, post-national, to name a few. The terms post-national and post-sovereignty are meant to express the idea that democracy is possible beyond the nation state. This expresses the idea that the link implied by nationalism between cultural integration and political integration can be prised open. These issues are addressed in 2.3. and 2.4. Section 2.3. turns to the changing role of the nation state in the light of processes of globalisation and addresses the implications for immigration policy. The final section 2.4. is concerned with the

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[58] Cf. O. Waever et al. (eds.), *Identity, Migration and the New Security Agenda in Europe*, London, Pinter, 1993.

[59] A. Zolberg, 'Contemporary Transnational Migrations in Historical Perspective: Patterns and Dilemmas', in M. Kritz (ed.): *U.S. Immigration and Refugee Policy*, Lexington, D.C. Heath, 1983; here p. 6 and p. 11.

theoretical discussion about access to citizenship and the demarcation function of citizenship.

But first, this chapter starts with a brief review of the development of migration theory. Here, the concept of migration systems is a useful tool to understand the mechanisms binding immigration countries to emigration countries. Thus, particularities and similarities of migration processes and the constraints the relationship between emigration and immigration countries puts on the latter's immigration policy formulation can be explored and compared.

2.2. THEORISING INTERNATIONAL MIGRATION

International migration has become a major component of global change.[60] Much of the literature on international migration has focused on global economic conditions as the key determinants of population movements or classical refugees who flee persecution because of their nationality, religious affiliation or political opinion.[61] International labour migration is usually linked to poverty and economic underdevelopment in countries of origin and considerable discrepancies in standards of livings and wages between sending and receiving countries.[62] International labour migration is also assisted in developing

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[60] The literature on international migration is extensive. Excellent overviews have been provided by S. Castles, et al., *The Age of Migration. International Population Movements in the Modern World*, Basingstoke, Macmillan, 1993; and R. Cohen (ed.), *The Cambridge Survey of World Migration*, Cambridge, Cambridge University Press, 1995.

[61] For an overview of the history of flight movements see A. Zolberg et al., *Escape from Violence. Conflict and the Refugee Crisis in the Developing World*, Oxford, Oxford University Press, 1989.

[62] Recent studies point also to ecological developments as a source of migration movements. Major disturbances such as deforestation, desertification and floods occur more frequently in less developed regions of the world. These environmental disasters are to a large extent the result of economic exploitation of natural resources which in turn is expedited by uneven global economic development. According to Papdemetriou and Martin, severe migration pressure has also been created by a combination of "economic mismanagement and ecological deterioration". D. G. Papdemetriou et al., 'Labor migration and development: research and

countries by significant population growth with the subsequent increase in economically active persons and chronic underemployment. This is in contrast to the relative demographic stability in western Europe. The combination of poverty and underemployment compels people to leave their home, in many instances unwillingly and without their families, to seek a better and more dignified existence elsewhere.

A recent overview of contemporary theories of international migration by Massey and his colleagues usefully distinguishes between theoretical frameworks that explain, on the one hand, the initiation of migration movements, and on the other hand, the perpetuation of movements.[63]

Theoretical frameworks explaining the *initiation* of migration include

- neo-classical economic models, emphasising the importance of geographical differences in the supply of, and demand for, labour in explaining why individuals move;
- the 'new economics' approach which views the migration decision as a household decision whereby migration may be regarded as one element in its survival strategy;
- the dual market theory whereby migration is caused by a chronic need for foreign labour in the industrialised countries;
- the world systems theory, emphasising the importance of global economic integration and arguing that international migration follows the economic and political organisation of a global market.

Perpetuation of migration movements is explained by

- the existence of networks and chain migration, the effects of which are to reduce the costs and risks for migrants, and thus encourage movement;

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policy issues', in ibid. (eds.), *The Unsettled Relationship: Labor Migration and Economic Development*, New York, Greenwood Press, 1991, p. 3.

[63] D. S. Massey, et. al., 'Theories of international migration: a review and appraisal', *Population and Development Review*, 1993, Vol. 19, No. 3, pp. 431-67.

- the development of institutions, such as agencies and lawyers, which facilitate the migration process either legally or illegally;
- the process of cumulative causation where each act of migration alters the social context within which subsequent migration decisions are made;
- the concept of a systems approach in which migration flows develop a degree of stability and structure over space.

Theoretical frameworks to explain international migration have been characterised by microeconomic models of individual choice. According to these models migration interactions are explained on the basis of economic differences between countries. Migration is caused by complementary push and pull factors; the former is characterised by poor living conditions in the country of origin and the latter by the availability of well-paid work (in relative terms) in the country of employment. The decision-making process of the individual migrant is explained in terms of push and pull factors whereby the cost-benefit analysis of migrating is made by the migrant. [64] The push-pull framework assumes that people migrate from underdeveloped regions of the world to developed regions and that migration achieves in the long term a certain economic equilibrium between regions of labour supply and demand. Yet these economic models explain migration interactions between regions and states only partially and have been criticised as too simplistic and ahistorical.[65]

Moreover, receiving countries have not only stopped labour recruitment but try actively to keep immigrants out through legal obstacles and strict border controls. The ideal-type model of a global, unrestricted migration market is so far removed from reality that it has hardly any explanatory potential. Colonialism and the global economic dominance of the western industrialised countries have led to the formation of specific migration flows. Restrictive admission policies condition the

[64] Cf. G. De Jong et al., (eds.), *Migration Decision Making. Multidisciplinary Approaches to Microlevel Studies in Developed and Developing Countries*, New York, 1981.

[65] Cf. Castles et al., 1993, op. cit., pp. 19-20; A. Richmond, *Global Apartheid. Refugees, Racism and the New World Order*, Oxford, Oxford University Press, 1994, Chapter Three 'Reactive and Proactive Migration'; S. Sassen, *The Mobility of Labour and Capital*, Cambridge, Cambridge University Press, 1988.

character and volume of international migration today. The imposition of quantitative and qualitative limits on entry creates different categories of migrants who ultimately occupy different positions in the socio-economic structure of the receiving societies - temporary workers, legal immigrants, students, refugees etc. - and destination countries adjust their policies in response to changing internal and external conditions.

In order to explain the selectivity of migration flows, 'push-pull' models have to be complemented by historical aspects. An important factor for the explanation of migration flows are relations between sending and receiving countries as a consequence of colonialism, trade and investment, political influence and cultural ties. For many 'push-pull' models the state is a disturbance for the 'normal' functioning of the migration market. Yet, as the analysis of migration flows shows, the state is central to explaining contemporary migration for theoretical as well as practical purposes. Border controls reduce the applicability of economic models by impeding the free circulation of labour. Admission policies are a major factor influencing the composition and volume of international migration. The admission policies of developed countries are today highly selective. Indeed,

> "it is precisely the control which states exercise over borders that defines international migration as a distinctive social process."[66]

Recognition of the complexity of international migration led to a shift in the focus of theories of international migration from an emphasis on differences between countries to explanations based on differences between individuals and groups. Migration theory has moved away from the perception of migration as a process of individual decision-making by migrants, predominantly based on economic considerations. Greater attention is paid to the context within which migration decisions are made and to efforts to identify the specific social and economic dimension that define this context. Thinking has moved away from mechanical models of wage and employment differentials to more dynamic formulations that look at the interplay between micro-level decisions

[66] A. Zolberg, 'The next waves: migration theories for a changing world', *International Migration Review*, 1989, Vol. 23, No. 3, pp. 403-30, here p. 405.

and macro-level processes. Dissatisfaction with the push-pull framework and neo-economic explanations for migration have given rise to new theoretical perspectives.[67]

The complexity of migration flows has led to the migration process being viewed in system terms.[68] The systems approach is based

> "on the conceptualization of a migration system as a network of countries linked by migration interactions whose dynamics are largely shaped by the functioning of a variety of networks linking migration actors at different levels of aggregation."[69]

The systems approach is based on a number of premises.[70] The first is that a migration system creates a 'unified space' through the interaction between nation states as either sending or receiving countries. Secondly, migration is only one of many processes linking sending and receiving countries that already have historical, cultural, political or economic linkages. Thirdly, over time, the processes linking areas of origin and destination modify conditions in both countries. The fourth premise is that the state plays a crucial role in determining international migration flows either through explicit policies or by fostering economic and political links with other states that may indirectly lead to migration. The final premise is that it is necessary to identify the mechanisms through which the macro-level processes that influence migration flows are translated into a migration decision.

One of the mechanisms identified is the operation of migrant networks of families and friends which have been established over time and which link villages or cities to labour markets in the receiving countries.[71] Martin notes that

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[67] See Massey et al., 1993, op. cit.

[68] Cf. M. Kritz et al. (eds.), *International Migration Systems: A Global Approach*, Oxford, Clarendon Press, 1992.

[69] M. Kritz et al., 'Global interaction: migration systems, processes and policies', in ibid. et al. (eds.), 1992, op. cit., pp. 1-18, here p.15.

[70] Cf. Kritz et al. (eds.), 1992, op. cit.

[71] Kritz et al., 1992, op. cit., p. 1.

"(m)ost labor migration has its genesis in recruitment by employers or their agents from receiving nations. This recruitment creates information networks and economic dependencies that soon become institutionalized, a process which yields the aphorism that migration streams are much easier to start than to stop."[72]

Migration assisted by such networks eventually becomes self-perpetuating and its character changes to accommodate the entry of groups which were not intended to arrive according to the immigration policies of the receiving countries. Papademetriou observes:

"The occasional dissonance between the needs of a receiving country's labour market and the behavior of migration flows usually means that the receiving society, but not the capital itself, has lost control over the migration process and that ethnic networks have developed and matured to the point where they are able to frustrate the host society's official immigration policies and in effect act as independent migration forces."[73]

Important in this context are social or ethnic networks, informal relations such as family and friends, and formal institutions like recruitment agreements, or advice and community centres in the receiving country.[74] These networks as well as improvements in communication systems make it much easier for potential migrants to obtain information. Mass communication systems, making people more aware of living standards in developed receiving countries, play a part in encouraging them to emigrate. Modern modes of travel assist in migrations which would not have been possible some decades earlier and have contributed to the growth in international labour migration.

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[72] P. L. Martin, 'Labour migration: theory and reality', in Papdemetriou et al. (eds.), 1991, op. cit., p. 28.

[73] D. G. Papdemetriou, 'Migration and development: the unsettled relationship', in Papdemetriou et al. (eds.), 1991, op. cit., p. 213.

[74] Cf. J. L. Goodman, 'Information, uncertainty, and the microeconomic model of migration decision making', in De Jong et al., (eds.), 1981, op. cit., pp. 130-48; S. Akerman, 'Towards an understanding of emigrational processes', in W. H. McNeil et al. (eds.), *Human Migration. Patterns and Policies*, London, Bloomington, 1978, pp. 301-06.

A second set of factors which stimulates migration is to be found in the settled immigrant populations. The legal position of immigrants, the demographic structure of the immigrant population and the extent of integration into the receiving society play an important part in the continuation of immigration. Settled immigrants, for example, have acquired rights to family reunification which for some groups, such as Turks in Germany, have been the principal reasons for immigration since the recruitment halt in 1974.

A third set of factors is to be found in the receiving countries. In the long term, the scale of immigration is also determined by the demographic structure and the economic development of the receiving society. An ageing population and a relative decline of the economically active part of the population in west European societies has led to debates about the need for foreign labour immigration.[75] In the short term, the fact that most of the immigrants and their descendants in western Europe have found a foothold in the labour market, despite the disproportionate level of unemployment to be found among certain immigrant groups, has led to calls for a more restrictive immigration policy. However, some sections of the economy, such as agriculture, harbour a need for temporary cheap labour which is not available from the current labour reserve under the present circumstances. Groenendijk and Hampfink show in a comparative study of the EU member states how the demand for a flexible, cheap labour force combined with strict immigration rules leads to the exploitation of asylum seekers and encourages illegal immigration with the silent understanding of the governments.[76] The demand for migrant labour does not need to be an official policy of the receiving country and may exist despite strict immigration controls. This invariably results in an increase in the entry of illegal immigrants. However,

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[75] See on the debate in Germany F. Kulluk, 'The political discourse on quota immigration in Germany', *New Community*, 1996, Vol. 22, No. 2, pp. 301-20; S. Spencer (ed.), *Immigration as an Economic Asset. The German Experience*, London. IPPR/Trentham Books, 1994a; D. Cohn-Bendit et. al., *Heimat Babylon. Das Wagnis der multikulturellen Demokratie;* Hamburg; Hoffmann & Campe, 1992. On the debate in Britain see S. Spencer (ed.), *Strangers and Citizens: A Positive Approach to Migrants and Refugees*; London, Rivers Oram Press, 1994b.

[76] K. Groenendijk et al., *Temporary Employment of Migrants in Europe*, Reeksrecht Samenleuing, University of Nijmwegen, 1995.

governments may do little to prevent immigration if the workers fill a need and can be expelled if and when that need no longer exists.[77]

The existence of migration ties is a necessary but not a sufficient condition for the existence of a migration system. System specification requires other links, especially those arising from the functioning of the global economy and from international relations. Zlotnik suggests general principles to guide the identification of migration systems. These include, among others, that the system should include interacting nation states with stable migration flows, including temporary worker and tourists. A migration system may be determined from the perspective of either receiving or sending countries. Countries within a geographically defined region would form a migration system if they had similar patterns of migration, comparable levels of development and a high degree of cultural affinity. For receiving countries to be part of one system, they would have to show some degree of coherence in their policies used to control migration and be linked by strong economic and political ties.[78]

A migration system approach implies that the direction of migration movements is seldom arbitrary. Intermediary structures which link the sending country to the receiving country are important factors. Sassen distinguishes four kind of relationships which determine the direction of migration flows:[79]

- "past and current neo- or quasi-colonial bonds";
- "the range of economic linkages brought about by economic internationalization";
- "the organized recruitment of workers, either directly in the framework of a government supported initiative by employers, or through kinship and family networks"; and
- "ethnic linkages established between communities of origin and destinations".

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[77] See Papdemetriou et al., 1991, op. cit., p. 14.

[78] H. Zlotnik, 'Empirical identification of international migration systems', in Kritz et al. (eds), 1992, op. cit., pp. 19-40.

[79] S. Sassen, *Transnational Economies and National Migration Policies*, IMES, University of Amsterdam, 1996c, p. 4.

These elements are characteristics for the creation of migration systems. These links often only create the conditions which make migration possible: knowledge of the destination country, financial and practical support before departure and after arrival by already settled immigrants in the receiving country. The organised labour migration into western Europe in the 1950s and 1960s is an example of policy-driven cooperation to facilitate selected immigration, and to create intermediary structures for that purpose such as recruitment agreements and agencies. One consequence of historically evolved links between sending and receiving countries, and the intermediary structures which operate between them, is the manifestation of certain migration patterns.

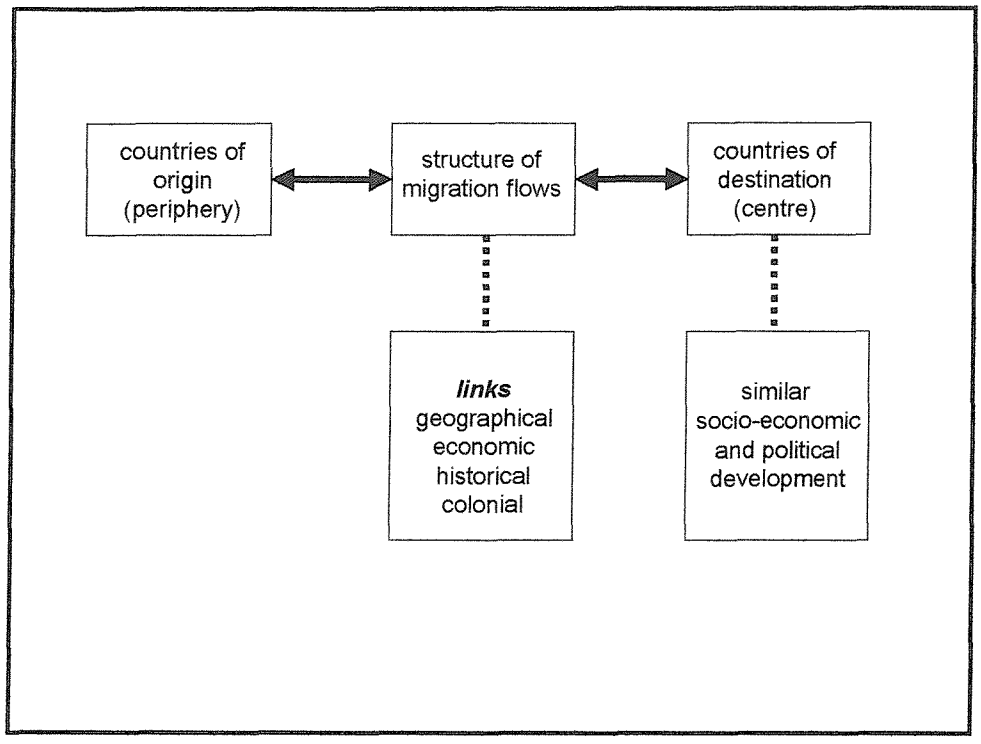
Emphasising the linkage between population movements and other global processes, Zolberg's analysis of population movements assumes the existence of an international political and social system. Within that system population movements are influenced by different subsystems.[80] In his analysis Zolberg refers to Wallerstein's world system theory which interprets the global economic integration as the central mainspring of development and underdevelopment. The world is understood as a global system where national borders do not impede transnational resource flows. Responding to the needs of international capitalism, the world can be conceived in terms of an international division of labour with centre, semi-peripheral, and peripheral nations according to the type of labour performed.[81] The economic interdependence of states has been described in the centre-periphery model as flows of capital from the centre to the peripheries and of flows of labour from the periphery to the centre. But the world system is heterogeneous and includes many centres and peripheries and this leads to the formation of migration systems with different dynamics. Migration systems interact with different demarcation structures and processes of which nation states and ethnic groups are some of the most prominent. The concept of migration systems, illustrated in Table 2.1., enables us to relate migration movements to political, economic and social processes on the global,

[80] A. Zolberg, 'International Migration Policies in a Changing World System', in R. Adams et al. (eds.), *Human Migration. Patterns and Policies*, Bloomington, Indiana University Press, 1978, pp. 241-86.

[81] I. Wallerstein, *The Modern World System*, Vol. 1, New York, Academic Press, 1974.

regional and nation state level. This helps us to explore historical particularities and similarities of migration flows and the experience of individual states or regions.

Figure 2.1. Structure of a Migration System



An analysis in terms of migration systems and of individualistic push and pull models are not necessarily mutually exclusive. The arguments used to create a link between the micro- and the macro level are important. One cannot just shift from one level to the other:

> "At the individual level, most people move voluntarily for much the same reasons: they learn of opportunities to improve their standard of living elsewhere and, in the absence of restraints, they move. At a larger level, however, such movements always involve social groups and political entities. An understanding of migration therefore needs to look at the interface of micro-and macro-sociological processes, and in the process it must consider cultural and moral issues."[82]

[82] O. Patterson, 'The emerging West Atlantic system', in W. Alonso (ed.), *Population in an Interacting World*, Cambridge/Ma., Harvard University Press, 1987, pp. 227-62, here p. 227.

Of crucial importance for the analysis of migration structures is, on the one hand, to understand the complex structure of migration flows, and, on the other hand, the power and legitimisation processes in the receiving countries.[83] Destination countries use their political power to influence migration flows while internal power differences between different immigrant or ethnic groups, in particular with regard to the majority group, determine the situation of immigrants. This includes different access opportunities to the labour market or education systems as well as the possibility to mobilise resources in the political or cultural field. Equally important is the question to what extent the use of this power, of immigration control, is legitimate.[84] Democratic governments face the problem that their control measures are often subject to international human rights law while at the same time closure discourses are reinforced which seek to legitimise exclusion tendencies through danger scenarios such as increased crime or notions of *Überfremdung*.

2.3. DIALECTICS OF IMMIGRATION CONTROL AND GLOBALISATION

The territorial (nation) state system emerged in Europe after the Treaty of Westphalia in 1648. The principle of the territorial state implied by state sovereignty constituted a revolution of the patchwork political communities in medieval Europe.[85] During the subsequent centuries the internal and external order of the nation state was laid out and clarified in Europe. The state came to be regarded as the political unit with a legitimate monopoly of official violence and the capacity to carry out acts of governance exclusively within its own territory and control of its territory.[86] The principle of state sovereignty did not appear out of thin air. It is a historically specific answer to questions about the

[83] Cf. A. Richmond, *Immigration and Ethnic Conflict*, London, Macmillan,1988.

[84] Cf. J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt/M., Suhrkamp, 1994, pp. 651-60.

[85] Cf. J. Ruggie, 'Territoriality and beyond: problematising modernity in international relations', *International Organisation*, 1993, Vol. 47, No. 1, pp. 139-54.

[86] See M. Weber, *Wirtschaft und Gesellschaft*, Tübingen, J. C. B. Mohr, 1985 (original edition 1922).

nature of political community. It draws a demarcation line between life inside and life outside a political community. The principle of internal state sovereignty offered a resolution to questions about what a political community can be, given the priority of citizenship and particularity over universalist claims to a common human identity. External sovereignty refers to the unitary nature of the state and prescribes that no state is subject to the power or control of any external actor.[87] Though the nature of identity and the boundaries separating the inside from the outside are inherently unstable.[88] Patterns of inclusion and exclusion which distinguish the internal from the external are the result of numerous processes, including processes identified with the concept of the state, fixing unity on the inside and shifting diversity and disruptions to the outside.[89]

From the late eighteenth century onwards, Europe as a whole underwent a transition from indirect rule via intermediaries to centralised direct rule with some representation for the ruled.[90] Internally, states imposed national languages, national education systems, military service and more. Externally, they began to control movement across frontiers, to use customs as instruments of economic policy and to treat foreigners as distinctive kinds of people deserving limited rights and close surveillance. Life thus homogenised within states and formed distinctive characteristics, and became more differentiated among states.[91] The discourse of sovereignty also took place internally, relating to the nature of power and rule. Sovereignty shifted from the person of the monarch to the territory of the state and state institutions, and the loyalty of citizens became something that had to be won by modern states

[87] Walker has written extensively about the problematic nature of the inside/outside dichotomy. See R. Walker, *Inside/Outside: International Relations as Political Theory*, Cambridge, Cambridge University Press, 1993, p. 62-3.

[88] Walker, 1993, op. cit., chapter eight.

[89] Walker, 1993, op. cit., pp. 179-80.

[90] C. Tilly, *Coercion, Capital and European States. AD 990-1992*, Oxford, Blackwell, 1990, p. 110.

[91] Tilly, 1990, op. cit., p. 19.

(legitimacy). The idea of state sovereignty was the source of the idea of the impersonal, abstract state power which controls a consolidated territory.[92]

The later stages of European state formation produced the phenomenon of national (political) identification with the state.[93] In this sense, national consciousness consists of an identification of the individual with a culture that is protected by the state.[94] The French revolutionary constitution of 1791 politicised the cultural concept of nationality. Citizenship became defined by nationality as well as by legal, political and social rights, thereby giving an individual a political identity in terms of the nation. The main point is that political identity became nationalised in modern Europe to the point where nationality equalled identity (including democratic political identity). It became a social construction that is taken for granted, a cognitive frame in which to threaten nationality is to threaten identity. The identification of citizenship with residence in a particular territorial space became the central fact of political identity. The structural function of nationalism can be summarised as providing the ideological glue that defines a relatively circumscribed group of people and unified them around a set of shared institutions and practices that were informed by a common culture and were sovereign over a well defined territory.[95] Hobsbawm argues that attempts to formulate objective criteria for defining a nation have failed because they have tried to fit historically novel, continuously changing and far from universal entities into a framework of permanence and universality. Even criteria such as ethnicity, language and common history are "fuzzy, shifting and ambiguous."[96]

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[92] D. Held, *Democracy and the Global Order*, Oxford, Polity Press, 1995, p. 46.

[93] Cf. Tilly, 1990, op. cit., p. 116.

[94] See in general E. Gellner, *Nations and Nationalism*, Oxford, Blackwell, 1983.

[95] Gellner, 1983, op. cit., p. 43.

[96] E. Hobsbawm, *Nations and Nationalism since 1780, Cambridge*, Cambridge University Press, 1992, pp. 5-6.

The concept of the nation state has been challenged by processes of globalisation and this has raised important questions of governance.[97] Processes of globalisation are not new but were initiated in the fifteenth century when European powers began to colonise large parts of the world. However, there are a number of factors in the late twentieth century which have accelerated the degree of economic and cultural interdependence on a global scale. These include rapid developments in transportation systems, in information and communication technologies, the elimination of barriers to trade and investment, and the growing importance of multinational companies. This development is manifested in a number of areas, not least in that financial markets have become independent from national boundaries and national authorities. Following the free movement of capital, economic activities in general are now less restricted by national boundaries: markets are becoming global and many companies no longer limit production to a single country. Developments in information technology, communication and transport have evidently contributed to this, and similarly, have assisted internationalisation in cultural and political matters. Capital, goods and production, but also information, ideas and cultural products transcend borders and geographical distances with more and more ease. The increasing movement of people, partly as a result of more sophisticated and relatively cheap means of transport, seems to be an inevitable result or even part of this globalisation process.

Since the development of a global economy, population movements have become part of a global social transformation and evolution process. This is the case especially since 'labour was set free' by the industrial revolution. Mass migration followed direct economic pressures of industrialisation. In the period from 1820 to 1930, about 55 million Europeans emigrated to and settled in North-America. Those who had become 'dispensable' during the process of industrialisation, were perceived as social costs, which could be externalised through partly forced, partly voluntary emigration. This had a positive effect for

[97] Cf. J. N. Rosenau, 'Governance, order and change in world politics', in ibid. et al. (eds.), *Governance without Government. Order and Change in World Politics*, Cambridge, Cambridge University Press, 1992, pp. 1-29.

the sending countries in two ways: on the one hand, they eliminated a social and economic burden; on the other hand, the colonies meant new markets for exports and investment possibilities for capital. It needs to be remembered that the Europeans, who at the end of the 20th century try to shield 'their' continent from migrants from other regions of the world, only 100 years ago forced their access into 'new' territories with military and economic means.

It has already been pointed out that none of the aspects of globalisation has been actually new, at least not in the western world. But the scale of the integration of economies of developing countries into the world economy, and of the accompanying cultural transformation and rapid urbanisation, were genuinely new and irreversible.[98] The contradiction which has become apparent is of a world which stimulates the increasing mobility of capital, goods, information and particular groups of people but which restricts the free movement of people as undesirable migration. The consequence is the contradiction, on the one hand, between national immigration policies, and, on the other hand, the political-structural conditions of the international system and growing global economic integration.[99]

The paradox that capital and commodity markets are nowadays globalised, yet the labour market - even if subject to pressures from the capital and commodity markets - is regulated nationally results in the ambivalence of modern nation and welfare states between national demarcation processes and dependence on the global markets. This expresses itself politically in the form of deregulation of markets, flexibilisation of social conditions (e.g. labour conditions) and privatisation of public companies. Whereas migration within a national society to the more prosperous regions is welcomed, this mobility is largely obstructed between nation states. The closure of labour markets along national boundaries attributes an importance to them which they in the light of international capital markets do not have. The international flow of labour

[98] For an account of this development see E. Hobsbawm, *Age of Extremes. The Short Twentieth Century 1914-1991*, London, Michael Joseph, 1994, pp. 364-71.

[99] Cf. S. Sassen, *Migranten, Siedler, Flüchtlinge. Von der Massenauswanderung zur Festung Europa.* Frankfurt/M. Fischer Verlag, 1996a; Richmond, 1994, op. cit., chapter two.

remains under the jurisdiction of individual nation states which protect their right to decide who is allowed entry and on what terms.

However, not everyone has been affected by these processes in the same way. For skilled migrants, these developments offer new opportunities, and adaptation to the new environment does not need to pose a serious problem. Yet, for the unskilled, whether migrant or indigenous worker, the global division of labour has meant unemployment of an increasingly structural nature, leading to a deterioration of their circumstances and, at worst, social marginalisation. At the same time, the fragmentation and declining value of traditional institutions and communities at the individual level can lead to insecurity and even to social isolation. The welfare state appears to be less capable of protecting the weak in society by its mechanisms of economic redistribution.[100] In this situation, the changes are seen as threatening, and more trusted structures may needed to be preserved or to be rebuilt. One of the manifestations in a number of European immigration countries is a revitalised nationalism which puts emphasis on the definition of the 'nation' and excludes certain immigrant groups and their descendants from that concept.[101]

Global economic processes have had direct consequences for migration since it helped to generate or increase different forms of migration movements, such as labour mobility relating to the operation of multinational companies and organisations. The labour market for the highly educated has become increasingly international.[102] In general, this kind of labour migration linked directly with economic internationalisation is not viewed as problematic. The migrants concerned are usually highly educated and their arrival is well prepared. Their stay is often temporary and is seen as being in the economic or

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[100] Cf. N. Harris, *The New Untouchables. Immigration and the New World Order.* London/NewYork. I.B. Tauris, 1995.

[101] Cf. S. Castles et al., 1993, op. cit., p. 30.

[102] Cf. P Stalker, *The Work of Strangers. A Survey of International Labour Migration*, Geneva, ILO, 1994. Stalker calls this particular category of migrants "professionals" and distinguishes them from four other types: settlers, contract workers, illegal immigrants, and asylum seekers and refugees.

general interest of the receiving state. An indirect effect of internationalisation is the immigration of people who arrive uninvited. The debate about immigration policy in the European Union member states is almost exclusively concerned with these latter migrants because this migration is seen as undesirable. The response of the developed world to a perceived threat of large scale immigration arising from changes in the global political economy has been the emergence of a system of selective exclusion through the use of narrower definitions of legal form of immigration.[103]

In the economy of what Sassen calls the "global city", she observes a growing dichotomy between the formal economy on the one hand, which centres mainly on well paid professionals, and an increasingly informal sector on the other hand, which is characterised by flexibility (in other words, unregulated labour) and consists principally of the provision of services which are often personal.[104] It is often the immigrant, legal and illegal, who finds a niche in this sector. The demand for labour in this part of the economy encourages the existence and growth of this informal economy. The growth of the informal sector and immigration are entwined, and these processes are mutually reinforcing. Harris has pointed out that restricting or even regulating migration which has its roots in economic considerations is in conflict with the reality of a global economy. He argues that economic activity in general and production in particular can only reach their full potential if they are complemented by a global labour market.[105]

The emergence of an increasingly integrated world economy means that remote geographical areas have grown together after the Second World War. Obviously, this has had implications for migration movements. The impact of economic and technological change makes it easier to obtain information and to make individual decisions about migration and facilitate international migration. In addition, the rapid expansion of means of communication and

[103] Cf. Richmond, 1994, op. cit.

[104] S. Sassen, *The Global City.* New York, Princeton University Press, 1991.

[105] Cf. Harris, 1995, op. cit.

information provide the world with interpretations and ideas of a good way of living. Many more potential migrants have access to information about possible destinations. The world-wide competition in the production process as well as the globalised patterns of consumption ensure that one specific model of production and consumption prevails in most societies or is seen as desirable. This implies that an increasing number of people nurture ambitions and values which are those of the western industrialised states, such as material gains and consumption of certain products. This is part of a process where even the poorest and geopolitically least significant countries tend to acquire some of the values of the industrialised countries as stakes in the political-economic competition.

It has been argued that the "gatekeeper role of the state" has become increasingly more significant as the export of industrial capital has in turn intensified the development of an international labour market.[106] Yet many commentators point to the increasing difficulties of nation states to control immigration. Challenges to the nation state have come from several directions: from the process of European integration and the development of supra-national forms of governance, and from changes in the international economy. Other transnational processes impinging on the state are the struggle around human rights and social rights. All major developed receiving states have to take into account a web of human and social rights in whatever decisions they take about immigrants and immigration policy. Explanations for an erosion of state capacity include the role of employer demand for a flexible work force, the emergence of liberal human rights based political influences and transnational networks through which migrants develop strategies to overcome immigration regulations.[107]

Cornelius and his colleagues argue that the gap between the goals of immigration policy and actual policy outcomes "is wide and growing in all major

[106] F. Bovenkerk et al., Racism, migration and the state in western Europe: a case for comparative analysis', *International Sociology*, 1990, Vol. 5, No. 4, pp. 475-90, here p. 482.

[107] Sassen, 1996c, op. cit.

industrialised democracies".[108] Increasing numbers of non-EU citizens living and working in EU member states without authorisation are interpreted as evidence of a larger regulatory or management problem of immigration policy. The fundamental question this poses concerns the ability of the state to control who has access to its territory. This has led to a debate on whether the realist paradigm of the state as a sovereign and autonomous actor in the international system can be considered any longer as adequate. Or will changing economic, political and institutional framework conditions require a new analytical perspective? Sassen argues that the role of the state in the formulation of immigration policies has changed dramatically in the process of globalisation.

> "Immigration is one major process through which a new transnational political economy is constituted, one which is largely embedded in major cities insofar as most immigrants, whether in the United States, Japan or Western Europe, are concentrated in major cities. Immigration is, in my reading, one of the constitutive processes of globalization today, even though not recognised or represented as such in mainstream accounts of the global economy."[109]

Sassen concludes that parallel to the supra-national regulation of international finance and trade flows within the frameworks of international bodies such as the International Monetary Fund, the regulation of migration movements, so far a prerogative of nation states, will soon be replaced by supra-national form of regulation. Advance into the post-national era will be, according to Sassen, accompanied by a gradual transfer of sovereignty from the nation state to international regimes and supra-national institutions whose tasks will be to ensure "governance without government":

> "These and other developments point to an institutional reshuffling of some

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[108] W. A . Cornelius et al., 'Introduction: The ambivalent quest for immigration control', in ibid. (eds.), *Controlling Migration. A Global Perspective*, Stanford, Stanford University Press, 1994, pp. 3-47; here p. 3; for the contrary argument see the commentary by R. Brubaker in ibid., pp. 227-31.

[109] S. Sassen, 'Whose city is it? Globalization and the formation of new claims', in ibid., *Globalization and Discontents. Essays on the New Mobility of People and Money*, New York, The New Press, 1998, pp. 19-36, here p. 21.

of the components of sovereign power over entry and can be seen as an extension of the general process whereby state sovereignty is being partly de-centered onto non- or quasi-governmental entities for the governance of the global economy and international political entities for the governance of the global economy and international political order."[110]

Large scale, internationally interdependent economies also mean that the political autonomy of states has been compromised. This is illustrated on the international level by institutions like the World Bank. In the European context a clear illustration is the evolution of the European Steel and Coal Community through the European Economic Community to the present quest for political unity in the European Union. Increasingly, states are confronted with problems which go beyond their competence to control, and this is not only true of financial and economic matters. The prevention of war, combating poverty, and safeguarding human rights demand international cooperation and internationally working institutions.

It has been argued that the sovereignty of the EU member states, closely connected to the control of a state's external borders, has been eroded in the process of European integration. The development of the internal market and free movement rights makes it inevitable, according to some commentators, that EU member states will transfer decisions on immigration issues to a supra-national level.

> "The EU shows us with great clarity the moment when states need to confront this contradiction [of two different regimes for the circulation of capital and the circulation of immigrants] in their design of formal policy frameworks."[111]

This contradiction poses problems that cannot be solved through old rules of the game. The need for a European policy on the admission on non-EU

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[110] S. Sassen, *Losing Control? Sovereignty in an Age of Globalization*, New York, Columbia University Press, 1996b, p. 98.

[111] S. Sassen, 'The de facto trans-nationalizing of immigration policy', in ibid., 1998, op. cit., pp. 5-30, here p. 14.

national migrants is here explained against the background of growing economic interdependence within the EU.

2.4. MIGRATION, CITIZENSHIP AND THE NATION STATE

Debates on immigration have been linked to the much debated 'crisis of the nation state'[112] and the question of national identity as immigrants may be perceived as a threat to the identity of the nation state. Although Germany, France and the UK experienced different kinds of immigration, all three countries have to deal with the underlying question of national identity.[113] The emergence and consolidation of national identity is closely interwoven with concepts of citizenship as it developed in the context of the nation state and citizenship has become one of the most used concepts to describe processes of inclusion of immigrants in modern nation states.[114] Throughout the formation of the modern state, the struggle for membership in the national political community has largely been synonymous with the establishment of a form of popular sovereignty through the entrenchment of civil and political rights.[115] The establishment of civil rights in the eighteenth century was an important step in the development of political rights which create the possibility of participation in the exercise of political power as a member of a political association. Political rights were gradually realised during the nineteenth and twentieth centuries as

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[112] See for example A. Milward, *The European Rescue of the Nation State*, London, Routledge, 1992; G. Noiriel, *Le creuset français*, Paris, Seuil, 1988; A. Smith, *Nations and Nationalism in a Global Era*, Cambridge, Polity Press, 1995.

[113] Cf. D. Schnapper, 'The debate on immigration and the crisis of national identity', *West European Politics*, 1994, Vol. 17, No. 2, pp. 127-39.

[114] Cf. B. van Steenbergen, 'The condition of citizenship; an introduction', in ibid. (ed.), *The Condition of Citizenship*, London, Sage, 1994, pp. 1-9; for an overview on the voluminous literature on the concept of citizenship see W. Kymlicka et. al, 'Return of the citizen: a survey on recent work of citizenship, *Ethics*, 1994, Vol. 104, No. 1, pp. 352-81.

[115] See Held, 1995, op. cit., p. 67; T. H. Marshall, *Citizenship and Social Class, and Other Essays*, Cambridge, Cambridge University Press, 1950; A. Smith, *National Identity*, London, Penguin Books, 1991.

an indispensable part of guaranteeing individual freedom.[116] The establishment of political liberty involved a process whereby the political rights which had previously been the monopoly of a privileged elite were extended to the adult population as a whole. Citizenship thus came to be equated with full membership of a political community.[117]

Citizenship as a legal form of membership in a state is an aspect neglected by political theory and political sociology where T.H. Marshall's seminal essay has established a view of citizenship as a bundle of universal rights. The analysis of citizenship as state membership was not a mainstream concern[118] but an influential book by Michael Walzer reintroduced a notion of citizenship as state membership into normative political theory.[119] In comparative political science an important contribution was made by Roger Brubaker who explicitly analyses citizenship as an allocation of persons to states.[120]

The tension created when state borders become more rigid while societies become mobile across state borders manifest itself in the organisation of membership at the state level. This formal membership is organised as the legal status of citizenship. Work on citizenship has generally dealt with its function under two aspects.[121] Internally, citizenship is a status of basic equality and serves the inclusion of people and the creation of solidarity.

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[116] See further Marshall, 1950, op. cit.; Held, 1995, op. cit., p. 68.

[117] The development of the modern welfare state during the twentieth century added a further dimension of citizenship rights, the so-called social rights. These are beyond the subject of this study. See further Marshall, 1950, op. cit.

[118] Cf. the overview article by Kymlicka, 1994, op. cit., explicitly excluding admission to citizenship.

[119] M. Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*, New York, Basic Books, 1983.

[120] R. Brubaker, *Citizenship and Nationhood in France and Germany*, Cambridge/Ma., Harvard University Press, 1992.

[121] Cf. Marshall, 1950, op. cit.; R. Bendix, *Nation-Building and Citizenship*, Berkley. University of California Press, 1977. For a critic of Marshall see J. M. Barbalet, *Citizenship. Rights, Struggle and Class Inequality*, Milton Keynes, Open University Press, 1988; and B. S. Turner, 'Outline of a theory of citizenship', *Sociology*, 1990, Vol. 24, no. 2, pp. 189-217; for the aspect of solidarity see T. Parsons, Das System moderner Gesellschaften, München, Juventa Verlag,1984.

"The concept of solidarity refers to the subjective feelings of integration that individuals experience for members of their social group."[122]

This solidarity is flexible but cannot be tied to any criteria. Smith shows for the case of France:

"in other words, the newly arrived, though formal citizens, could never be part of the *pays réel*, of the solidarity community of residents by birth; ... so the first Revolutionary impulse in France to grant citizenship on the basis of an ideological affinity (as exemplified by the case of Tom Paine) later gave way to a growing sense of historical, even genealogical, community, based on long residence and ethnic ancestry."[123]

For the purpose of this study, the following discussion is mainly concerned with the second, external aspect of citizenship. Externally, citizenship serves the purpose of demarcation by declaring an individual to belong to a certain state. Thus, it allocates populations to states as the basic units of the international political system. The demarcation function of citizenship can be understood as the other side of the modernisation process, namely that of the successive extension of basic right internally. The striving for a homogeneous society, the extension of citizenship and, with it, connecting specific rights to more groups, is opposed by an increasing rigidity externally. This development, however, is in sharp contrast to a growing internationalisation of economic and political relations and has led to tensions with the idea of state sovereignty. Bovenkerk and his colleagues point out that

"cultural characteristics ... have been constructed by the dominant class as universal attributes of the 'nation'. This ideological process implies the establishment of criteria which serve as a further measure of inclusion and exclusion; that is as a measure of 'belonging' to the nation. The

[122] J. C. Alexander, 'Core solidarity, ethnic outgroups, and social differentiation: a multidimensional model of inclusion in modern societies', in J. Dofny (ed.), *National and Ethnic Movements*, London, Sage, 1980, pp. 5-28, here p. 6.

[123] A. Smith, *The Ethnic Origin of Nations*, Oxford, Blackwell, 1993, p. 136.

> significance of such criteria has increased parallel to the increasing mobility of capital and labour across national boundaries."[124]

These processes of economic and political internationalisation have had implications for the role of the nation state, as discussed in the previous section, which in turn affect the concept of citizenship. The idea of sovereign nation states has been challenged in a growing economically and politically interdependent world and by apparently paradox developments.[125] Firstly, the economically and politically internationalisation is opposed by a strengthening of regional movements. Secondly, the notion of the nation state being the centre of sovereignty (monopoly of legislation and jurisdiction) is in contradiction to the simultaneous delegation of these powers to supra-national institutions such as the Commission of the European Communities and the European Court of Justice.[126] Finally, the alleged unlimited, absolute nation state sovereignty is increasingly restricted by external moral and legal limitations. These increasing limitations are the result of growing international economic (International Monetary Fund, World Bank), political (free trade areas, associations) and cultural interdependencies. The growing moral limitations are due to the effects of human rights discourses, international movements and non-governmental organisations.[127] This is complemented on the state level by a framework of basic rights codified in liberal-democratic constitutions.

The implications of the above developments for the concept of citizenship are demonstrated by several trends. Firstly, there has been a trend towards universal

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[124] F. Bovenkerk et al., 'Comparative studies of migration and exclusion on the grounds of "race" and ethnic background in western Europe: a critical appraisal', *International Migration Review*, Vol. 25, No. 2, 1991, pp. 375-91, here p. 388.

[125] See for example J. A. Camillieri et al., *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World*, Aldershot, Edward Elgar, 1992.

[126] Cf. E. Meehan, *Citizenship and the European Union*, London. Sage, 1993; Y. Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe*, Chicago, The University of Chicago Press, 1994.

[127] See for the latter point Habermas, 1994, op. cit., pp. 659-60; M. Walzer, 'The Civil Society Argument', in C. Mouffe (ed.), *Dimensions of Radical Democracy*, London, Verso, 1992, pp. 89-107; Soysal, 1994, op. cit.

inclusion, i.e. political and legal equality between citizen. This equality of inclusion, however, even if shifted from the national to the European Union level, is linked to systematic exclusion, i.e. the political and legal inequality between immigrants on the one hand, and citizens on the other hand.[128] Secondly, immigrants have increasingly gained rights which were traditionally reserved to citizens.[129] Thus, it has been argued, citizenship loses legal, political and social importance, yet this development intensifies the tendency to exclusion. Thirdly, citizenship has become a multi-layered term: political citizenship is complemented by social citizenship, and gains importance at different levels of political integration.[130] However, the idea and practice of democratic self-determination and a citizenry is still expressed by an interpretation of citizenship tied to the nation state. Lastly, one consequence of international migration and processes of globalisation has been a pressure on nation states to move to a de-coupling of ethnicity, culture, nation and citizenship. At the same time, the traditional overlapping and merging of ethnic, cultural, national identity, and citizenship has been reinforced by the establishment of a citizenship of the European Union.[131]

How are these paradoxes discussed in the literature? Both conservative as well as liberal and communitarian authors have not paid much attention to the exclusionary effect of citizenship.[132] One author who has struggled with this aspect of citizenship is Michael Walzer. In contrast to the particularistic and usually conservative analysis of communitarians, Walzer has accepted universally justified moral demands for justice and he has recognised the problem of exclusion. Nevertheless, regarding the first paradox of citizenship he argues for relatively closed borders out of ethical-political considerations. For democratic

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[128] Cf. T. Hammar, *Democracy and the Nation State. Aliens, Denizens and Citizens in a World of International Migration*, Aldershot, Avebury, 1990; Brubaker, 1992; op. cit., Meehan, 1993, op. cit.; R. Bauböck (ed.), *From Aliens to Citizens*, Aldershot, Avebury, 1994.

[129] Cf. Soysal, 1994, op. cit.

[130] Cf. Soysal, 1994, op cit., p. 148 and p. 159.

[131] Cf. Castles et al., 1993, op cit., pp.12-15; Soysal, 1994, op cit., pp. 156-62.

[132] See for example the contributions in M. Brumlick et al. (eds.), *Gemeinschaft und Gerechtigkeit*, Frankfurt/M., Campus, 1993, with the exception of the article by A. Wellmer; G. Frankenberg (ed.), *Auf der Suche nach der gerechten Gesellschaft*, Frankfurt/M., Suhrkamp, 1994 and Kymlicka et al., 1994, op. cit.

reasons he opposes a 'second class citizenship' and pleads for a strict 'first admission selection':

> "(A)dmission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination."[133]

According to Walzer "to give up any effective self-determination" is to give up the state.[134] Thus, at the core of the ethical-political argument against open borders is a belief in the overlapping of ethnic, cultural and national identity and citizenship. Exclusion is necessary and legitimate for two reasons: firstly, to defend shared meanings, values, ways of life through specific (ethnic, cultural, religious) political communities or states; secondly, for the reproduction and development of a collective political identity and sense of community.

The exclusionary effects of citizenship cannot be reconciled with a universally understood egalitarianism which is shared by most liberal, democratic or socialist justice theories. This universal principle does not allow for the privileged treatment of members of particular communities.[135] According to this view, citizenship is just as little defendable as other ascriptive attributes such as gender, race, age, language or religion. as Carens puts it:

> "Citizenship in Western liberal democracies is the modern equivalent of feudal privilege - an inherited status that greatly enhances one's life chances. Like feudal birthright privileges, restrictive citizenship is hard to justify when one thinks about it closely."[136]

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[133] Walzer, 1983, op. cit., p. 62.

[134] Walzer, 1983, op. cit., p. 44.

[135] Cf. W. Kymlicka, *Contemporary Political Philosophy*, Oxford, Oxford University Press, 1990, p. 5, R. E. Goodin, 'If people were money', in B. Barry et al. (eds.), *Free Movement. Ethical Issues in the Transnational Migration of People and Money*, New York, Harvester Wheatsheaf, 1992, pp. 6-21.

[136] J. H. Carens, 'Aliens and citizens: the case for open borders, *The Review of Politics*, 1987, Vol. 49, No. 2, pp. 251-273, here p. 252. See also J. H. Carens, 'Migration and morality: a liberal egalitarian perspective', in Barry et al. (eds.), 1992, op. cit., pp. 25-47; A. Dummett, 'The transnational migration of people seen from a natural law tradition, in ibid., pp. 169-80; Walzer, 1983, op. cit., p. 55; Brubaker, 1992, op. cit., p. 31; Bauböck (ed.), 1994, op. cit.; ibid.,

This does not imply a direct and unconditional "presumption for free migration".[137] What follows as a first option is the international redistribution of resources, and, as a second option, to the extent that such policies are either not proposed or unsuccessful, the moral demand for relatively open borders.[138]

Moral arguments are not the only normative arguments. They compete with realist and ethical-political arguments.[139] However, they need to be distinguished. Realist objections raised against the opening of borders are well known: 'waves' of migrants arriving in western Europe posing a threat to public order, rising unemployment and collapse of the welfare system, growing xenophobia and right wing extremism, fears of cultural *Überfremdung*. How realistic these well-known scenarios are, cannot be discussed here. However, it is assumed here that this is not only propaganda and the channelling of fears and prejudices. The opening of borders is by no means an appropriate way for an effective strategy to confront international inequalities.

Two conclusions are important in this context: Firstly, the international redistribution of resources is the first and most important option in the fight against structural poverty and inequality. So far, the industrialised countries have paid lip service to the fight against the root causes of migration rather than formulating and implementing common policies. Thus, in turn, the only morally legitimate defence of a closed border policy is being undermined, and the arguments are easier to recognise as what they historically have always been: a particularistic defence of privileges. Paradoxically, realist arguments against a policy of open borders reinforce the necessity for a restructuring of the international economic system and the control over resources. If realist arguments are used against both policies of open and closed borders, as it is

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Transnational Citizenship. Membership and Rights in International Migration, Aldershot, Edward Elgar, 1994, p. 8.

[137] Carens, 1992, op. cit., p. 25.

[138] Cf. Goodin, 1992, op. cit., p. 8.

[139] Cf. J. Habermas, *Erläuterungen zur Diskursethik*, Frankfurt/M., Suhrkamp, 1991; ibid, 1994, op cit.

often the case, they show their relationship to the conservative defence of the status quo; an attitude also described as 'welfare chauvinism'. [140]

Secondly, if one argues, in Goodin's words, for open borders as 'a second best stop gap' one has to face the tensions between the moral demands of universal justice and the realist demands. For that reason, Goodin, whose line of argument has been followed here to a large extent, does not argue for an immediate and complete opening of borders but for relatively open borders. Does this mean that the considerable differences between normative positions are meaningless regarding immigration and naturalisation policies? Is 'relatively open' not the same as 'relatively closed'? Yet these two positions influence the nature of the debate on the consequences of open borders and which consequences are to be expected. Further, they differ considerably with respect to the direction and content of control policies. Following the moral line of argument leads to demands for liberal policies and more open borders whereas a realist position means less open borders and restrictive admission policies.

Realist arguments for closed borders are often intermingled with communitarian ethical-political arguments.[141] In today's world, and particularly regarding issues of border control, migration and citizenship, the tensions are obvious.[142] If communitarianism, despite all its variations, has an identifiable theoretical position, it is that the particularistic demands of the community outvote universal demands. This 'priority rule' is in contrast with the moral discourse according to which universal principles and rights are not only utility considerations but outvote the demands of particular communities at least in the long term.

The defence of (relatively) closed borders is based on the premise that the state is the appropriate unit of democratic self-determination. Walzer shares with communitarians four assumptions which play a prominent role in the defence of relatively closed borders. However, not all communitarians - and not only

[140] Cf. Castles et al.,1994, op. cit., pp. 265-8; Habermas, 1994, op. cit., pp. 651-60.

[141] Cf. Walzer, 1983, op. cit.

[142] Walzer recognises the limitations of the communitarian approach, 1983, op. cit., p. 30; cf. Brumlick et al. (eds.), 1993, op. cit.

communitarians[143] - treat the state as a political community. Walzer compares the state with neighbourhoods, clubs and families.[144] Yet historically, states are not horizontally structured communities or voluntary associations built on democratic consent but vertically structured societies and institutions built on coercion. In order to avoid the usual connotations of the state with vertical hierarchy, bureaucracy and centralism, Walzer rather uses the term countries or political communities.[145] But this communitarian conviction speaks against rather than for the state, or more precisely: it only applies to states in that they correspond to the normative textbook-ideal of democratic consent-theory. If one recognises that states are neither culturally homogeneous nor democratic political communities, then the moral and ethical legitimacy of the exclusive right for states to the right of self-determination is undermined.

The second assumption, the overlapping of cultural, religious, ethnic, national and political communities has already been criticised. The communitarian legitimisation of closure does not take into account that these communities are historically different. Moreover, they do not just overlap peacefully but are often in conflict with each other. Walzer acknowledges that states are not necessarily ethnic and cultural homogenous entities[146] but he also treats states as nations or communities when this is incorrect.[147] This does not only reproduce the terminological blurring of state and national community. Rather, it is important with regard to the argument that the state is the adequate political unit for distributive decisions within its boundaries. Otherwise, this statement could not have been written:

> "... the political community is probably the closest we can come to a world of common meanings. Language, history, and culture come

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[143] Cf. Kymlicka, 1989, op. cit., p.135, p.178, pp. 199-201. Critical is Habermas, 1994, op cit., pp. 166-70.

[144] Walzer, 1983, op cit., pp. 35-42.

[145] Walzer, 1983, op. cit., p. 29.

[146] Walzer, 1983,op. cit., pp. 28-52. See for a critical point of view of the argument "ideal fit of states in cultural traditions" W. Kymlicka, *Liberalism, Community and* Culture, Oxford, Clarendon, 89.

[147] Cf. Walzer, 1983, op. cit., p. 42 and p. 63.

> together (come more closely together here than anywhere else) to produce a collective consciousness."[148]

However, it is arguable that a world without states would be a world without any special importance.[149] The argument does not apply to multi-cultural or multi-linguistic states nor to many, old and new, international communities such as religious, professional or political communities.

Walzer attempts to justify the legitimacy of states by attributing to the state a crucial role in the defence and reproduction of cultural diversity.

> "Neighbourhoods can be open only if countries are at least potentially closed... Neighbourhoods might maintain some cohesive culture for a generation of two on a voluntary basis, but people would move in, people would move out; soon the cohesion would be gone. The distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life. If distinctiveness is a value ... then closure must be permitted somewhere."[150]

As a third premise, Walzer asserts that cultural differentiation is based on closure. However, not all forms of cultural differentiation are tolerable such as differentiation based on race. Moreover, the form of closure is important. More or less voluntary closure, in agreement with the people included and excluded is fundamentally different from closure due to social conventions, law or the use of violence. Walzer recognises that forced closure "replaces commitment with coercion. So far as the coerced members are concerned, there is no longer a community worth defending."[151] Closure under conditions of relative equality is very different from closure under conditions of systematic exploitation and discrimination.[152]

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[148] Walzer, 1983, op. cit., p. 28.

[149] Walzer, 1983, op. cit., p. 34.

[150] Walzer, 1983, op. cit., pp. 38-39.

[151] Walzer, 1983, op. cit., p. 39.

[152] Cf. Kymlicka, 1990, op. cit., chapter 5.

As alternatives to sovereign states as political units, Walzer only allows the choice between a global state, "global socialism", or a world without states, "global libertarianism".[153] However, in his view

> "if states ever became large neighbourhoods it is likely that neighbourhoods will become little states. ... To tear down the walls of the state is not ... to create a world without walls, but rather to create a thousand petty fortresses."[154]

But it does not follow necessarily that we are forced to accept today's world of large 'fortresses' as the lesser of two evils. The concept of an absolute, indivisible sovereignty has been criticised by many.[155] We live *de facto* in a world with limited, delegated and shared sovereignty rights and with overlapping political units (neighbourhoods, municipalities, regions, states, supra-national unions). The ideal of democratic self-determination says little about the respective adequate territorial units. States are not culturally homogenous democratic associations, yet this assumption forms the basis for the defence of state sovereignty based on the belief in the democratic principle of communal self-determination.[156]

As one consequence of processes of globalisation and international migration, the tension inherent in modern nation states between ethnic and civil aspects has intensified, in other words:

> "der Widerstreit zwischen den universalistischen Grundsätzen des demokratischen Rechtsstaates einerseits, und den partikularistischen Ansprüchen auf die Integrität eingespielter Lebensformen andererseits."[157]

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[153] Walzer, 1983, op. cit., p. 34 and p. 48.

[154] Walzer, 1983, op. cit., pp. 38-39.

[155] Cf. T. W. Pogge for a critique of the "ideal fit of institutions within territorial states": 'Cosmopolitism and Sovereignty', *Ethics*, 1993, Vol. 103, No. 1, pp. 48-75.

[156] See for the history of this rhetoric of exclusion see P. Schuck et al., *Citizenship without Consent. Illegal Aliens in the American Polity*, New Haven, Yale University Press, 1985; Brubaker, 1992, op cit., p. 157, on its use by conservative and extreme right political parties in France.

[157] Habermas, 1992, op. cit., pp. 632-33. Cf. also Castle et al., 1993. op cit. and Soysal, 1994, op cit., chapters 8 and 9.

It has been argued that in order to achieve universal inclusion into the state, as a first step, the concept of citizenship needs to be de-coupled from ascriptive criteria such as gender, race or ethnicity. Carens, Kymlicka and Habermas have formulated clearly the normative and political consequences of the "Auflösung der semantischen Klammer um Staatsbürgerschaft und nationale Identität".[158] In weaker versions of de-coupling ascriptive criteria from citizenship, common language and history are still regarded as legitimate criteria for citizenship. Stronger versions do not require these as essential for democratic citizenship. Historically, such a de-coupling has been partly realised in imperial models of citizenship where, however, the active political participation was lacking.[159] In republican models of citizenship, the de-coupling of citizenship from ascriptive criteria is an important part of the political legitimacy of '*citoynneté*'. Only in extreme versions of the ethnic-*völkisch* concept of citizenship is this element completely lacking.[160] In a second, more contested step, it has been argued to de-couple citizenship from state membership. Historically, such as de-coupling is based on forms of local, communal, regional democracy. The conceptual de-coupling has been developed most clearly by Habermas who argues for a universal understanding of democratic citizenship where the question of the adequate political unit is left open:

> "Staatsbürgerschaft and Weltbürgerschaft bilden ein Kontinuum, das sich immerhin schon in Umrissen abzeichnet" [161]

2.5. CONCLUSION

One of the most important differences between contemporary migration and previous periods is connected to the workings of the international economic system, the international division of labour and their consequences. Whereas in

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[158] Habermas, 1994, op. cit., pp. 634-37, here p. 634; see also Carens, 1992, op. cit.. M. Walzer, 'The Civil Society Argument', in Mouffe (ed.), 1992, op. cit., pp. 89-107.

[159] Cf. Meehan,1993, op. cit., p. 2.

[160] Cf. the typology by Castles et al., 1994, op. cit., p. 39.

[161] Habermas, 1994, op. cit., p. 660.

the past, economic growth meant growth in employment, and therefore led to labour migration, today this rule is no longer valid or at any rate much less so. Western economies are becoming more and more specialised in high-tech, labour-extensive production and the provision of international services. In this situation, economic growth can go hand in hand with a decline in labour demand. More precisely, the demand for unskilled and semi-skilled labour is in decline while that for highly skilled labour is on the increase. The turning point for this development in the industrialised west European countries was around 1974 when economic recession and oil crisis led to the recruitment halt of migrant labour. The effects of this development were manifested in the rapidly rising unemployment rates in the 1980s, and then indirectly when the welfare state was no longer able to compensate those who fell outside the provisions of the labour market.

As far as immigration is concerned, these developments led to the emergence of a clear distinction between what has been referred to as the direct and the indirect consequences of globalisation. Migration on the part of the highly skilled and educated, which is to a certain extent a consequence of globalisation, continues and is even promoted by various national and international measures such as exchange programmes for students and researchers, and the free movement of labour within economically homogenous areas like the European Union. On the other hand, for those migrants who as an indirect consequence of globalisation are trying in increasing numbers to enter the more prosperous countries, an arsenal of policies aimed at restricted access to the territory is in place but the ability of the nation state to regulate immigration has been questioned.

The second major change has been a political one. Progress towards the establishment of a political union in western Europe and the loss of national autonomy has been a gradual process which became more obvious in the 1980s with the creation of the Single European Market. The emergence of supra-national governance, initially in the economic field, has been interpreted as a response to the inability of traditional state institutions to manage the

complexity of tasks facing them. The role of the state in its relations with other states is subject to change.

Immigration is one of the global processes that changes the position of the nation state within the international system. One way to describe the reaction of nation states to a changing international system is in terms of a restructuring of their boundaries. The case studies demonstrate how different processes of closure are structurally linked to migration movements. This interaction between global migration movements and the nation state, in particular the examination of the political response of the case study countries, forms the comparative basis for the analysis of the prospects for a common European immigration policy.

The focus of the following analysis of the case study countries - Germany, France and the UK - is on the question of how nation states structure their specific demarcation processes. The aim of chapter three is to examine the form and extent to which inclusion or exclusion of immigrants is regulated in the case study countries by using the example of the political measures of immigration control. Despite the incompatibilities of international migration movements with the concept of closed societies organised along nation states lines a continued importance is attached to the distinction between citizens and non-citizens. Chapter four turns to the internal dynamic of demarcation processes in nation states. The way and extent of regulation of internal demarcation processes will be demonstrated in more detail with the example of the policies of citizenship acquisition.

CHAPTER THREE

CASE STUDIES: THE POLITICAL CONTROL OF IMMIGRATION - THE DYNAMICS OF EXTERNAL CLOSURE

3.1. INTRODUCTION

The analysis of the case study countries serves as a comparative basis to identify similarities and differences in the development of the political control of immigration in order to demonstrate the difficulties and possible obstacles in formulating a common European immigration policy. Migration movements in western Europe are today subject to political considerations with the aim to intervene in a regulatory way. In this sense, immigration policies are an important part of a nation state's demarcation efforts as selective categories of immigrants are defined. These different categories are linked to certain rights within the receiving country which in turn determine the possibilities for naturalisation.

The political-institutional system dealing with immigration can be subdivided into two main processes of demarcation. External demarcation refers to border controls whereby people, grouped according to administrative categories, are admitted or refused entry. This includes controls carried out in other states, such as visa applications. Internal demarcation processes control access to resources. Firstly, determined by the category assigned at the point of external control, immigration authorities regulate an elaborate system of residence and work permits. Residence rights in turn are integral to the enjoyment of other rights, mainly economic and social rights. In all EU countries, a minimum period of legal residence is also required before an immigrant may apply for naturalisation. Thus, migration control forms indirectly an important barrier to political membership. Secondly, naturalisation, the ultimate political demarcation mechanism, elevates immigrants to the status of citizens. Internal demarcation is for most immigrants of high relevance. This concerns in all states a complex system of rights where the structures of the welfare state are

of particular significance.[162] However, as the subject of this study is the interaction between nation states and the European Union, examples of demarcation processes have been chosen which can be found on both the national and the EU levels, namely the regulation of admission of non-EU citizens and citizenship policies.

The focus of the analysis is on the situation of non-EU national migrants. Citizens of EU member states and their families are entitled to a general right of residence in any other EU states regardless of whether they are pursuing an economic activity.[163] In the case of most non-EU nationals resident in EU member states it can take up to five years before restrictions on migrant workers' free access to employment are lifted. Given that the practice today is to align residence permits with work permits, it may take a similar period of time before restrictions on the duration of residence are removed.

State responses to immigration can be understood as processes of inclusion and exclusion relating to the movement of people across national borders and their temporary or permanent residence in states other than that of their birth. These processes of distribution of resources within a nation state imply decisions about who is allowed to enter the state territory and who is not. This is a political question in so far as it, for example, implies decisions about the

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[162] For a detailed analysis on how these processes can be understood conceptually see for example T. Faist, 'Boundaries of welfare states: immigrants and social rights on the national and supranational level'; in R. Miles et al. (eds.), *Migration and European Integration*, London, Pinter, 1994, pp. 177-95; G. Freeman, 'Migration and the political economy of the welfare state', AAPSS, 1986, No. 485, pp. 51-63; H. Heinelt et al., *Immigranten im Wohlfahrtsstaat: Rechtspositionen und Lebensverhältnisse*, Opladen, Leske+Buderich, 1992.

[163] Three Directives adopted by the Council in 1990 regulate the right of residence: Directive 90/364/EEC of 28 June 1990 on the right of residence, *OJ* 1990, L 180, p. 26, Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self employed persons who have ceased their occupational activity, *OJ* 1990, L 180, p. 28, and Directive 90/366/EEC of 28 June 1990 on the right of residence for students, *OJ* 1990, L 180, p. 30. The right has been explicitly recognised in Article 8a(I) Treaty on European Union.

acquisition of juridical status and citizenship or eligibility of access to state resources.[164]

> "Hence, effective regulation requires the creation of a hierarchy by which people are organised into distinct collectivities in order to effect the uneven distribution of scarce resources. ... certain characteristics are chosen to effect and legitimate this process of differentiation. These characteristics are then used to typify individuals and classify them in groups."[165]

A hierarchy of migrants is created in relation to the acquisition of legal status and citizenship, and in the determination of eligibility for access to state-allocated resources.[166]

The focus of this chapter is on external demarcation - the political control of immigration, i.e. access to territory and to some extent the related right to work, as an example of external demarcation processes. The central part of the analysis consists of the case study countries governments' responses to labour immigration from the early 1970s to the mid-1990s. The chapter concludes with a discussion of the ability of states to control immigration. Chapter four will shift the focus to internal demarcation.

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[164] F. Bovenkerk et al., 'Racism, migration and the state in western Europe: a case for comparative analysis', *International Sociology*, 1990, Vol. 5, No. 4, pp. 475-490, here p. 483-84.

[165] Bovenkerk et al., 1990, op. cit., p. 483.

[166] R. Miles, *Racism*, London, Routledge, 1989; F. Bovenkerk et. al., 'Comparative studies of migration and exclusion on the grounds of "race" and ethnic background in western Europe: a critical appraisal', *International Migration Review*, 1991, Vol. 25, No. 2, 1991, pp. 387-8.

3.2. IMMIGRATION AND POLITICAL CONTROL IN GERMANY[167]

Lack of labour in agriculture and industry, the building of canals and roads increased since the 1880s seasonal labour migration to Germany to a mass migration. Concern about the *Polonisierung des Ostens* (Max Weber)[168] through predominantly Polish immigration was countered in Prussia through the development of a restrictive system of alien control during the 1890s, aimed at the Polish majority of labour migrants and ensured that this migration did not turn into immigration, thus settlement, but remained a temporary, seasonal labour migration.[169] In the Weimar Republic, the admission of foreigners did not follow any longer the anti-Polish logic of the Prussian practice but the economic ratio of the labour market policy: visa for admission of foreign workers were only issued if German workers were not available. Employment of foreign workers continued on a low level and ended almost completely with the global recession in 1929/30. This policy of connecting labour market administration and alien admission, Bade observes, resonates in the guest worker policy of the Federal Republic of Germany in the 1950s and 1960s.[170]

Since the end of the Second World War, the Federal Republic of Germany (hereafter called Germany) has admitted by far the largest numbers of migrants in Europe with a net intake of more than 20m people between 1945 and 1992 [171]. During this period, Germany experienced immigration by four distinct groups. First, the immigration of approximately 12m 'ethnic German'

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[167] See for a detailed account of Germany's immigration history and policy K. Bade, *Ausländer, Aussiedler, Asyl in der Bundesrepublik Deutschland*, Berlin, Landeszentrale für politische Bildungsarbeit, 1994; ibid. (ed.), *Deutsche im Ausland, Fremde in Deutschland. Migration in Geschichte und Gegenwart*, München, C. H. Beck, 1993 and U. Herbert, *Geschichte der Ausländerbeschäftigung in Deutschland 1880 bis 1980: Saisonarbeiter, Zwangsarbeiter, Gastarbeiter*, Berlin, Dietz, 1986.

[168] K. Bade, 'Billig und willig' - die 'ausländischen Wanderarbeiter' im kaiserlichen Deutschland, in K. Bade (ed.), 1993, op. cit., pp. 311-24, here p. 322.

[169] Bade, 1993, op. cit., pp.311-24.

[170] Bade, 1993, op. cit., p. 324.

[171] H. Fassman et al., 'Patterns and Trends of International Migration in Western Europe', *Population and Development Review*, 1992, Vol. 18, No. 3, pp. 457-80.

Vertriebene and *Flüchtlinge* until the early 1960s.[172] Second, the active recruitment of contract workers during the 1950s and 1960s. Third, the immigration of 'ethnic German' *Aussiedler* and *Übersiedler*,[173] and finally the continuing influx of asylum seekers.

After the Second World War, Germany integrated successfully over nine million expelled Germans from former German territory. Additionally, over three million East Germans fled to Germany for political and/or economic reasons. By 1950, these two groups constituted 14.6 per cent of the population.[174] A key strategy of the Allied Forces was the quick integration of the expellees and refugees, an objective which was specified in the refugees law of 1946. The integration of millions of refugees and expellees was certainly helped by favourable economic conditions. Still, it is important to stress that it was not left to the economic miracle but was strongly directed by state intervention. Measures with regard to housing, education and work were implemented which often favoured refugees over the local population. The official attempt to draw a positive image of the refugees and expellees helped to counterbalance social

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[172] The official definition of *Vertriebene* is: 'Expellees are those Germans who have lost their homes in German territory in the East (as defined by the borders of 31.12.1937) that are currently under foreign administration, or had homes in foreign territory and lost them as a result of expulsion caused by the Second World War', Gesetz über die Angelegenheiten der Vertriebenen und Flüchtlinge of 19.5.1953, *Bundesgesetzblatt I*, p. 201. *Flüchtlinge* (refugees) are defined as 'Germans from the Soviet-occupied zone who came after the end of the war from the Soviet zone or the Soviet sector of Berlin to West German territory, including West Berlin, and their children', in ibid. This includes also spouses and children of expellees and refugees.

[173] *Aussiedler* are defined as 'German citizens or members of the German people who before 8 May 1945 had their place of residence in the former German eastern territories, Albania, Bulgaria, Danzig, Estonia, Yugoslavia, Lithuania, Latvia, Poland, Rumania, the Soviet Union, Czechoslovakia or Hungary, and who have left or will leave these countries after the end of the general expulsion measures', quoted in B. Winkler, *Zukunftsangst Einwanderung*, 3rd rev. ed., München, C. H. Beck, 1993, p. 115. *Übersiedler* are people from the former German Democratic Republic who moved through legal means to West Germany until June 1990 when the special provisions for this group were stopped.

[174] W. Benz, 'Fremde in der Heimat: Flucht – Vertreibung – Integration', in Bade (ed.), 1993, op. cit., p. 382.

tensions and resentments against this group emerging from the poor economic conditions. In 1949, after the establishment of the Federal Republic of Germany, the *Bundesvertriebenenministerium* (Ministry for Expellees) was founded to coordinate social and economic measures concerning refugees and expellees from former German territory. The integration of the refugees was seen to be completed by the late 1960s, and the Ministry for Expellees was abolished in 1969.[175] The establishment of the Ministry is characteristic of the way these immigrants have been regarded. The expellees and refugees played an important part in the reconstruction of West Germany but they were never regarded as immigrants. As *Volksdeutsche* (people of German origin) they belong by definition to the German *Volksgemeinschaft*, and were seen as simply repatriating to their homeland. The immigration of *Aussiedler* continued after the end of the expulsion measures. In 1953, a law was passed that expanded the definition of ethnic Germans to include those persons who left eastern Europe or the former Soviet Union 'after the end of the general expulsion measures'.[176] A transitional legal provision that granted millions of German refugees admission to Germany after the Second World War became a constitutional right to return for ethnic German immigrants from eastern Europe. The immigration of almost 1,6m *Aussiedler* to Germany between 1951 to 1988 was largely unquestioned and integration into German society took place quietly.[177] The costs of the integration of *Aussiedler*, their different customs and often lack of the German language was not an issue of public debate in the seventies and early eighties.

The Cold War severely limited the possibility of labour recruitment from eastern Europe, a development reinforced by the building of the Berlin wall in 1961 and the closure of the German-German border. German government officials and employers started to recruit workers from southern Europe where unemployment was high. Between 1955 and 1968 recruitment agreements were concluded with Italy, Spain, Greece, Turkey, Portugal, and Yugoslavia. It

[175] Benz ,1993, op. cit., pp. 374-86; Herbert, 1986, op. cit., pp. 179-87.

[176] quoted in Winkler, 1993, op. cit., p. 117.

[177] Bade, 1994, op. cit., p. 43.

was official policy to restrict foreign labour to Europeans but other countries such as Morocco and Tunisia also entered into labour agreements, although the numbers involved were small. The recruitment agreements were not the result of long-term planning. Rather, they represented a purely functional response to the short-term requirements of the German labour market. This attitude was best expressed in the term guest worker - by definition guests do not stay. It was generally expected that the migrant workers would return to their countries of origin once they were no longer needed. The recruitment programmes were under government control and work permits were tied to a specific employer. Germany's guest worker policy did not envisage their permanent integration into German society. The migrant workers lived in special workers' hostels, they had no right to settle or to bring their families nor were they offered services such as language classes and training schemes. The rationality behind the rotation system, which implied that guest workers had to return after two or three years, was to avoid the integration of the foreign workers.

The year 1973 was a turning point in Germany's recruitment policy. Oil crisis and economic recession led the government, like in other west European countries, to impose a ban on recruitment. At that time it had become clear that the policy of rotation had failed. The halt on recruitment, however, did not affect citizens of the member states of the European Community (EC). In 1973, the year of the EC's first enlargement, freedom of movement for workers was already established between the member states Belgium, France, Germany, Luxembourg, Denmark, the Netherlands, Italy, Ireland and the United Kingdom. Greece joined in 1981, Spain and Portugal in 1986. Thus, due to the European integration process, the situation for EC migrant workers and their families improved considerably. Their status is secured by a range of policies. For example, it is not allowed to discriminate against EC citizens in employment, and they have a right to be joined by their families. In turn, however, this process reinforced the inferior position and exclusion of non-EC citizens.

The paradox of the ban on recruitment is that far from inducing migrant workers to leave Germany, it confronted migrants from non--EC countries with a choice

they had until now not been required to make. They could either return to their country of origin and thereby forfeit the opportunity to return to Germany or they could stay in Germany on a more permanent basis. Confronted with this choice, most migrants chose to stay in Germany and were joined by their families. By the early nineties, the number of foreign residents had increased by almost 50 per cent compared to 1973 whereas the foreign working population remained stagnant. However, the fact that the former guest workers and their families have settled in Germany, illustrated by the development of community structures such as 'ethnic' small business, sport clubs, political and cultural associations has so far not been translated into the German social, political and legal framework. In contrast to the experience of the first post-war German immigrants for whom substantial financial support, housing and education were immediately provided, the German state still treats the migrants as a supplementary workforce to fill gaps in the labour market. This approach is reflected in restrictions on family reunification and access to legal employment for family members of non-EU citizens resident in Germany. Aid to return programmes, though of limited success, have been offered against the background of increasing unemployment during the 1980s.Yet the demand for foreign labour did not end with the recruitment ban. Exceptions were made for jobs in certain sectors such as mining and food if no local labour was available. Temporary admission of migrant workers continued during the seventies and eighties and has been the compromise between the official policy of the recruitment ban and the demand for migrant labour.

Unification and the new immigration situation

The opening of the borders between east and western Europe following the events of 1989 led to increased immigration to western Europe. The main recipient has been Germany with almost 1.5 million people from eastern Europe alone in 1989/1990. This is almost twice the number of immigrants from eastern Europe as during the period 1980 to 1988. By the end of the 1980s, two issues dominated the debate on immigration in Germany. First, from the 1980s onwards, the constitutionally guaranteed right to asylum increasingly became a bone of contention in political debate. Against the background of the experiences during the National Socialist Regime, the right of asylum was

specified in the German Basic Law. Article 16 (2) constituted until its amendment in 1993 the most liberal asylum right in Europe and guaranteed asylum for all politically persecuted. From 1973, non EU-citizens needed a visa to enter Germany, with the exception of *Aussiedler* and citizens of European Economic Area states or states with which Germany has special agreements (Australia, New Zealand, Israel, Japan, Canada and the USA). Consequently, the only way to enter Germany legally, apart with a tourist visa, has been to apply for political asylum. Until the 1970s, the number of asylum seekers was small and almost all came from eastern European countries. During the 1980s, the number of asylum seekers increased significantly and a shift in the countries of origin occurred, with now less than one third of all applicants from eastern Europe and the majority from the developing world.[178] Many have been employed during the asylum procedure or as *de facto* refugees.[179] Large numbers of migrant workers arrived as tourists when the visa obligations for citizens of Poland, Hungary and former Czechoslovakia were abolished in 1991, or they worked whilst applying for asylum.

Secondly, the break up of the communist regime in eastern Europe and the abolition of most obstacles on migration led to large numbers of *Aussiedler* arriving in Germany. The number of *Aussiedler* immigrating to Germany increased rapidly in 1987. In 1988, over 200,000 *Aussiedler* came to Germany, and in 1989 the number reached 377,055 ethnic German immigrants. The high number of 'ethnic Germans' emigrating to Germany from eastern Europe and the former Soviet Union combined with the economic recession contributed to a shift in attitudes towards this immigrant group. *Aussiedler* have increasingly been seen as taking advantage of the economic opportunities and the welfare benefits afforded in Germany and not as people escaping tyranny. Their lack of the German language and their different customs have led to criticisms about their 'Germanness' as being the reason to allow them immigrate to Germany. The opinion was expressed that immigrant of Turkish origin born in Germany

[178] Bundesministerium des Innern (BMI), *Aufzeichnung zur Ausländerpolitik und zum Ausländerrecht in der Bundesrepublik Deutschland*, Bonn, 1993, p. 49.

[179] Cf. K. Groenendijk et al., *Temporary Employment of Migrants in Europe*, Nijmwegen, Katholieke Universiteit, 1995, on the use of asylum seekers as a cheap, flexible labour force.

were 'more German' than so-called ethnic German immigrants. Concerned about the strong hostility against *Aussiedler*, the government carried out an information campaign in 1989 to win support for the immigration of *Aussiedler*. They have been presented as a cultural, economic and social benefit to the country in contrast to the image of non-German immigrants who are seen as a threat to the social order and economic well being. *Aussiedler* have been proclaimed to be the solution to Germany's demographic problem and vital to secure the future of the pension scheme. The second development was a massive increase in the immigration of *Übersiedler* from the GDR which contributed to the fall of the Berlin wall. In 1989, 343,854 *Übersiedler* registered, and in the first half of 1990 a further 238,384.[180] Including the *Übersiedler*, Germany admitted alone in 1989 almost three quarter of a million new German citizens or immigrants of German origin.[181] Since 1987, almost 50 per cent of migrants have been either *Aussiedler* from eastern Europe or *Übersiedler* from the former GDR.

Against the background of economic recession, high structural unemployment, the rise of racist attacks on foreigners, and the electoral success of right-extreme parties, the German government asserted its position to limit the admission of non-EU immigrants with the reform of the foreigners' law in 1990. The legal status of immigrants and migrant workers had been specified in a special *Ausländergesetz* (foreigners' law) in 1965 which regulates the granting of work and residence permits, naturalisation criteria, and expulsion. This law is also a means of controlling the influx of new immigrants, both by defining visa policies and regulations concerning family reunification and by specifying exceptions to the general ban on recruitment of migrant workers. The revision of the foreigners' law in 1990 was officially presented as a codification of the ban on the recruitment and Germany's restrictive immigration policy. The German government argued that immigration of people from alien cultures is not in the national interest as social and political stability are tied to the national

[180] In contrast, from the building of the Berlin Wall in 1961 until the end of 1988 ca. 600,000 *Übersiedler* moved from the former GDR to West Germany.

[181] K. Bade, 'Fremde Deutsche: 'Republikflüchtlinge' – Übersiedler – Aussiedler', in ibid. (ed.), 1993, op. cit., pp. 401-10, here pp. 403-5.

homogeneity of the state.[182] Yet at the same time the rules on the employment of foreign labour were amended allowing for a range of exceptions to that ban. The relevant decree, the *Anwerbestoppausnahme-Verordnung*, can be read as a catalogue of all the new forms of temporary employment of foreign labour used during the eighties. In particular, agreements on seasonal work have been concluded with several eastern European countries. The foreign workers are entitled to similar working conditions as German workers. Another form of flexible labour is cross-border work. Czechs, Slovaks (since September 1990) and Poles (since January 1991) have the possibility to work in Germany within the border zone up to 50 km from the frontier provided they return home every evening.[183]

In 1993, official anti-immigration rhetoric culminated in the abolition of the constitutionally guaranteed right of asylum. The government claimed that only a change in the constitution could lead to a reduction in the number of asylum seekers. The conservative-liberal coalition government and the main opposition party, the social-democrats, agreed on the so-called asylum compromise. In the end, the 'asylum-compromise' went further as a 'migration compromise' which illustrates the blurring of asylum and immigration issues in political debate. Apart from the abolition of the constitutionally guaranteed right of asylum, it also included significant agreements on naturalisation and the immigration of *Aussiedler*. Changes in the immigration of ethnic Germans stopped short of an abolition of the constitutional right to return home, as demanded by the social-democratic party. The introduction of an annual quota for the immigration of *Aussiedler* and indirect administrative steering possibilities led to a plateau of around 210,000 ethnic German immigrants per year, with a falling trend over the last years. Potential *Aussiedler* now have to apply from abroad to ensure that only 'Germans' are arriving. Additionally, the services offered to *Aussiedler*, first restricted in 1991, when the changing

[182] L. Hoffmann, *Die unvollendete Republik: Zwischen Einwanderungsland und deutschem Nationalstaat*, 2nd rev. ed., Köln, PappyRossa, 1992, p. 71.

[183] Groenendijk et al, 1995, op. cit., pp. 30-40.

political climate made this decision possible for the conservative government, were further limited.[184]

A further measure was the consolidation of changes in the naturalisation regulations of 1990. Immigrants living more than fifteen years in Germany and children of immigrants between the age of 16 and 23 can become naturalised if they fulfil certain conditions and give up their former citizenship. Commentators have interpreted this as a positive step towards the liberalisation of the *ius sanguinis* principle. However, the rejection of dual nationality and the introduction of residence permits in January 1997 for children of immigrant origin born in Germany, mainly affecting Turkish citizens, gives the wrong signal to immigrant communities.

A fourth development, almost unnoticed by the public, was the extension of the temporary employment system for migrant workers. The German government responded for foreign policy reasons to the migration pressure from the east European neighbour states with the introduction of quotas for migrant workers. From 1989 on, Germany concluded bilateral agreements with several east European countries which offer the possibility of employment for up to three years. The agreements provide for an annual quota of workers for each country. German employers subcontract to employers in eastern Europe for a defined, temporary project in Germany. The foreign companies employ their own staff. Again, as with the recruitment programme in the 1950s and 1960s, a characteristic feature of these agreements is the principle of contract work, i.e. migrant workers have to sign a contract with a specific company and their residence permits depend on this employment contract. Furthermore, these foreign workers are excluded from German social security provisions, and often receive lower wages than workers employed by a German company. Former contract workers have to spent at least two years abroad before they can again take up employment in Germany.[185]

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[184] Cf. Bade, 1994, op. cit.

[185] Cf. E. Hönekopp, *Labour Migration to Germany from Central and Eastern Europe - Old and New Trends*, Institute for Employment Research, Nürnberg, 1997.

These agreements should not be simply regarded as a means of satisfying labour demand. The formal aim of the system, including seasonal and cross-border work, is to improve relations between Germany and the neighbouring countries but should also be interpreted in the context of the new German *Ostpolitik*. In the changed geopolitical situation after the fall of the Iron Curtain, Germany is trying to integrate - or co-opt - its poorer eastern European neighbours in bilateral agreements designed to control migration movements and to reduce illegal immigration and employment by providing the temporary labour needed after unification in Germany. Further reasons brought forward were that providing the workers with hard currency and improving professional qualifications would assist the economic development and the democratic reform process in the sending countries. Similar aims were formulated to legitimise the recruitment of temporary migrant workers from southern Europe three decades earlier. In order to protect the domestic labour force, the quota was reduced when the unemployment rate in Germany increased. After a decline in the employment of foreign contract workers in the eighties, there was a rapid increase from 1989 onwards. In 1993, as part of the asylum compromise, the annual quota for contract workers was limited at an average of 100,000. Several measures were introduced to make the system less attractive following the rise in the unemployment rate in 1993. These new groups of migrants are also confronted with the guest worker ideology. Yet again, significant numbers will turn an initial temporary position into permanent status. However, concern over the import of cheap labour has also been voiced by trade unions with regard to posted workers from EU member states with lower wages and less social protection who benefit from the freedom of movement within the EU.[186]

An ethnic hierarchy of migrants

There is a clear division of policies directed towards ethnic Germans on the one hand and non-German immigrants on the other. Whereas the German government maintains that the "boat is full" in justifying the closure of its borders against the influx of non-German/non-EU migrants, the policy

[186] Groenendijk et al., 1995, op. cit.

regarding the immigration of ethnic Germans is diametrically opposed. The fundamental principle guiding government policies on immigration is the differentiation between those who are 'ethnic Germans' and those who are not. This doctrine has been maintained by all main political parties (the social-democratic, the conservative and the liberal party). Ethnic Germans or *Volksdeutsche* (people of German origin) are officially not perceived as immigrants. This view is best expressed by Alfred Dregger from the conservative Christian Democratic Party when he stated that Germany is the "*Heimat* (homeland) of all persecuted and oppressed Germans".[187] This doctrine is constitutionally institutionalised in Article 116 Basic Law. The provision is unique within the European Union in the field of immigration law. The central distinction in the treatment of these two immigrant groups has been the application by the German state of the principle of ethnicity (or *Volk*) to the question of citizenship. This concept deprives the government of a policy framework to deal with the dilemma of settled guest workers. The policy implication of the right to return home for ethnic Germans is the provision of state support programmes to guarantee a smooth and quick integration. Besides support schemes and financial contributions, this means above all the automatic acquisition of German citizenship.

The situation is fundamentally different for immigrants lacking German roots. Policies relating to them are essentially exclusionary, either internally in the form of their legal status and the absence of integrative measures, or externally, by implementing measures to stop further immigration of these groups. Whereas immigrants from Italy, Greece, Portugal or Spain are accepted today, and their legal status has improved due to their status as citizens of a EU member states, the immigrants from Turkey are perceived as problematic. The debate on the reform of the citizenship law focuses on this part of the immigrant population. The thrust of the debate is of a cultural nature. The main factor appears to be that the majority of these immigrants are

[187] quoted in R. Tichy, *Ausländer rein! Deutsche und Ausländer - verschiedene Herkunft, gemeinsame Zukunft*, München, C. H. Beck, 1993, p. 34.

Muslims and that their life style and many of their values are incompatible with a secular, modern, industrial society.

Restrictive measures are necessary, so the official line of argument goes, to guarantee public order. This is conveyed through a language and imagery of threat: the lack of space and resources to accommodate more foreigners, the jeopardising of social peace through *Überfremdung* (foreign domination), and the inability or unwillingness to integrate. The exclusion of the non-German minority and the striving for ethnic homogeneity, particularly reflected in the *Aussiedler* policy, shows a way of thinking that continues in the tradition of the ethnic nation state. Historically, nation-building and identity formation in Germany have resulted from a process of exclusion. Today, the motor of this process is a feeling of threat (unemployment, lack of housing, 'foreigners' crime'). In particular the perception of material threat plays a large role in the hostility against minorities. In times of empty public purses, increasingly narrower economic possibilities and cuts in welfare provisions, the living conditions of the national majority are noticeably affected and tolerance towards ethnic minorities is declining.

The transformation of migrant workers from a temporary workforce to a settled immigrant population is until today not accepted. The presumption that categories of migrants, such as contract workers and asylum seekers, would only stay temporarily has been a way to bridge the gap between policy statement and reality. The refusal to accept ethnic diversity has its roots in the prevailing image of the German nation which has been challenged by the settlement of large immigrant groups. Yet, as has been shown, labour market policy and foreign policy considerations play a significant role in determining admission policies. The characteristic ethnic understanding of the German people, however, affects strongly the formulation of integration policies and naturalisation regulations. A report by the Interior Ministry defines integration as 'incorporation into German conditions', and identifies as the essential preconditions adaptation to the social values and norms, knowledge of the German language and 'renunciation of exaggerated national-religious

behaviour'.[188] These demands are equivalent to assimilation. In this rationale, naturalisation is seen as the end of an integration process and not as a means of integration.

The continuing legal insecurity and disadvantage for migrant workers who originate from outside Europe or from central and eastern Europe is in stark contrasts with the experiences of migrants who are citizens of EU states. Yet, third country nationals are again divided into those who enjoy more favourable provisions under bi- or multi-lateral agreements between their country and Germany or the European Union. EU Association Agreements (e.g. with Turkey, the Maghreb countries), Europe Agreements with the central and eastern European countries and bilateral Cooperation Agreements between eastern European countries and Germany have conferred certain rights to citizens of these states employed legally in Germany. However, the diversity of these agreements and the rights they confer on individuals means that they cannot be seen as a model for the future. It is arguable that their patchwork approach is insufficient in achieving equality between non-EU migrant workers and EU citizens. Those agreements that give limited free movement rights for some non-EU immigrants such as Turkish workers, have led to the creation of a higher 'intermediate' status for this group. Now, the new forms of temporary employment prevailing since the 1980s, many migrant workers are excluded from social rights such as the eligibility for welfare state programs or family reunification. This process will lead to further social stratification unless it is clearly seen as part of a process towards full integration of all non-EU immigrants and their families. Well meaning declarations by politicians to counter racism are flawed if non-German immigrants are officially marginalized.

The discrimination against non-EU immigrants is inherent in the temporary migration policy. This is particularly evident in the employment restrictions imposed on migrants in terms of geographic and professional mobility. Language difficulties and lack of education further contribute to the inferior status of these migrants in the receiving society. Given the lack of freedom of

[188] BMI, 1993, op. cit., p. 5.

movement and choice, these migrant workers cannot take advantage of the same opportunities that the labour market offers German and EU citizens. Thus, immigration regulations have not only economic consequences but also a direct effect on the migrants' integration into German society. Constraints on other rights in the economic, social and political spheres further marginalize migrant workers and their families. Poverty, poor housing and inadequate education are some of the more profound consequences. General discrimination in the workplace, in the allocation of housing, and other aspects of their daily lives, is also experienced by long-term resident immigrants. Democratic principles of equality and claims to human rights challenge the tendency of the ethnic nation state tradition to exclude a part of the people - in the sense of population - from political participation. As long as citizenship rights are granted on the basis of ethnicity, the social and political tensions resulting from such mechanisms of inclusion and exclusion will continue.

3.3. IMMIGRATION AND POLITICAL CONTROL IN FRANCE

The first law in 1893 which imposed on foreign workers the duty to register and carry an official document proving their regular status was entitled *Loi sur la protection du marchée du travail national*, intended to provide protection for native French workers.[189] This constituted the first step towards the construction of the migrant worker of the present time. From now on, foreigners could not work any longer in France if the state did not authorise them. In order to implement this legislation, the Third Republic had to draw a demarcation line, largely ignored until then, in the midst of its 'people': French citizenship. This invisible line, based on an abstract legal concept, membership of a state, quickly became a social frontier. The Third Republic established the link between the national and the social dimension.

[189] G. Noiriel, *Le creuset français*, Paris, Ed. du Seuil, 1988, p. 88; C. Withol de Wenden, *Les immigrés et al politique: 150 ans d'évolution*, Paris, Presses de la FNSP, pp. 24-8.

The first controls over entry into France were institutionalised in 1906. Private companies, especially those involved in mining and metal production, organised immigration rather than the government. Direct state intervention began in 1914. Thereafter, immigration was promoted in order to compensate for the loss of the male work force in the First World War.[190] The pre-war liberal immigration policy was continued after the Second World War and immigration was declared a state responsibility. [191] An immigration regulation was formulated under General de Gaulle in 1945 based on selective criteria like in the United States and Canada and the principle of equality. This *Ordonnance* is - apart from a few changes - still valid and forms the basis of the French immigration legislation.[192] In the same year, the *Office National d'Immigration* (ONI) was founded which had exclusive competence to regulate labour migration and was supposed to replace the system of private recruitment.

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[190] G. Verbunt, 'France', in T. Hammar (ed.) *European Immigration Policy*, Cambridge, Cambridge University Press, 1985, pp. 127-64.

[191] For a detailed overview of French immigration policy see P. Weil, *La France et ses étrangers*, Paris, Calman-Lévy, 1991; M. Silverman, *Deconstructing the Nation. Immigration, Racism and Citizenship in France*, London, Routledge, 1992; Withol de Wenden, 1988, op. cit. Two recent historical studies supplement the political science literature: R. Schor, *Histoire de l'Immigration en France*, Paris, 1997 and D. Assouline et. al., *Un Siècle d'Immigration en France,* Vol. 1 1815-1918 and Vol. 2 1919-1945, Paris, 1997. A good summary is in S. Angenedt, *Ausländerforschung in Frankreich und der Bundesrepublik Deutschland*, Frankfurt/M., Campus, 1992, pp. 21-33 and J. Costa-Lascoux, *De l'Immigré au Citoyen*, Paris, La Documentation Française, 1989, provides a good overview including historical background. A detailed bibliography can be found in F. Dubois, *Immigrations:qu'en savons nous? Un bilan des connaissances*, Paris,1989. The relevant journals are *Migrations Société*, with regular analyses of French newspaper articles on immigration issues, and *Plein Droit, La Revue de GISTI*, focusing on legal analysis. A special issue was published in 1995: 'Cinquante ans de législation sur les étrangers', No.19-20. A selection of publications on immigration from 1932 to 1995 which were significant for their period are reviewed in '30 titres qui ont marqué leur temps, *Hommes & Migrations*, 1995, No.1190, pp.14-5.

[192] *Ordonnance* N.45 2658 of 2.11.1945 relativeaux conditions d'entrée et de séjour desétrangers en France, *J.O.R.F.* 4.11.1945, et rectificatifs *J.O.R.F.* 7.11. et 13.12.1945 in their current version.

Before 1940, large numbers of migrant workers came from eastern and southern Europe. The East-West confrontation in Europe after the war meant that migration from the South replaced migration from eastern Europe. Bilateral recruitment agreements were concluded with Germany, Italy and later Greece. Until 1968, immigrants could obtain a legal status on proof of work. Silverman summarises the first post-war efforts of state regulated immigration as inadequate:

> "The heterogeneous nature of immigration, the failure of ONI and the minimal prominence given to the topic in official circles make it impossible to talk of a coherent state policy on immigration in the immediate post-war period."[193]

At best, one can talk of a dual system of state immigration from the south European countries on the one hand, and unrestricted immigration from Algeria and other French colonies.[194]

Unregulated immigration and changes in public discourse 1956 - 1973

Immigration to France increased during the mid-1950s. The initial aim was to promote European immigration and recruitment agreements were concluded with Spain in 1961 and with Portugal in 1963. However, agreements were also concluded with Morocco, Tunisia, Mali and Mauritania in 1963, Senegal in 1964, Yugoslavia and Turkey in 1965.[195] This took place in addition to immigration from Algeria until 1962 which continued after Algeria's war of independence and decolonisation. Between 1956 and 1962 France experienced a slight economic recovery. Labour shortage, e.g. in the construction industry, was compensated for by the unregulated return of French citizens from Algeria (*repatriés*) and - still unrestricted - immigration of Algerians. From 1960 to 1974, nationals from the so-called *communauté francophone* enjoyed freedom of movement, i.e. citizens from the former

[193] Silverman, 1992, op. cit., p.42.

[194] Cf. Angenedt, 1992, op. cit., p.22.

[195] Cf. Silverman, 1992, op. cit., p.43; J. Garson, 'Migration and interdependence: the migration system between France and Africa', in: M.Kritz et al (eds), *International Migration Systems*, Oxford, Clarendon Press, 1992, pp. 80-93.

African colonies did not need a visa to enter France nor a residence or work permit in France. By the end of the 1960s, about 80% of migrant workers had entered France illegally or with the help of a tourist visa. Until 1962, this form of immigration was tolerated and regularisation was a realistic option for migrant workers. [196]

After the Algeria war in 1962, the French economy underwent a slow modernisation process. With an increasing orientation towards the European Community and a growing demand for labour, the government retreated completely from labour recruitment. Between 1962 and 1973, about 130.000 foreigners immigrated to France annually.[197] Immigration from Italy declined as the situation in Italy improved and working conditions were better in Germany and Switzerland. This was partly replaced by immigrants from Spain. Portuguese immigration completely bypassed the French state and was legalised later. The largest part of the immigrants, however, came from North Africa. Immigration was still in the hand of the employers rather than controlled by the state.

> "Unprotected by the state, virtually absent from political debate and largely disregarded by the unions, immigrants were considered a peripheral presence in French society. The following years saw a progressive politicisation of the phenomenon of immigration and a movement (in the national consciousness) from the periphery to the centre."[198]

Immigration moved to the fore of public consciousness at the end of the 1960s and, in general, was seen as positive. In official circles, however, increasingly concern was expressed about the 'problem' of North African immigration. The lack of immigration regulation has led to increased family immigration. At the end of the 1960s, the government tried to implement an immigration policy with the aim of reducing the dependency from the main (non-European) emigration countries. In 1968, in violation of the Evian Agreement, a quota for Algerian

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[196] N. Marot, 'L'évolution des accords franco-africains' , *Plein Droit*, 1995, No. 29-30, pp. 96-9.

[197] Angenedt, 1992, op. cit., p. 24.

[198] Silverman, 1992, op. cit., p.46.

immigrants was introduced. Legalisation of immigrants already in the country was forbidden.

The unwillingness of the French government to regulate immigration in the phase 1956 to 1973 was unchanged but it was during the late 1960s and early 1970s that immigration became a publicly discussed issue and resentments against certain immigrants groups emerged as they still exist today. The theme that dominates most analyses of the recent period is what Max Silverman has termed the 'racialised' view of the post-1960s influx of non-European immigrants.[199] This perspective has informed the discussion and actions of trade unions, political parties and the government. Within the political dialogue and in the construction of public policy during the past 15 years, 'immigrants' have been generally presumed to be people originating in Africa and the Caribbean, regardless of whether they are in fact citizens (either naturalised or born in France).[200]

The first attempt by the French state to define a coherent immigration policy for France developed after the May crisis of 1968, and is summarised in a report written by Correntin Calvez for the Economic and Social Council in 1969. The report recognised the economic need for labour, but for the first time clearly differentiated European from non-European workers. European immigrants were regarded as being able to assimilate and they should be encouraged to become French citizens, argued Calvez, while non-European immigrants constituted an 'inassimiable island':

> "It seems desirable, therefore, more and more to give to the influx of non-European origin, and principally to the flow from the Maghreb, the character of temporary immigration for work, organised in the manner of a rapid process of introduction which would be linked as much as possible to

[199] Silverman, 1992, op. cit.

[200] Africans were still a minority of all resident immigrants in France in 1990. The largest single immigrant group is from Portugal. Cf. Institut Nationale de Statistique et d'Études Economique (ed.), *Les étrangers en France: portrait social*, Paris, INSEE, 1994.

the need for labour or the business sectors concerned, and in cooperation with the country of origin."[201]

Thus, from the beginning of the process of defining and implementing immigration policy, the idea of difference was asserted, a difference that was frequently posed in racialised terms.

Implementation of immigration control 1974 - 1981

In July 1974, as a consequence of severe economic problems after the oil crisis of 1973, the French government banned all labour immigration. This included also citizens from the former African colonies. In November 1974, two *circulaires* (secondary legislation) from the Interior and Labour Ministry introduced residence and work permit obligations, thus abolishing the privileged treatment of the *communauté francophone*. Residence and work permits were now issued to immigrants from the former colonies according to the same criteria as for other third country nationals on the basis of the *Ordonnance* of 1945.[202]

Immigration controls were intensified, yet labour migration was mainly determined by family immigration so that the situation hardly changed. Family immigration even increased, like in Germany, as the migrant workers now prepared for a long-term stay. Two attempts in 1975 and 1977 to stop family immigration were annulled by the *Conseil d'Etat*, the highest French administrative court, for humanitarian reasons, but nevertheless family immigration was restricted and became more difficult. Yet the lack of social-political programmes to promote the integration of immigrants led to tensions between the immigrant and indigenous population. The immigrant population, in 1970 50% was family immigration, lived in very poor housing conditions and there were not any school integration concepts. The use of quotas in housing and schools became a widespread practice in the 1970s, based on a notion of a 'threshold of tolerance'. Although the words 'immigrant' and 'foreigner' were used to describe those against whom such

[201] C. Calvez, 'Le problème des travailleurs étrangers', *avis et rapports du Conseil économique et social, JORF,* 27.3.1969, p. 315.

[202] Cf. Marot, 1995, op.cit.

quotas should apply, what was clearly meant was those perceived as non-white and different.[203]

In 1975, special rules on seasonal labour were introduced. A seasonal job is defined as not longer than six months per year. In agriculture (fruit farming and forestry), eight months may be granted.[204] The migrant workers have no access to the French labour market during their stay and have to leave the country as soon as their contract is finished. The workers are paid a minimum wage, and their selection and transport is organised by the *Office des Migrations Internationales* (OMI), ONI's successor organisation. Seasonal workers are covered by the French social security law. At the same time, the bilateral recruitment treaties granting migrant workers from the former French colonies in North and West Africa special status were ended between 1975 and 1977.[205] The recruitment of seasonal workers from Morocco and Tunisia had already been regulated in agreements from 1963. Potential workers have to apply at the OMI offices in Casablanca and Tunis. The minimum period of employment is four months and the workers have to leave France at the end of their contract. Employers have to pay a fee in advance, varying from 750 Francs for employment in agriculture up to 2.000 Francs for non-agricultural workers, reflecting the needs of the French labour market. Agreements on seasonal work was further concluded with Yugoslavia in 1965 and 1986.[206] Yugoslav workers were only allowed to stay for less than four months.

In 1977, two measures were introduced to limit immigration. First, a financial incentive (*aide au retour*) was offered to unemployed immigrants to stimulate the return to their countries of origin. During the 1970s, when policy-makers assumed that there was a real possibility that North-Africans would return home, a policy consensus developed around state aid for programmes that would encourage

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[203] Cf. R. Grillo, *Ideologies and Institutions in Urban France*, Cambridge, Cambridge University Press, 1985, pp. 125-7.

[204] Office des Migrations Internationales, *OMI classeur. Réglementation de l'immigration*, Paris, 1993, p. 69.

[205] Verbunt, 1985, op. cit.

[206] OMI, 1993, op. cit., pp. 16-7.

them or at least permit them to do so. The limited success of the programme led to increased deportations which were controversial within the centrist and Gaullist government parties as well as internationally. The *aide au retour* was mainly chosen by Portuguese and Spanish instead of African immigrants who had been the target of the government programme. Nevertheless, a similar resettlement assistance program was drawn up again in late 1991 but has not been successful either.[207] Secondly, family immigration and conditions for residence permits were made more difficult and attempts to stop illegal immigration were made. Nevertheless, immigration increased. The measures were aimed at mainly non-European immigrations as at this time immigration from the prospective EC member states Spain, Portugal and Greece was not regulated.[208]

The *loi Bonnet* of 1980 changed for the first time the *Ordonnance* of 1945. Until then, the *Ordonnance* had been interpreted and implemented through ministerial *circulaires* (administrative regulations).[209] Entry and residence conditions became stricter and it became easier to deport foreigners. The *loi Bonnet*, according to Wölker, forms the turning point in France's post-war immigration policy and not, as other commentators state, the regulations based on this law passed by the socialist government since the autumn of 1981.
During the 1970s, the government struggled to implement the main lines of the Calvez Report, but was unsuccessful. Confronted with the mobilised opposition of the left, the government avoided any serious attempt to exclude the families of non-European workers already in the country, a policy that had the contradictory effect of converting a population of immigrant workers into one of resident families. This meant that the policy problem was increasingly less that of

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[207] D. Kubat, 'France: Balancing Demographic and Cultural Nationalism', in ibid (ed.), *The Politics of Migration Policies*, New York, Center for Migration Studies, 1993, pp. 164-187; Verbunt, 1985, op. cit., pp. 127-64.

[208] Silverman, 1992, op. cit., p. 57.

[209] Many regulations have not been published and decisions have differed from administration to administration. Thus, often a decision was not comprehensible for the person concerned. Cf. GISTI, 'La France: état de droit?, *économie & humanisme, Dossier: L'Immigration qui fait la France*, 1981, No. 257, pp. 20-30.

immigration (that is, a border problem), and more that of integration of immigrant communities.

A new immigration policy under Mitterand?

During the 1980s, immigration became one of the most important political issues in France.[210] The aim of the immigration policy of the Socialist government under President Mitterand was to prevent any further immigration. The involvement of the central state, now controlled by a socialist-communist coalition government under Pierre Mauroy, grew. Measures against illegal immigrants were intensified but illegal immigrants already in the country were offered the opportunity to legalise their status. The largest regularisation programme was carried out in 1981/82, and about 130.000 applicants received a residence permit, followed by regularisation programmes in 1989 and in 1991/92. The *aide au retour* programme was intensified. Family immigration was made easier and the deportation of foreigners became more difficult.

The second objective of the new government was the integration of immigrants through improved living conditions and a more secure legal status. New regulations regarding residence and work were supported by measures improving the social and political participation. Immigrants gained the right to form associations and the passive and active right to vote in trade unions. New bodies were founded on the local and national level to include immigrants in the decision-making process. Although the socialist government described its immigration policy as new, the continuity of argumentation since the late 1960s is striking. If anything can be described as new it was not the policy objectives but the increase in regulations and decrees. The socialist immigration policy since1981 was first seen as an improvement regarding the legal status of settled third-country nationals.[211] However, the measures introduced since 1983 are

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[210] An good overview on the development from 1980 to 1986 is in S. Body-Gendrot et al., 'Entré interdite: La législation sur l'immigration en France, Royaume-Uni et aux Etats-Unis', *Revue Française de Science Politiques*, 1989, Vol. 39, No. 1, pp. 50-74; and in C. Wihtol de Wenden, 'France's policy on migration from May 1981 till March 1986: its symbolic dimension, its restrictive aspects and its unintended effects', *International Migration*, 1987, No. 2, pp. 211-20.

[211] So for many, e.g. Angenendt, 1992, op. cit., p. 32.

equivalent to an expansion of state instruments to control migration movements which were, contrary to official claims, not met with corresponding integration endeavors. [212]

By 1982, immigration regulations towards Algerian citizens were so restrictive that the Algerian government protested officially. Contrary to the initial intention, and not least due to pressure from the right-extreme party *Front National*, more and more restrictive immigration regulations were introduced, such as for example the sharp restriction of family immigration in December 1984. Since the 1980s, the leader of the *Front National*, Le Pen, stated that immigration constituted a threat to the nation. In 1983, the just abolished *aide au retour* program was reintroduced in order to counter increasing unemployment and the pressure from the (extreme) right.

In July 1984, a new law was passed jointly by the left and right parties in the parliament which merged the residence and work permit regulations. The different permits were reduced to two: the *carte de séjour temporaire* and the *carte de résident*, valid for ten years. The merger of the different residence titles combined with the lack of compulsory return was by some commentators interpreted as a recognition of the permanent settlement of the immigrants.[213] At the same time, however, immigration controls were tighten up and family immigration was made more difficult, emphasising the discrimination against third-country nationals in contrast to citizens of EC member states. This is not compatible with the Council of Europe Convention on Migrant Workers which France signed in 1984. The year 1984 is characterised by contradictions in the French immigration policy: on the one hand, facilitation in the residence law and signing of the Council of Europe Convention; on the other hand restrictions in family immigration and thus

[212] For are more positive view see Withol de Wenden, 1987, op cit.

[213] Silverman, 1992, op. cit., p. 62, sees the new *carte unique* as a step forward. See also U. Knight et al., *Deutschland nur den Deutschen? Die Ausländerfrage in Deutschland. Frankreich und den USA*, Erlangen, Straube, 1991, p. 94. In practice, however, applicants faced bureaucratic obstacles before they finally received the new residence permit after months of delay. Cf. GISTI, *La loi du 17 juillet 1984 et son application*, Paris, 1984.

a break with the premise of equal treatment and human rights allegedly underlying this policy field.

In 1986, the Gaullist party *Union pour la Démocratie Française* won the parliamentary elections. Their immigration law of September 1986, also known as the *lois Pasqua,* constituted a further restrictive step but failed like all previous measures to get illegal immigration under control. Two changes are noticeable: settled immigrants could now be deported on grounds of public order, and a visa obligation was introduced for all countries except for EC member states and Switzerland. The majority of the more liberal provisions of the 1980 law were abolished and the restrictive trend of the 1984 law was confirmed and further developed.[214] This law also laid the foundation for the paradox situation of the *sans papier.* An immigrant can lose his or her *carte de résident* by offences against public order. However, often these people fall under one of the protected categories specified in the immigration law who cannot be deported such as parents of French children. Consequently, these immigrants live and work in France without a residence and work permit but with official knowledge.[215]
The years from 1986 to 1988, the first cohabitation when Jacques Chirac was Prime Minister, did not change the political situation within a polarising debate. While under Chirac the main focus of the debate was on immigration and national identity, under the Rocard and Cresson governments the debate shifted to issues of integration problems symbolised by the veil worn by Muslim women. The discourse on 'integration problems' of mainly North African immigrants was aggravated through the violent riots in the *banlieues* of some large cities such as Paris or Marseille in the early 1990s.

> "After ten years under a socialist president, France was profoundly marked by a sense of national and social crisis. The term 'immigration' had become a euphemism for this crisis. ... Caught in the glare of the national racism of Le Pen ... anti-racism (and the organised Left in general) not only lacked the necessary vision and strategy to cope with the wider social

[214] See for a critical analysis GISTI, *La loi du 9 Septembre 1986 sur l'entrée et séjour des étrangers en France*, Paris, 1986.

[215] See for a detailed account GISTI, *Note sur le projet de loi gouvernemental relatif à l'entrée etau séjour des étrangers en France. Analyse et commentaire du projet de loi*, Paris, 1986.

crisis but frequently perpetuated a discourse which contributed to a confusion of racism and anti-racism."[216]

Continuity of the *lois Pasqua*?

The socialist government during the period 1988 to 1993 tried hard to prove the critics from the right wrong that a left government is 'soft' on immigration. It did not take long before another 'reform' of the immigration law was attempted. The *loi Joxe* of August 1989 continued the policy of the previous conservative government: the tightening up of entry controls and entry refusal at borders but improved rights for non-French family members of French and non-French citizens who had lived in France for longer than ten years. The category of immigrants who were entitled to a *carte de résident* was extended and expulsion of immigrants who had been living in France for over ten years was almost impossible.[217]

In 1991, the government adopted two measures to restrict access to the labour market for migrants and asylum seekers. Firstly, sanctions against employers were introduced to prevent the employment of illegal migrant workers. Secondly, the long standing policy to allow asylum seekers to look for employment in order to support themselves during the asylum procedure was abolished in order, so the argument went, to prevent the abuse of the asylum system. From then on, a work permit has been only issued to asylum seekers if no other workers are available on the French labour market. Despite a restrictive policy on migrant labour, seasonal migrant work still occurs on a large scale. In addition to existing agreements, an agreement with Poland was concluded in 1992.[218]

Between 1993 and 1995, France was for the second time governed by a *cohabitation* government with Mitterand as President but Balladur from the conservative *Rassemblement pour la République* as Prime Minister. The new

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[216] Silverman, 1992, op cit., p. 69

[217] Cf. GISTI, *La loi du 2 Aout 1989 sur le séjour et l'entrée des étrangers en France*, Paris 1989; ibid., 'La réhabilitation des "plein droits"', *Plein Droit*, 1989, No. 9, pp. 10-11; an overview on the immigration policy of the early 1990s is in C. Wihtol de Wenden, 'Frankreich', in H. Heinelt (ed), *Zuwanderungspolitik in Europa*, Opladen, Leske + Budrich, 1994, pp. 255- 71.

[218] OMI, 1993, op. cit., p. 33.

government passed already in its first year a package of immigration regulations, again known as the *lois Pasqua* after the Interior Minister. The changes were so restrictive that even government members criticised them.[219] The constitutional court ruled that the restrictions on family immigration are unlawful as every person and not only French citizens had a right to family life.[220] Two regulations abolished in 1989 were reintroduced: immigrants who had been charged with a public order offence and those who had been illegally in France could obtain a *carte de résident*. The categories of foreigners who could not be deported or refused entry at the border were narrowed down. The discussion on immigration focused on illegal immigration and internal security in the context of protecting the population from crime and drugs. The *lois Pasqua* reduced the question of immigration to a question of policing comparable with the German situation where the *Ausländerrecht* is assigned to the police law (*Polizei- und Ordnungsrecht*). The integration of immigrants was not any longer an issue in political debate.[221] Critics argued that the *lois Pasqua* were in contrast to its original objectives, namely legal security for immigrants with regard to residence permits and reduction of the numbers of immigrants without residence permits. [222] Instead, more immigrants fell through the immigration regulations and joined the growing

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[219] The Justice Minister and the Minister of Social Affairs objected to identity controls as discriminating. Institutional changes were controversial within the government. The *Secrétariat d'Etat à l'Intégration* was abolished and the mandate for the *Haut Conseil à l'Intégration* was not extended. Cf. Bade, 1994, op. cit., p. 24.

[220] *Le Monde*, 16.8.1993; Terre des Hommes (eds), *Lois sur l'Immigration. Conséquences sur les droits des enfants et de la famille. Les lois Passqua en examen,* St. Denis, 1993.

[221] Cf. 'Politique de l'Immigration. De la "génération Mitterand" à la "génération Pasqua". Revue de Presse,' *Migrations Societé*, 1993, Vol. 5, No. 28-9, pp. 105-16.

[222] For an assessment of the *lois Pasqua* see N. Guimezanes, 'Les étrangers et les récentes réformes du droit de l'immigration et de la nationalité', *Journal du Droit International*, 1994, Vol. 121, No. 1, pp. 59-88; C. Bruschi, 'Moins de droits pour les étrangers en France', *Migrations Societé*, 1994, Vol.6, No. 31, pp. 7-23; GISTI, *Projet de réforme de l'entrée et du séjour des étrangers. Legiferer pour mieux tuer des droits. Texte, Analyse, Commentaire*, Paris, 1993; *Hommes & Migrations*, 1994, No. 1178, special issue. A good overview about the political legal situation of immigrants before the *lois Pasqua* is given by N. Guimezanes, 'La situation en France des étrangers non-communautaires à l'aube de l'année 1993', *Journal du Droit International*, 1993, Vol. 120, No. 1, pp. 5-39.

number of the *sans papiers*.[223] These immigrants cannot be deported but at the same time do not get the opportunity to legalize their stay. The "*absurdité de cette impasse*"[224] exists until today and the proposals by the socialist government under Prime Minister Jospin elected in May 1997 do not solve the situation completely.

Further amendmends to the immigration law, the *loi Debré*, passed by the conservative government during the last months of its term of office, have been regarded as the "*le texte le plus dur*".[225] One of the most controversial issues was the vague formulation of offences against the *ordre public*. This provision could be used to deny the issuing or extension of a resident permit. In April 1997 the *Conseil constutionnel* ruled that the withdrawal of a long term resident permits solely on grounds of public order was unconstitutional.[226] This would have mainly affected non-European immigrants and, due to the changes of the citizenship law in 1993, many young persons born in France of Algerian parents (cf. 4.4). The *loi*

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[223] In contrast to 'illegal' immigrants, the *sans papier* did not enter France illegally. They are often family members of settled immigrants or foreign students who do not any longer get a residence permit due to changes in the law. The *loi Pasqua* affected in particular immigrants under18 years. Usually, children of immigrants received their own residence permit automatically on their eighteenth birthday if they had come to France before the age of eleven. The new law lowered the age of entry to six years so that many youths were suddenly not entitled to a residence permit but by law protected from deportation.

[224] P. Farine, 'De la dérive à l'impasse', *Migrations Societé*, 1996, Vol. 8, No. 45, pp. 3-4.

[225] P. Farine, 'Le texte le plus dur', *Migrations Societé*, 1997, Vol. 9, No. 49, pp. 3-4 and ibid., 'Une loi d'exception', *Migrations Societé*, 1997, Vol. 9, No. 50-51, pp. 3-4.

[226] Décision n. 97-389 DC du 22 avril 1997: Loi portant diverses dispositions relatives à l'immigration, *JORF*, 25 avril 1997. The law was amended and entered into force as Loi du 24 avril 1997 sur l'immigration n. 97-396, *JORF*, avril 1997. On the decision of the court see 'Le Conseil constitutionnel censure deux dispositions de la loi Debré', *Le Monde*, 25.4.1997; on the *loi Debré* see 'Le gouvernement a décidé de modifier la loi Pasqua sur l'immigration', Le Monde, 9.10.1996; 'Le projet de loi sur l'immigration durcit le controle des flux migratoires', *Le Monde*, 18.12.1996; and the Interior Minister in *Le Figaro*, 7.11.1996: Un point de vue du Ministre de l'Intérieur, Jean-Louis Debré: "Pour une immigration irrégulière zéro".

Debré is only a provisional solution that does not make up for a comprehensive immigration legislation.[227]

The change of government in May 1997 gave hope for a change in French immigration policy. The *Parti Socialist* had promised during the election campaign to repeal the loi Debré. However, the new French government, like the German government, backed away from a comprehensive reform of the immigration law. The text submitted by Interior Minister Chevènement amended only some of the restrictions introduced earlier that year. Critique came from all sides: The Green Party, the Communist party and immigrant groups criticised that the governments did not fullfil its election promis to revoke the *loi Debré* while the conservative parties denounced the reform for opening the borders to illegal immigrants. [228] According to the government, its immigration policy is guided by

> "le souci de définir des règles simples, réaliste et humaines pur les séjours des étrangers, de prévenir les flux d'immigration illégale, de garantir l'intégration republicaine et de rendre possible un véritable codéveloppment avec les pays concernés."[229]

These guiding principles of French immigration policy do not present a qualitative change but are in the tradition of the successive French governments since the 1980s. The emphasis is on combating illegal immigration (border policies) and integration measures for resident immigrants. The French government shares here the conviction with the German and British governments that a reduction of immigration is a necessity for the successful integration of foreigners.

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[227] This critique has also been expressed by the neo-gaullist RPR member of the Assemblé Nationale Léonard: 'Reform der Einwanderungsgesetzgebung. Französischer Ministerrat nimmtGesetzentwurf an', *Frankfurter Allgemeine Zeitung*, 8.11.1996.

[228] So for example the French Human Rights Commission. In particular in asylum and citizenship issues would the government proposal fall far behind its initial promises; cf. *Der Tagespiegel*, 4.10.1997 and 5.12.1997.

[229] printed in *JORF*, 26.6.1997, pp. 9819-9821.

3.4. IMMIGRATION AND POLITICAL CONTROL IN THE UNITED KINGDOM[230]

As in Germany and France, demands for immigration control during the 1890s came at a time when cheap foreign labour turned public opinion against unrestricted immigration. The first major campaign against immigrants occurred at the end of the nineteenth century following the arrival of Russian Jewish refugees.[231] The campaign received much of is impetus from the East End of London where many of the refugees settled and let to the adoption to the Aliens Act of 1905, the first major piece of legislation to limit entry into the UK. The First World War led to the Aliens Restriction Act of 1914 which was extended by the Aliens Act of 1919. In 1920, the government further restricted the immigration of non-Commonwealth citizens who were unable to provide proof of sufficient funds.[232] The entry of citizens from Commonwealth countries was not controlled.

Like France, the UK experienced a shortage of labour after the Second World War. The solution lay with immigrant labour. In the UK this took four forms: first, the recruitment of Polishes-servicemen; second, European Volunteer Workers; third, immigration from Ireland; and fourth, from the Commonwealth countries.

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[230] For detailed information on developments in British immigration law and policy see D. Coleman, 'Immigration policy in Great Britain', in F. Heckmann et al. (eds.), *Migration Policies: A Comparative Perspective*, Stuttgart, Enke, 1994, pp. 105-25; S. Juss, *Immigration, Nationality and Citizenship*, London, Mansell, 1993; Z. Layton-Henry, 'The would-be zero-immigration country, in A. Wayne, et. al (eds.), *Controlling Migration: A Global Perspective*, Stanford, Stanford University Press, 1995, pp. 273-95; ibid., *The Politics of Immigration*, Oxford, Blackwell, 1992; C. Howard, 'United Kingdom II: Immigration and the Law', in Kubat (ed.), 1993, op. cit., pp.108-24; V. Bevan, *The Development of British Immigration Law*, London, Croom Helm, 1986; A. Dummett, et al., *Subjects, Citizens, Aliens and Others. Nationality and Immigration Law*, London, Weidenfeld & Nicholson, 1990; T. Rees, 'United Kingdom I: Inheriting Empire's People', in Kubat (ed.), op. cit., 1993, pp. 87-107; I. Spencer, *British Immigration Policy since 1939*, London, Routledge, 1997.

[231] Cf. Juss, 1993, op. cit., pp. 32-36.

[232] On the early history of immigration policy see for example C. Holmes, *A Tolerant country?*, London, Faber and Faber, 1991, pp. 14-44.

It was latter group of immigrants from the former colonies in Africa, the Caribbean and the Indian sub-continent that has formed the most significant part and has been the subject of the debates and controversy that led to a series of legislative acts that places strict control on immigration.[233] Unlike in France and Germany, immigration was not discussed in economic terms.

> "In general, neither the leaders of the Tory or labour party showed any appreciation or interest in the economic side of immigration."[234]

In several ways the immigration experience differs from continental European countries. The first striking difference is that the UK has had a negative net-migration in the years between 1965 and 1985. Secondly, the UK has more extensively been involved in different migration processes at the same time than the other west-European countries. Also in a third aspect is the British case unique among the major west-European receiving societies. The former colonial immigrants who at least initially enjoyed *de jure* equality make up almost all the 'foreign' population (ethnic minorities) whereas in France former colonial immigrants account for only a part of the immigrant population. Furthermore, a large proportion of its foreign workers has come from Ireland. The Irish have always been treated like British citizens if resident in the United Kingdom. In 1949, the British parliament passed the Ireland Act to confirm the economic, social and political rights that the Irish have traditionally enjoyed in Britain.

Prior to 1962, the relationship between citizenship and immigration was straightforward. British subjects, including anyone born in the Commonwealth, were free from immigration control. The British Nationality Act of 1948 reaffirmed the right of all Commonwealth citizens to enter the UK without restrictions. Underlying the 1948 Act was an ideology of the Commonwealth ideal whereby every Commonwealth citizen was considered a British subject and thus assured free entry into the 'mother country'.[235] Immigration control

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[233] On early post-war immigration to the UK see Spencer, 1997, op. cit., pp.21-81.

[234] G. Freeman, *Immigrant Labor and Racial Conflict in Industrial Societies. The French and British Experiences 1945-1975*, Princeton, 1979, p. 183.

[235] Bevan, 1986, op. cit., p. 77; Freeman, 1979, op. cit., p. 37-46; see section 4.5.

distinguished initially between Commonwealth citizens on the one hand, and non-Commonwealth citizens on the other. Whilst the former were subject to the 1948 British Nationality Act, the latter were subject to the 1905 Aliens Act, the first legislation designed to limit entry into Britain.

With the ending of the Empire, the Commonwealth ideal became an important element in British national identity.[236] The functioning of the Commonwealth required good relations with member countries and especially those in Asia and Africa that would increasingly form a majority of the membership.[237] Free movement played an important part in sustaining this ideal. Imposition of entry controls could jeopardise any sense of 'we-ness' among the Commonwealth countries. Free movement posed no problem for the doctrine of solidarity and universal brotherhood as long as immigration was predominantly from the so-called Old Commonwealth countries, that is Canada, Australia and New Zealand. The situation began to change, however, with the change in composition of immigration. Increasing immigration from the New Commonwealth countries in Asia, Africa and the Caribbean led to political agitation for its control. Riots between black immigrants and white groups in Nottingham and London in 1958 brought the issue to the attention of the national press, the public in general and on top of the political agenda. The immediate reaction to the riots, highlighting the hostility against 'black' Commonwealth immigration, was the assumption that immigration control was the answer. Thus began a steady shift towards an ever more restrictive position on immigration.[238]

Subsequent legislation placed strict limitations on non-European, non-white immigration from the New Commonwealth countries. The first controls were imposed by the Commonwealth Immigrants Act of 1962, passed by a Conservative government. This Act broke with the ideal of unity and equality

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[236] Freeman, 1979, op. cit., p. 290; Z. Layton-Henry, *The Politics of Race in Britain*, London, 1984, pp. 7-9.

[237] Layton-Henry, 1984, op. cit., p. 33.

[238] On the discussion on the effect of the race riots on immigration legislation see Spencer, 1997, op. cit., pp. 98-102.

and served as the precedent for further restrictive legislation.[239] All those seeking to enter the UK for settlement from the Commonwealth and colonies had to apply for work vouchers whereas those born in the UK or holding UK passports were nor restricted under the Act but deemed to 'belong to' the UK.[240] In addition, for the first time, Commonwealth citizens could be deported after a court recommendation. The Labour Party was vehemently opposed to this Act and pledged to repeal it if it took office. Though once in power in 1965, the Labour Party position had converged with the conservative position and now fully accepted the need for controls on non-white immigration. The number of work vouchers were reduced to a maximum of 8,500 per year. Access was now limited to particular skills or a specific job offered by an employer. The limited number of work vouchers effectively reduced primary Commonwealth immigration, leaving immigration possibilities to dependent relatives of immigrants already resident in Britain. The 1965 rules also introduced a stricter interpretation of who was to be admitted as a dependent, excluding nephews, cousins and children over 16.[241]

By the latter half of 1967 immigration was again an issue in British politics prompted by increased immigration of East African Asians. The fear of large-scale immigration increased pressures for further immigration controls. The perceived crisis revolved around the rapid emigration of Asians holding British passports from Kenya and other East African states. Asians resident in Kenya had retained their British citizenship following Kenya's independence in 1963. As their passports had been issued by the British government, they were not subject to immigration controls under the 1962 Act.[242] The effect of the Commonwealth Immigrant Act 1968 was to strip such persons of the automatic right to enter and settle in the UK unless they had a connection to the UK by birth, descent or naturalisation. As most Asians in African Commonwealth

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[239] Holmes, 1991, op. cit, p. 61.

[240] For the detailed regulations see Spencer, 1997, op. cit., pp. 129-134.

[241] Cf. Freemann, 1979, op. cit., p. 55; Bevan, 1986, op. cit., p. 79; Spencer, 1997, op. cit., pp. 134-40.

[242] Cf. Holmes, 1991, op. cit., pp. 54-58; D. Hiro, *Black British, White British*, London, Grafton, 1991, p. 213; Spencer, 1997, op. cit., pp. 140-43.

countries, for example, had obtained their British citizenship by registration they could not establish any such link.[243] Their admission was regulated by a quota system of 1,500 specially issued vouchers per year.[244] The effect of the Act was to create a new class of citizens who were, in effect, stateless.

The end to free movement in the Commonwealth

Further restrictions were introduced in the Immigration Act of 1971 which ended the distinction between the category of alien and Commonwealth citizen created by the earlier immigration acts. The 1971 Immigration Act replaced the Aliens Act of 1919 and the Commonwealth Immigrants Acts. The aim of this legislation was to maintain strict control over New Commonwealth immigration but to permit the entry of those persons living in Commonwealth countries who were of British descent. This legislation introduced the now infamous concept of 'patrial' status. A patrial is someone whose parent or grandparent was born in the UK. Those were now the only immigrant group who enjoyed the right of free entry and indefinite stay. Patrials could settle and apply for British passports. The category of patrial was important not just in relation to immigration into the UK but because patrials constituted a class of citizens entitled under the 1972 Treaty of Accession between the UK and the European Community to the benefits of EC membership, namely free movement, as UK citizens. The vast majority who fell into this category were white.[245] The majority of citizens of New Commonwealth countries had lost their privileged status and have become not only in the EC context but also within the UK third country nationals.

The new Act made the entry for those without a patrial connection to the UK dependent on the issue of a work permit which did not confer rights of residence. Work permits are approved on the basis of qualification, age and language proficiency for initially one year. After four years, work permit holders

[243] Juss, 1993, op. cit., pp. 71-101; Bevan, 1986, op. cit., p. 80-81, Holmes, 1991, op. cit., p. 54; Dummett et al., 1990, op. cit., p. 202. This affected not only British passport holders from African Commonwealth countries but also from Bangladesh, India, Sri Lanka, Pakistan and the Caribbean.

[244] Hiro 1991, op. cit., p. 214; Holmes, 1991, op. cit., p. 55.

[245] Bevan, 1986, op. cit., p. 83.

can apply for the removal of the time limit. The 1971 Immigration Act basically brought primary Commonwealth immigration to an end. The Act distinguishes between migration for settlement, for work and for temporary purposes. Illegal immigration was made a criminal offence. Gordon states that the 1971 Act also constituted a shift to internal control mechanisms and that "internal controls have become increasingly significant."[246]

In 1979 a Conservative government was elected which immediately started to work to fulfil its election promise to reduce immigration, to define entitlement to British citizenship and right of abode. The result was the British Nationality Act of 1981 which ended the common status of the UK and Colonies and the status of Commonwealth and linked immigration policies to citizenship. The new Nationality Act supplemented the efforts of the 1971 Immigration Act to reduce non-white immigration.[247] The implications of the 1981 Act are discussed in the following chapter.

The most important change introduced by the Immigration Act 1988 is the removal of the automatic right of entry for wives and children of Commonwealth citizens settled in Britain before 1973. Dummett and Nichols argue that the act removed

> "the only statutory right to family reunion in British law. It is now the case, as a result of that Act, that no British citizen has a right to be joined in the United Kingdom by a spouse of either sex."[248]

This, however, advantages citizens of other European Community (EC) member states. The Single European Act of 1987 gives EC nationals the right to free movement and to work in other members states. This includes the right to family life. Spouses of workers exercising their right to free movement must be allowed to join their partners. In contrast, the immigration of prospective husbands from New Commonwealth countries, especially from the Indian sub-continent, was

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[246] P. Gordon et al., *British Immigration Controls*, London, Runneymede Trust, 1985, p. 17.

[247] Cf. Z. Layton-Henry, *Race and the Thatcher Government*, in ibid. et. al. (eds.), *Race, Government and Politics in Britain*, London, Macmillan, 1986, pp. 73-100.

[248] A. Dummett, et al., *Subjects, Citizens, Aliens and Others*, London, 1990, pp. 253-4.

made virtually impossible by the contentious 'primary purpose rule'. According to this rule entry was denied if the immigration officer assumed that the purpose of the marriage was to gain a residence permit and to take up employment in the UK. [249]

Like its continental European neighbours, the UK experienced since the mid-1980s a rise in the number of asylum applicants.[250] The government's response to the perceived mass immigration of 'bogus asylum seekers' was two-fold. First, visa obligations were gradually introduced for citizens of Commonwealth states, starting with Sri Lanka in 1985. By 1996, these were extended to 117 countries in a EU co-ordinated visa list.[251] Secondly, in 1987 the Carriers Liability Act was passed, imposing fines for airlines bringing people into Britain without valid entry documents. The Asylum and Immigration Act 1993, among other provisions, increased the carriers' liability fine to £2,000 and introduced the 'safe third country' concept into British legislation i.e. asylum seekers who have stopped on their way to the UK in a safe country could be returned there. The same provision was incorporated into French and German asylum law in 1993. A list of safe countries was agreed on the EU level as part of the adoption of the Dublin Convention.[252]

The latest legislation has been the Asylum and Immigration Act 1996, which came into force in January 1997. One of the main criticism against this Act has been the formal introduction of internal controls in the form of employers' sanctions and the obligation for statutory institutions such as the Department

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[249] For an analysis of the implementation and critique of the primary purpose rule see Justice (ed.), *The Primary Purpose Rule: a Rule with no Purpose*, London, 1993.

[250] Home Office, Immigration and Nationality Department, *Annual Report*, London, HMSO, 1993, p. 7.

[251] Council Regulation (EC) No. 2317/95 of 25 September 1995 determining the third countries whose national must be in possession of visas when crossing the external borders of the Member States, *Official Journal*, L 234, 3.10.1995, pp. 1-3.

[252] Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities, Dublin, 15.6.1990; reprinted in T. Bunyan, *Key Texts on Justice and Home Affairs in the European Union*, London, 1997, pp. 49-54.

for Social Security or schools and colleges to check the immigration status of their clients or students.[253] The employment of workers without a work permit has become an offence leaving the employers with the duty to check the immigration status of an applicant. This Act has institutionalised the practice of internal controls in the UK. This constitutes a shift in the UK's immigration control approach closer to the west European countries tradition of internal policing measures. Traditionally, local authorities or welfare services have not played a role in internal controls. Only in 1995, the Home Office Secretary announced new regulations under which officials were required to report those immigrants to the Immigration Service who were claiming benefits and using services but did not have a proper status. Even before the 1996 Asylum and Immigration Act, a NACAB report states, "employers are already playing safe by adopting a more intrusive and intimidating approach than required under existing legislation."[254] According to the Immigration Law Practitioners Association, "the provisions of the Asylum and Immigration Bill are seeking now to make employers part of the enforcement process, ... to act as policeman."[255]

In an era where the western states contribute to the preservation of the present international economic system and increasing economic inequalities refugee and migration movements will continue. Further restrictions on immigration and asylum have resulted in a situation which hardly left a legal framework for migration, or legal gates of entry for immigrants. Leigh and Beyani have criticised the latest British immigration legislation on the grounds that

> "there is a danger that the underlying philosophy of the 1996 act is to reinforce the trend of irregular movements and the avoidance of international obligations to determine the status of asylum seekers."[256]

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[253] See The Glidewell Panel, *The Report from an independent enquiry into the implications and effects of the Asylum and Immigration Bill 1995 and related social measures*, London, 1996.

[254] NACAB, *Evidence: Prevention of Illegal Working - Response to the Home Office Consultation Document*, London, 1996, p. 2.

[255] ILPA, *Response to the Consultation Document on Prevention of Illegal Working*, London, 1996, p. 1.

[256] L. Leigh et al., *Asylum and Immigration Act 1996*, London, Blackstone Press, 1996, p. 4.

The second major concern is that the new legislation, including the abolition of social security provisions for in-country asylum claims since February 1996, will lead to more illegal work. Apart from students or visitors who may take up unauthorised employment, asylum seekers are now increasingly confronted with the dilemma that they are not entitled to social benefit nor are they allowed to work during the first six months of their stay in Britain. The Refugee Council warned the government that

> "the risk is, with the changes proposed to the Income Support entitlement of asylum seekers, that they may be far more likely, out of desperation, to be tempted into working illegally, and should that be the case, then this situation will have been directly caused by the government's policies."[257]

Yet working illegally constitutes a criminal offence and "those who, in desperation, seek work will instantly make themselves liable to arrest and prosecution."[258] The vicious circle is thus complete. Foreigners are only employed on a temporary basis in the UK, usually for a maximum period of three years which can be extended to four years, and have to apply for a work permit from abroad.[259] After four years continuous employment, a foreigner can apply for indefinite leave to remain. Holders of an indefinite work permit can work in the occupation of their choice without the need for a further work permit. The two main work permits are firstly, the work permit for a specific person requested by the future employer, and secondly, the work permit for 'keyworkers' in senior and highly specialised positions. Foreigners cannot be recruited on an anonymous basis. As in France and Germany, the employer must show that the post cannot be filled by a UK or EU citizen. Foreigners working on a work permit cannot change employers without prior approval from the Department of Employment. Family reunification is subject to entry clearance and visa regulations. The work

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[257] Refugee Council, *Response to Home Office Consultation on "Prevention of Illegal Working"*, London, 1996, p. 3.

[258] Commission for Racial Equality, *Response to the social security (persons from abroad) miscellaneous amendment regulations*, London, p. 8.

[259] 1971 Immigration Act as amended in 1990.

permit holder has to show evidence of sufficient resources and satisfactory accommodation.[260]

In May 1997 the Labour Party was elected into office. Yet hopes for a turn towards a more liberal immigration policy were soon disappointed. Measures proposed for a reform of the 1996 Act focused on restricting access to the asylum procedure and rights of asylum seekers during the refugee determination process.[261]

The UK did not have a recruitment policy like Germany and to a lesser extent France. Labour immigration was mainly Commonwealth immigration. As in France, it became clear by the 1950s that most of these immigrants would stay long-term or even settle in the UK. As increased immigration was not any longer wanted nor was migrant labour needed on the labour market, the first restrictions for Commonwealth immigrants were introduced in 1962 and further tightened in 1968 and 1971. This is in contrast to the *laissez faire* policy of the French government towards colonial immigration. The French state intervened relatively late in 1974 with the ban on labour recruitment. A further difference was the early politicisation of immigration in the UK during election campaigns in the 1960s compared to France and Germany. By the 1980s, the three case study countries shared the same main policy premises: labour migration either from former recruitment countries or colonies has been officially halted and secondary immigration has been restricted. Yet none of the three countries has ever formulated a comprehensive and clear immigration policy but instead relied on *ad hoc* secondary legislation forming a plethora of immigration rules, many applied on a discretionary basis.[262] The UK "has only responded at particular moments to particular pressures."[263] This is also true for Germany and France.[264]

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[260] Cf. Groenendijk et al., 1995, op. cit.

[261] Home Office, *Fairer, Faster and Firmer – A Modern Approach to immigration and Asylum*, CM 4018, London, HMSO, 1998.

[262] Juss, 1993, op. cit., pp. 157-8.

[263] A. Dummett, ' Agenda for Changing the Law', in ibid., (ed.), *Towards a Just Immigration Policy*, London, 1986, pp. 216-38, here p. 221; see also Juss, 1993, op. cit.

3.5. LIMITS TO POLITICAL CONTROL OF IMMIGRATION

All periods of social and economic change have been accompanied by migration and governments have used their authority to distinguish between 'wanted' and 'unwanted' immigrants. Yet the capacity of western democratic states to control and to intervene successfully in migration movements has been questioned. Cornelius and his collegues characterise controlling immigration as an 'ambivalent quest'. On the one hand international convergence exists in terms of the policy instruments chosen for controlling immigration; the results of migration control; the increasing incidence of social integration measures, and general public reactions to current immigration flows. On the other hand, these authors identify a widening gap between the goals of national immigration policies, and their actual results. [265]

The control of immigration is traditionally seen to be at the core of state sovereignty. Thus, it is rather surprising that the case study countries, as EU states on the whole, have implemented only minimal institutional regulations.

> "The most basic migration policy tasks of states are to establish the terms under which persons may legally enter the national territory for long-term or permanent residence and to plan and manage inflows to contribute to national, economic, demographic, and security objectives. This involves not only setting numerical targets but also determining the criteria by which migrants will be recruited or selected."[266]

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[264] Cf. A. Perotti, 'Le retour en force du dossier relatif à l'immigration', *Migrations Societé*, 1997, Vol. 9, No. 50-51, pp. 129-40; Demonpion, 1997, op. cit.

[265] Cf. Cornelius et al. (eds.), *Controlling Migration. A Global Perspective*, Stanford, Stanford University Press, 1994; J. F. Hollifield, *Immigrants, Markets and States*, Cambridge/Ma., Harvard University Press, 1992; D. Jacobsen, *Rights Across Borders: Immigration and the Decline of Citizenship*, Baltimore, John Hopkins University Press, 1995; S. Sassen, *Losing Control? Sovereignty in an Age of Globalization*, New York, Columbia University Press, 1996b; Y. Soysal, *Limits to Citizenship*, Chicago, University of Chicago Press, 1994; for the contrary argument see G. Freeman, 'Can liberal states control unwanted migration?', *Annals*, 1994, No. 534, pp. 17-30.

[266] Freeman, 1994, op cit., p. 19.

Admission policies, an elemental demarcation process of the nation state, do not only define politically the permeability of borders. As the case studies have shown, the categorisation of migrants is determined by political processes. A system of selective immigrant categories has emerged in the case study countries. Different criteria are used to categorise migrants whereby the differentiation according to economic and political migrants is often a product of the receiving state. Control of immigration tends to be based on an ethnic categorisation of immigrants while the grounds for entering the country are often secondary. Specifically implemented immigration policies establish selective categories for migrants, i.e. governments specify the criteria according to which migrants are admitted or not. Consequently, all other possibilities to enter the state are defined as illegal. This 'labelling' process itself is highly political.

Three types of migration are directly relevant to control at the point of border crossing: legal and illegal immigration as well as refugee flows.[267] The previous sections on the case study countries' immigration policy have shown that there are basically four main legal ways to enter the territory of a state. First, family immigration because family members are persons with special ties to resident immigrants. Second, colonial or 'ethnic' immigration, i.e. people who are in some way regarded as being affiliated to a country. Third, labour immigrants, i.e. certain professional groups, business people, migrant workers; people who are of special interest for a country. Fourth, refugees and asylum seekers, i.e. people who are admitted on humanitarian grounds.

Individual states' capacity to control immigration differs with regard to the respective group of people whose migration behaviour the state wants to influence. Family immigration constitutes today in each of the case study countries one of the most important immigrant category. Moreover, it is also the most important mechanism that transforms guest worker systems into permanent legal immigration systems. Failed attempts by French governments to stop family immigration - prevented by the highest administrative court for

[267] For internal demarcation processes other groups can be relevant.

humanitarian reasons - show how difficult it is for the state to influence this category. The right to family life is today regarded as a human right, written down in many European and international conventions, and as such not exclusively in the domain of national jurisdiction.[268] Recognising that family immigration is one of the most important immigration mechanisms, France and Germany have steadily tightened the right of entry of family members through as restrictive as possible regulations without being accused of violating their international obligations or even their own constitutions. The UK's efforts to limit family immigration culminated in the removal of the automatic right of entry for wives and children of Commonwealth citizens in 1988.

Another group of immigrants that contribute to the consolidation of migration systems are colonial and 'ethnic' immigrants. Each of the case study countries has had historical phases where a government could only with difficulty control these movements. This was, for example, the case for French citizens from Algeria after the Algeria war or in West Germany for *Vertriebene* after the Second World War. In both cases, a rhetoric of national solidarity accompanied the admission and integration of these groups. Yet these two examples also show that solidarity is less urgent when there is strong domestic counter-pressure due to economic recession and rising unemployment. In the mid-1970s, France begun to limit immigration from Algeria and Germany introduced a maximum quota for *Aussiedler* in 1991. In 1972, the UK government accepted responsibilities for Ugandan residents of Asian descent who were British passport holders although it could have limited their entry under the 1968 Act. Moreover, the UK government campaigned to persuade other governments to admit Ugandan Asians, too.

In particular, France and Germany have implemented in different forms guest worker systems. Guest worker systems imply that a state has actively stimulated immigration and that migration patterns have been successfully

[268] G. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 53-5.

established.[269] The aim to entice migrants to return to their countries of origin has failed. After the recruitment ban, family immigration and illegal immigration continued to maintain relatively stable migration patterns. Also, it is doubtful if there has ever been a political and/or economic interest to stop 'guest worker' migration to western Europe completely. This is particularly questionable for France.[270] Employers have an interest in cheap labour, and especially the lose implementation of control policies can be an elegant way to be seen as responding to public pressure, often formulated by trade unions, to clamp down on illegal workers while at the same time allowing the immigration of flexible and cheap (illegal) migrant labour. On the international level, 'guest worker' migration or temporary migrant work is regulated mainly through a host of bilateral agreements.[271] Other categories of economically motivated migration are specific professional groups or investors. This form of immigration has been dealt with in an unbureaucratic way in western Europe. Top manager or professional sports people are rarely denied entry.

By definition, illegal migration movements are more difficult to control than legal ones as the migrants try to avoid administrative interventions. Yet the existence of illegal migrants in each country is not evidence for the inability to control migration flows. Illegal immigrants do not necessarily enter a country illegally but may be overstayers or may take up work in breach of their conditions of stay. No state is willing to provide the immense resources necessary to prevent illegal immigration. This is part of a negotiation process within each society to determine how many resources will be provided and which measures are acceptable to reduce illegal immigration. Control measures can be either external in the form of border controls or internal in the form of deportation or prevention of illegal work. In all three countries the governments have tried to curb illegal work through employers' sanctions. Illegal immigrants often find

[269] Although some attempts have not been successful. Agreements between Germany and Algeria did not lead to the establishment of a migration movement nor did migration movements between France, and Italy and Greece respectively last long.

[270] See Miller's comments on Hollifield (1991): J. M. Miller, 'Evolution of policy modes for regulating international labour migration', in Kritz et. al. (eds.), 1992, op. cit., pp. 300-14.

[271] For a detailed analysis see Miller, 1992, op. cit.

employment within their immigrant community, in which case recruitment often takes place on the basis of family or ethnic links. They are also employed to bridge gaps caused by temporary rises in labour demand. Restrictive legislation and raids on building sites or hotels will not solve the problem of exploitation and social dumping nor will it create more jobs for citizens of European Union member states.

Another instrument is the regularisation of illegal immigrants and their children under certain circumstances. This may appear like an admission of the futility of immigration control but illegal immigrants are open to exploitation by employers and landlords and regularisation programmes are carried out for humanitarian and economic reasons. Out of the case study countries, regularisation programmes have only been offered in France. They have also been used in the southern EU member states - Spain, Portugal and Italy - but do not seem to be a policy option in the northern EU member states. France allowed extensive illegal immigration for most of the 1960s and the early part of the 1970s and subsequent regularisation programmes may have led to the expectation that there will be periodic amnesties to regularise the status of illegal immigrants. Exactly for this reason has the German government ruled out any regularisation programmes or amnesties which, it argues, would be like an invitation to illegal immigration. There have only been *Stichtagsregelungen* for humanitarian reasons during the 1980s for certain refugee groups as for example stateless Palestinians from Lebanon who could not be deported to their home country. The UK government, in an attempt to clear the backlog of asylum applications, announced in 1998 an amnesty for all asylum applications submitted before a certain date but like the German government has gone to great length to avoid the term amnesty.

The efficiency of external control certainly depends to some extent on the geographical situation and the nature of the external borders. Long land borders are preferred crossing regions. Attempts to cut off migration flows have led to an increase in illegal immigration. Once established through recruitment programmes or colonial ties migration flows are consolidated through family migration and network structures. The formal closure of these legal means of

entry does not interrupt the migration pattern but tends to divert flows into different gates of entry such as illegal and asylum migration.[272]

Restrictive immigration policies cannot always be applied to third country nationals. Humanitarian principles must be taken into consideration, as specified in international law such as the Geneva Refugee Convention and the European Convention on Human Rights (ECHR).[273] The most important principles are the right to asylum, the right to family life and the free choice of a partner. The exercise of these rights, and more particularly the abuse of them (alleged or factual) has led to considerable debate. The response on the policy level has been the introduction of harsher conditions of entry, including family immigration of resident third country nationals, and combating alleged abuses such as marriages of convenience. Yet, the closing of the legal ways of entry had the unintended effect to increase informality and illegality. Legal measures do not stop immigration.[274]

The net of international regulations concerning refugees and asylum seekers is in comparison to migrants close-meshed. Desbarats lists apart from the UN Convention and Protocols on the refugee status around thirty international agreements and a further twenty regional agreements which specify international law according to which national measures are judged.[275] Refugee flows are relatively easier to control for west European states than other migration movements. Usually, refugees do not come from the neighbouring country and are often contained in a specific region. There are also 'non-

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[272] Cf. Castle et al., 1993, op. cit.; M. J. Miller, 'Illegal Immigration', in R. Cohen (ed.), *The Cambridge Survey of World Migration*, Cambridge, Cambridge University Press, 1995, pp. 537-46.

[273] Cf. R. Plender, (ed.), *Basic Documents on International Migration Law*, 2nd rev. ed., The Haag, Kluwer Law International, 1997.

[274] This has been officially recognised by the German government in its annual report on the application of the Schengen Agreement where nevertheless the emphasis on external control was confirmed.

[275] J. Desbarats, 'Institutional and policy interactions among countries and refugee flows', in Kritz et. al. (eds.), 1992, op. cit., pp. 279-99. However, about 50 states, mainly in eastern Europe, the Middle East and South East Asia, have not ratified the international conventions.

controllable' refugee flows such as the flight of citizens of the German Democratic Republic to Hungary in 1989. This was an exceptional case as the Federal Republic of Germany had manoeuvred itself into a 'political out' by deliberately not reforming the citizenship law (cf. 4.3). The general impression that refugee movements cannot be regulated stems from the crisis-like circumstances which are often connected to the creation of refugee movements or which may lead to an increase in particular refugee movements.

All case study countries have in common that refugee policies implement notoriously restrictive admission procedures. Asylum seekers have been turned into an administrative problem by the receiving state and are portrayed as an almost unmanageable problem, though largely self-inflicted. The problem is created by the remarkably large discrepancy between national administrative regulations on the one hand, and the much broader formulated humanitarian considerations, on the other hand. These humanitarian considerations usually correspond with international agreements. The tension between national and international norms leads to the violation of humanitarian principles and international agreements. The interest of EU states to keep refugees out of their territory has led to new policy initiatives such as the 'safe third country' concept which allows EU member states to deport asylum seekers to a neighbouring country outside the EU if the refugee has crossed that country on the way to western Europe. Yet once asylum seekers are on the territory of an EU member state decisions have to be made according to certain legal standards. The functions of asylum procedures are to deter asylum seekers whose applications are 'unfounded', to grant protection to 'genuine' refugees and to ensure the deportation of rejected asylum seekers. The crucial issue here are the decision criteria. But asylum seekers flee their countries of origin for a combination of economic and political reasons and can seldom provide a clear-cut 'case story'. The reaction to this decision-making problem, an important part of a nation state's demarcation definition, is a further differentiation of demarcation processes which has led to the development of a complex asylum system with a relatively large scope for discretionary decisions. The impracticability of the present system is demonstrated by the large backlog of asylum decisions. Paradoxically, many asylum seekers waiting

several years for a decision of their application acquire a residence right or at least protection from deportation purely on the basis of the length of their stay.

Rights which affect state sovereign controls regarding the domestic labour market and immigration, such as access to employment and family reunion, are subject to significant restrictions by the countries of employment. The connection between restrictions on access of foreign workers to employment and their low occupational status has been identified as one aspect of institutionalised discrimination ingrained into the temporary migration system. It is one area where governments are least inclined to realise equality between migrant workers and citizens. Though economic interests and the situation on the labour market have a stronger influence on immigration policy, as is argued by some commentators, than state intervention.[276] While the principles of temporary labour migration are similar in the case study countries, the origin and form of the temporary migrant labour in the case study countries has been shaped by historical ties, foreign policy considerations and needs of different economic sectors.

In summary, one can say that the case study countries have had limited success in improving the control of legal immigration but all have difficulties to control the structure of their immigration. Not every recruitment attempt has led to a guest worker system but once such a migration pattern has been established they often develop their own dynamic. Generally speaking, once migration flows have been successfully implemented, they can hardly be prevented by administrative measures. This was clearly shown in Germany where the recruitment ban and the withdrawal of child benefit for immigrants' children living abroad, affecting, mainly Turkish immigrants, did not lead to an increase in return migration. The specific mechanisms to control the structure of immigration flows have developed historically rather than as an expression of the formulation of a policy goal. A significant part of immigration is beyond the scope of direct immigration control, namely citizens of the EU and family immigration of third country nationals. In the areas of family immigration and

[276] For example Hollifield, 1992, op. cit.

asylum, state control measures often collide with human rights concepts. This has led in the past to a suspension of certain regulations by national courts. Moreover, most control measures are not only very expensive but also have implications for the civil liberties of all residents, citizens and non-citizens and may thus not be socially acceptable to a society.[277]

3.6. COMPARISON: CONVERGENCE AND DIVERGENCE

The west European migration system is characterised by an increased dynamic, diversification and expansion of migration flows. This process, started after the Second World War, intensified during the mid-1980s and interrupted the relatively stable dynamic of the 'guest worker' systems and colonial immigration which dominated the 1950s and 1960s. Migration systems and nation states are linked to each other through two demarcation processes. On the one hand the external demarcation process described here by way of example of immigration control policies and on the other hand internal demarcation processes. The latter one is subject of the following chapter. Migration movements interact with different demarcation processes, leading to fragmentation and polarisation processes. These processes differ for different societal spheres. This can refer to social exclusion processes such as segregation, private networks and attitudes of the majority towards the minority; and economic exclusion processes such as ethnically segmented labour markets. Thus, migration re-structures the relationship between the nation state and the global society. The different aspects of a complex, multi-layered global structure are illustrated in Table 3.1. by four interactive components.

[277] Cf. M. Heisler et al., 'Migration and the links between social and societal security', in O. Waever et. al. (ed.), *Immigration, Identity and the New Security Agenda in Europe*, London, Pinter, 1993, pp. 148-66. They suggest that entry controls raise important issues concerning the definition of national identity and political community. States are not losing the ability to control their borders in a physical sense but the important questions revolve around the social and moral costs of doing so.

Table 3.1. The Dynamic of Migration Systems

	Policy Shapers	Migration Systems
Nation States	Inherent laws and patterns: political and social processes welfare system labour market needs demographic policy	Barriers to movement: immigration policy citizenship legislation
Global Processes	Global and transnational processes: economic, environmental and human rights dynamics international economic and political cooperation cultural integration international law	Migration flows: immigrant networks historical & colonial ties

Modern nation states are part of migration systems which develop their own dynamic and are difficult to influence by an individual state (cf. 2.2). This means that states have to adapt constantly to new demands. The dynamic in the present nation state system is caused by national and global processes. Flows of people are established through different ties between countries of origin and destination and are consolidated through network structures. Over time, these develop their own dynamics and become self-sustaining flows. So, for example, guest worker systems in Germany and France have been designed for a limited period of time but have led to constant migration flows and consequently permanent immigration. The most important legal mechanism that stabilises such flows is the principle of family immigration. It is generally accepted that attempts to cut off established flows lead only to an increase in illegal immigration. Nation states interest in immigration, and even in promoting certain forms of immigration, is influenced by different factors such as labour market needs or demographic considerations. Control attempts by the receiving countries to regulate migration movements externally and to process them internally constitute barriers to migration. All three case study countries have expulsion or deportation procedures to remove people who do not qualify for a residence permit. This applies to unemployed labour migrants whose residence status becomes more and more legally insecure. It can affect long-term

resident immigrants if they commit a public order offence and foreigners who have been sentenced for serious crime can be recommended for deportation by the courts after they have served their sentence. Processes and policies on the national level interact with global and transnational processes. These are particularly determined by economic processes as well as power relations within the international state system. International economic and political cooperation are undermining the exclusiveness of nation states in questions of governance while facilitated mobility and trends to cultural integration may weaken the national division between people and national loyalties. Relevant in this context are also processes which are directed by human rights discourses and limit nation state's room of manoeuvre in restricting the entry of non-EU citizens.

Immigration control measures have contributed to two seemingly contradictory trends. On the one hand, immigration control has led to a closer integration of individual states into the network of international migration movements and their specific migration systems. On the other hand, control measures have contributed to 'sealing off' policies and to the disintegration of the state from international migration movements. Regarding the case study countries and their incorporation into migration systems, the main issues can be summarised as follows:

- Despite the large number of migrants world-wide, migration is still the exception with regard to the total population. Migration processes are not diffuse movements of 'all the poor of the world' to the industrialised countries. Migration flows are separated into different migration systems structured according to historically developed relations between sending and receiving countries.
- The case study countries show an increased diversification of immigration flows and a stabilisation of the ethnic communities in the receiving states.
- While the volume of legal immigration can be controlled to a certain extent, the composition of the migration movements can hardly be influenced. Once established migration patterns are difficult to cut off and efforts to do so have led to an increase in illegal immigration.

- Temporary employment of migrant workers after the Second World War has resulted in the extension of the original employment and consequently to the establishment of settled immigrant population.
- International obligations, labour market policies and foreign policy considerations impinge on the formulation of immigration policies.

Immigration policy is an instructive example to demonstrate the double function of demarcation processes. In a situation of permanent immigration, certain boundaries are institutionalised whereby the possibility of closure offers at the same time openings. The case study countries are not 'victims' of globalisation processes and limited to reactions to these but they are actors who produce themselves global structures and consolidate these through their conduct.

The improvement of the situation of EU-nationals working and living in another EU state has been accompanied with increased restrictions for non-EU immigrants. Since the 1980s, and in particular after the opening of the borders between east and western Europe, the group of non-EU immigrants has been further divided into 'desirable' and 'non-desirable' groups. Both France and the UK restricted access for citizens of their former colonies in Africa and Asia. Germany and to a lesser extent other EU member states admitted increasingly migrant workers from eastern Europe. Substantial temporary labour emigration from eastern Europe has been facilitated in bilateral labour agreements, seasonal and other temporary forms of work.[278] Furthermore, between 1993 and 1996 Association Agreements have been concluded between the European Union and central and eastern European countries. All the agreements contain articles granting the right to establishment for companies and citizens from each of the Association Agreement countries. Similar free movement provisions are not included in the Association Agreements with the Maghreb countries. In fact, they contain not a single article regarding labour immigration but only guarantee the principle of non-discrimination in the country

[278] See for an overview H. Werner, *Temporary Migration of Foreign Workers. Illustrated with Special Regard to East-West Migrations*, Labour Market; Research Topics 18, Institute for Employment Research, Nürnberg, 1996.

of employment. The free movement provision in the Turkey-EC Association Agreement has been suspended by the EU governments until further notice.[279]

The development of immigration legislation has improved regulation possibilities but this has also been compensated to a large extent by the increasing complexity of today's migration processes. Processes of external closure of societies are characterised by two trends. On the one hand, since the implementation of the first immigration legislation in western European states more than hundred years ago, border controls have been strengthened and the admission criteria have become more restrictive. On the other hand, economic considerations and international human rights obligations have increased the permeability of nation state borders. This is demonstrated by the development of selective categories, implemented by national immigration policies. These are, as outlined above, firstly labour migrants. An important element for the demarcation efforts of nation states is in this context that successfully implemented migration flows cannot be stopped in the future. The second important category is family immigration. Here, the concept of family unity codified in national and international law prevents a complete ban on this form of immigration. Ethnic and colonial immigration proved to be easier to control. Improving conditions in countries of origin and dwindling solidarity in the 'mother' countries made it politically possible to introduce restrictions such as visa obligations, work permits and quotas. Asylum seekers pose a regulation problem to nation states as their treatment is governed by a variety of international human rights instruments. Part of illegal immigration is a reaction to restrictions of legal means of entry and is derived from labour and asylum migration flows.

Processes of convergence are observable for the case study countries on the macro level. The discussion on globalisation processes and admission policies shows similarities between the case study countries regarding their political

[279] Cf. E. Guild, *A Guide to the Right of Establishment under the Europe Agreements*, London, Baileys Shaw & Gillett, 1996; C. Klos, *Rahmenbedingungen und Gestaltungsmöglichkeiten*, Konstanz, Harre Gortung verlag, 1998, pp. 104-8.

reaction to different migration processes. This can be explained by similar problem perception in the receiving states but also by the increasing relevance of common normative standards in the international community. Individual rights of persons are protected by a series of international agreements such as the Universal Declaration of Human Rights, the two International Covenants on political and civil rights as well as on economic social and cultural rights or the Geneva Convention. Most west European countries have incorporated the relevant provisions into national law. Similarly, the Treaty of Amsterdam on European Union stipulates to act "in accordance with the Geneva Convention and ... other relevant treaties" (Article 63(1)). These treaties had 'standardisation' effect regarding the treatment of immigrants, asylum seekers and family reunification.

Table 3.2. below provides an overview of migration movements into western Europe and the main policy responses by the receiving states. However, the phases should not be regarded as mutually exclusive. Phases of migration overlap, such as policies of active labour recruitment and the formation of immigrant communities in north-western Europe due to family immigration. Increased numbers of asylum seekers or concern about illegal immigration were in some countries such as Germany earlier on top of the political agenda than in others, for example the UK. The policy instruments developed by the governments to deal with immigration show similar tendencies: bans on labour immigration, restrictive admission controls, restrictions on family reunification, restrictive asylum regulations and restrictions in the privileged treatment regarding immigration of certain groups with ethnic and/or colonial ties. Immigration policy is characterised by reactions to new problems or situations; long-term decisions are rarely taken.[280] This is particularly evident in France where each change of government led to amendments to the immigration law and regulations which did not show evidence of a more comprehensive long-term concept.

[280] Cf. M. Miller, 'Policy Ad-Hocracy: The paucity of coordinated perspectives and policies, *Annals*, 1986, No.485, pp. 65-75.

Table 3.2. Common Aspects of Political Responses to Migration into Western Europe

phase	migration and policy characteristics
post-war changes late 1940s	▪ political (refugees, displaced persons) ▪ ethnic (shift of borders, resettlement of populations)
liberal entry controls 1950s	▪ colonial immigration ▪ labour recruitment ▪ free movement within the Benelux countries and Scandinavian countries
guest worker systems 1960s-1973/4	▪ extension of labour recruitment to non-European countries ▪ policy of labour rotation ▪ first restrictions on colonial immigration ▪ free movement within the European Community
consolidation of migration patterns 1973- mid-1980s	▪ labour recruitment ban ▪ restrictions on family reunification and family formation ▪ introduction of temporary work programmes
strong asylum migration mid-1980s onwards	▪ begin of European cooperation in preventing asylum migration ▪ extra-territorialisation of border controls ▪ increased policing of borders and internal controls ▪ restrictions on access to the asylum procedure ▪ development of temporary humanitarian protection schemes
opening of the borders in eastern Europe 1989 onwards	▪ development of temporary work systems in response to increased labour migration ▪ restrictions on ethnic migration ▪ increased European cooperation against rise in illegal immigration and trafficking ▪ common external borders

Further measures used by all three case study countries include the extra-territorialisation of border controls in form of entry clearances, visa requirements, carriers liability and readmission agreements with the EU

neighbour states to the east and south.[281] All three governments prefer temporary, flexible migrant workers, including the employment of asylum seekers, as opposed to settlement of immigrants. These changes were accompanied by an ideological shift in the treatment of immigration. The debate on immigration has shifted from an economic and labour market question to an internal security question. Immigration policy is in national and EU documents dealt with in terms of control, enforcement and combating illegal immigration. Illegal migrants, in turn, are associated with organised crime.[282] Against the background of rising numbers of asylum seekers since the mid-1980s migrants and refugees have been labelled by politicians and in the media as illegal immigrants, bogus asylum seekers or economic refugees. Whatever the reality, clearly the perception is one of a massive increase in illegal immigrants, and combating human trafficking and abuse of the asylum system dominate the public debate on immigration.

Immigration has been regularly subject of the political-ideological opposition between parties on the left and right. Immigration issues are politicised during election campaigns, on the national as well as on the regional level. Yet the basic principles and guidelines of immigration policy in the case study countries are independent of the political orientation of the government in power. A study by Fijalkowski on the situation in Germany concluded that it is not possible to explain different models of national immigration policies in terms of party-political dominance.[283] Thränhardt came to a similar conclusion in a comparative study of Germany, France and the UK that despite all the rhetoric by conservative parties, anti-immigrant campaigns did not lead to new immigration policies. Influential economic interests, the legal rights of the

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[281] A second trend is the increase of internal control measures but this is beyond the scope of this study.

[282] Cf. Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, *Illegal Aliens: a Preliminary Study*, Geneva, 1996.

[283] J. Fijalkowski, 'Nationale Identität versus multikulturelle Gesellschaft. Entwicklungen der Problemlagen und Alternativen der Orientierung in der politischen Kultur der Bundesrepublik in den 80er Jahren', in W. Süß (ed): *Die Bundesrepublik in den 80er Jahren*, Opladen, Leske + Budrich, 1991, pp. 235-50.

immigrants, the reputation of the receiving countries abroad and international obligations did not allow a radical change. [284]

Debates on restrictions of labour immigration and immigration control in general has centred on three arguments: first, continued immigration is compromising the chances of successful integration of resident immigrants and their acceptance by the national population. A second image used by politicians is the notion that the 'boat is full' implying that the receiving country has reached its 'threshold of tolerance'. This is often used in conjunction with a third argument about the economic impact of immigration, implying that immigration and unemployment rates are interdependent factors.[285]

Whether governments acknowledge it or not, European countries have become multicultural societies. In consequence a policy approach has developed based on the twin concepts of control of new entry and integration of settled immigrants. However, the simple causal relationship between entry control and integration as it is so often represented by governments, the view that policies designed to control immigration are the precondition for successful integration, is empirically unproven. The aim in Germany was to minimise cultural distinctions through restricting further non-EU immigration, voluntary assisted repatriation for those who wished to leave and a policy of assimilation expressed in an uncompromising language in official documents.

> "There is a agreement on the fact that the Federal Republic of Germany is neither to be nor to become a country of immigration. The Cabinet has agreed that any further immigration of foreigners from non-EC Member States is to be prevented by all legal means. ... It is only by applying a consistent and efficient policy of restriction ... that the indispensable commitment of the German population to the integration of foreigners

[284] D. Thränhardt, 'Die Ursprünge von Rassismus und Fremdenfeindlichkeit in der Konkurrenzdemokratie. Ein Vergleich der Entwicklungen in England, Frankreich und Deutschland', *Leviathan*, 1993, No. 2, pp. 336-57.

[285] Although this is contested by many economists. Cf. the contributions in S. Spencer (ed.), *Immigration as an Economic Asset*, London, IPPR, 1994a.

can be ensured. This is a prerequisite for safeguarding the social peace'.[286]

This echoes the linkage between race relations and immigration control explicit in British policy.[287]

> "Government believes that firm and effective immigration controls are essential to maintaining good race relations."[288]

Yet politicians deny - against better knowledge - that closed borders are unrealistic. The majority of immigration today is legal and a large part of it cannot be restricted by the governments (cf. 3.5). Critics reproach European Union governments for spending enormous sums for the defence of their borders but thereby neglecting the second pillar of their immigration policy, namely the integration of immigrants.[289] In all three countries this pseudo-progressive approach that promoted a twin-track policy according to which the closing of borders is seen as the *ultimo ratio* for the integration of immigrants and good race relations is contradictory: border policies make explicit who is considered to be a member of the state and who is not, while notions that migrants are threats to social order and economic wellbeing are articulated in order to justify measures to guarantee the impermeability of borders. The images which are produced about migrants thus do not only affect those who knock on the door, but also those immigrants who are already resident or have the citizenship of the receiving country. It is unlikely that policies based largely on entry control can ever be really effective in promoting a positive view of immigration.

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[286] Government decisions of 1981 and 1982 quoted in BMI, *Survey on the Policy and Law concerning Foreigners in the Federal Republic of Germany*, Bonn, 1998, p. 7; see also BMI, 1993, op. cit., pp. 5-7.

[287] Cf. Layton-Henry, 1990, op. cit., p. 188.

[288] Home Office, *Prevention of Illegal Working*. Consultation Document, London, 1996.

[289] Cf. D. Lochak, 'La fermeture des frontières ne peut plus tenir lieu de politique', *Migrations Societé*, 1997, No. 9, No. 50-51, pp. 5-9.

Processes of convergence are visible on the decision making level, expressed in common control and enforcement measures, but national interests and problems differ to a significant extent. A closer analysis reveals important national differences in the respective national policy formulation. There are marked differences in the migration systems of the case study countries reflecting a range of historical and geographical processes. There is evidence that each country dominates a different migration system and this is not only reflected in migration statistics but also in policy initiatives. These policy initiatives reflect different national interests and have an impact on the countries' negotiation position in the EU. The immigration experiences look increasingly dissimilar when concrete migration patterns are analysed.[290]

A major difference is the origin of the migrant flows. The countries have drawn their labour from very different sources. In the case of the UK and France this has been linked to their particular colonial histories but France also sought initial recruitment from its neighbouring southern European countries and then turned to labour migration from North Africa. Germany recruited initially migrant workers from south European states but later mainly from Turkey. With regard to the origin of the main immigration flows, the trends in migration flows and the processes creating them indicated above show that the three case study countries fall into very different groups. Figures for the mid-1990s show that Germany's migration system is strongly European. The vast majority of its immigrants come from Europe. Germany received also a large proportion of its immigrants from central and eastern Europe which is partially explained by 'ethnic' migration. In contrast, about two third of the UK's immigrants come from outside Europe, mainly from the Indian subcontinent. France also tends to look beyond Europe. The majority of immigrants to France come from African countries and out of those the majority arrive from Algeria and Morocco.

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[290] For migration statistics see Sopemi, *Trends in International Migration*, Paris, OECD, annually; Council of Europe, *Current and Future International Migration Trends in Europe*, Strasbourg, annually; A. Lebon, Rapport sur l'immigration et la présence étrangère en France 1995- 1996, Paris, DPM, 1995; Beauftragte der Bundesregierung für die Belange der Ausländer, *Daten und Fakten zur Ausländersituation*, Bonn, 1995.

Temporary migration in the form of contract workers or seasonal workers seems to be an option for Germany and France to respond quickly to labour market demands. Both countries have to respond to continuing immigration from eastern European countries and North African countries respectively. Germany, however, finds itself in a particular situation with its eastern border being at the same time the external border of the European Union. The UK's situation is different from its continental European neighbours, mainly due to its geographical situation but has also experienced the arrival of east European migrant workers and refugees in larger numbers. The geographical composition of temporary labour migrants and immigrants reflects the incorporation of case study countries into specific migration systems reflecting historical ties, geographical position and contemporary foreign policy and economic interests. This is also reflected in the external demarcation process which led to the definition of specific privileged groups in each state. The context for these processes at the national level is strongly influenced by the different national historical traditions. This will be a major obstacle in the formulation of a common admission policy on the European level which goes beyond control and enforcement measures.

CHAPTER FOUR

CASE STUDIES: NATURALISATION – THE DYNAMICS OF INTERNAL CLOSURE

4.1. INTRODUCTION

The previous chapter examined the political control of immigration as an example of an external demarcation process. International migration movements are transnational processes extending across and influencing nation states. In contrast, an internal process establishing criteria which serve as measures of inclusion and exclusion is the evolution of citizenship. For those migrants who came to western Europe from (former) colonies, the assumption was - even if not always initially - that they would settle in the country of employment and "citizenship was granted intentionally or unintentionally".[291] However, for 'temporary' migrant workers whose residence depends on a residence and work permit system, their legal situation in respect of regular residence, permanent settlement and the acquisition of citizenship is subject to enormous obstacles. Legislation dealing with definitions of citizenship has been related to policies connected with immigration.[292] Citizenship carries with it rights to specific forms of political and economic participation within a nation state. Its significance only becomes apparent when people cross the boundary of the nation state and take up residence in another. Such mobility is not automatically followed by the acquisition of a new citizenship and access to this status is state-regulated and imposes certain conditions such as length of residence or language proficiency. This chapter turns to policies of citizenship acquisition as an example of an internal demarcation process to control access to resources.

[291] Z. Layton-Henry, 'The challenge of political rights', in ibid. (ed.), *The Political Rights of Migrants in Western Europe*, Sage, London, 1990, pp. pp. 1-26, here p. 23.

[292] Cf. R. Plender, *International Migration Law*, Dordrecht, Martinus Ninhoff Publishers, 1988.

Rights to citizenship are central to the question of who should be included in the national society as a full member with full civil rights and who should be excluded and treated as an outsider with lesser rights. Membership of a state is legally defined, yet this is also an expression of the national identity which results from a particular community's understanding of itself.[293] Consequently, notions about the concept of the state, national identity and access to citizenship are reflected in immigration legislation and immigration policies. Different concepts of nationhood with their particular criteria of acquisition of citizenship and rights granted by the state are part of deeply embedded orientations of a nation whose latent effect can influence policy outcomes (cf. 1.5). Ideational and cultural factors are closely linked to formal legal definitions of citizenship.

The national differences in the EU member states with regard to concepts of citizenship and naturalisation are particularly relevant in the current process of European integration and moves to harmonise policies in the field of immigration. Acquisition of citizenship in one EU member state conveys entitlement to citizenship of the European Union as a whole.[294] An analysis of the norms which determine how citizenship is acquired is therefore essential for any attempt to understand the responses states make to immigrants and whether they regard an influx as politically destabilising and a threat to internal security. The formulation of national immigration policies is rooted in different concepts of national identity and citizenship. These traditions, or rather the norms inherent in the different concepts, are reflected in a society's attitude towards the admission of aliens. Central to the process of admission has been the definition of nationality. The concepts of nationality and citizenship are historically closely connected and often used interchangeably in many European states.[295]

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[293] See for example A. Smith, *National Identity*, London, Penguin Books, 1991; E. Gellner, *Nations and Nationalism*, Oxford, Blackwell, 1983; and E. J. Hobsbawm, *Nations and Nationalism since 1780*, 2nd ed., Cambridge, Cambridge University Press, 1992.

[294] On citizenship of the European Union see 5.4.

[295] Layton-Henry, 1990, op. cit., p. 22; A. Dummet et al., *Subjects, Citizens, Aliens and Others. Nationality and Immigration Law*, London, Weidenfeld & Nicholson, 1990, pp. 8-9. Historically,

Citizenship comprises membership both of the state defined by rights and duties and of the nation conveying notions of a common cultural heritage and a collective consciousness of the past and future. This definition of membership serves, along with the territorial demarcation of the nation state, the purpose of the social and political delimitation of a state.[296] This study focuses on the first aspect, citizenship as formal membership in a state. The latter aspect, 'belonging' to a nation, is part of an ideological process whereby certain cultural characteristics such as language, religion or the legal system have been constructed by the dominant class as universal attributes of the nation. From the late eighteenth century, these cultural characteristics have been interpreted as given and natural whereby a specific collection of people believe that they share a common identity, a common heritage and future.[297] This sense of identification has been reinforced by forms of political representation and the creation of citizenship.

A further distinction can be drawn between formal citizenship and substantial citizenship.[298] Formal citizenship refers to legal membership of a state and the conditions under which citizenship will be awarded to a person. It determines "those who are, and who are not, members of a common society".[299] This can be understood as a mechanism of political closure or exclusion determining who is to be included within the society as a full member and who is not. Substantial citizenship allocates accordingly a certain set of rights and responsibilities to citizens and non-citizens.[300] This study is primarily concerned

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the synonymous use of nationality and citizenship is correct for states with a citizenship concept derived from Roman law.

[296] Cf. J. Habermas, 'Citizenship and national identity: some reflections on the future of Europe', *Praxis International*, 1992, Vol. 12, No. 1, pp.1-19.

[297] B. Anderson, *Imagined Communities*, London, Verso, 1991.

[298] Cf. Hammar, 1990, op. cit.; Bauböck, 1992, op. cit.

[299] J. M. Barbalet, *Citizenship. Rights, Struggle and Class Inequality*, Milton Keynes, Open University Press, 1988, p. 1.

[300] Ibid.; see also R. Bauböck, *Immigration and the Boundaries of Citizenship*, Monograph in Ethnic Relations No. 4, University of Warwick, 1992; B. S. Turner, 'Contemporary problems in the theory of citizenship', in ibid (ed.), *Citizenship and Social Theory*, London, Sage, 1993, pp.

with the first question and does not deal with the situation of immigrant populations in the receiving countries or the debate on the extension of citizenship rights to non-citizens.[301] The question of who 'belongs' is a complex one and it is certainly not suggested here that naturalisation represents the end of the immigration cycle in terms of integration. Many long-term resident third country nationals in the EU enjoy the same social, economic and cultural rights as the citizens of their country of residence. The main difference lies in the granting of political rights, i.e. the right to vote and to be elected.[302] Though even if immigrants obtain formal citizenship status, if they are not accepted as full members of the receiving societies it is likely that they will continue to receive unequal treatment relative to native citizens.[303]

The focus in this chapter is on the extension of formal citizenship to foreigners through naturalisation. The development of citizenship law as a process of inclusion and exclusion demonstrates how political closure processes are legally codified. Legislation on citizenship acquisition is mainly formulated with a view to the naturalisation of non-EU national migrants since citizens of EU member states and their families are entitled to a general right of residence in any other EU states regardless of whether they are pursuing an economic activity, including limited political participation rights (cf. 5.4.). The chapter begins with a brief outline of the general principles of the acquisition of citizenship in the EU member states. This is followed by an analysis of the legal concepts of citizenship in the case study countries, that is how external

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[301] On this debate see for example the contributions in Layton-Henry (ed.), 1990, op. cit. and R. Bauböck, (ed.), *From Aliens to Citizens. Redefining the Legal Status of Immigrants*, Aldershot, Avebury, 1994; T. Hammar, *Democracy and the Nation State*, Aldershot, Avebury, 1990.

[302] Cf. R. Brubaker, 'Membership without citizenship: the economic and social rights of non-citizens', in ibid. (ed.), *Immigration and the Politics of Citizenship in Europe and North America*, Lanham, University Press of America, 1989, pp. 145-62; Layton-Henry, 1990, op. cit.; see the seminal work by T. H. Marshall, *Citizenship and Social Class, and Other Essays*, Cambridge, Cambridge University Press, 1950, on the evolution of civil, social and political citizenship rights.

[303] Cf. S. Spencer, *Migrants, Refugees and the Boundaries of Citizenship*, London, IPPR, 1995.

demarcation and the creation of internal solidarity are substantially defined in the legal codes.[304] In particular the transformation processes of this legal concept, how membership criteria have changed in Germany, France and the UK, are examined as this offers a direct access to the understanding of the concepts which form the basis of opening and closure of societies. Citizenship legislation needs to state explicitly who does belong to the (nation) state. While the right to membership of a particularistic structure such as the nation state is universal, guaranteed in Article 15 of the Universal Declaration of Human Rights of 1948, the regulation of access to citizenship is the sole right of nation states as long as they do not infringe rights of other states. The final section highlights points of convergence between the different national concepts and the implication for the formulation of common policies.

4.2. GENERAL PRINCIPLES OF ACQUISITION OF CITIZENSHIP

The main modes of acquisition of citizenship are, on the one hand, the automatic granting of citizenship (citizenship of origin) and, on the other hand, the acquisition of citizenship as a result of an individual action, generally an application for naturalisation (acquired citizenship). The citizenship of origin is determined either on the basis of the principle of *ius soli* (place of birth) or of *ius sanguinis* (parents' nationality); more usually, it is a combination of the two.[305] These two forms of transmission of citizenship represent fundamentally different approaches to the concept of society. Does the society belong to those who happen to be born there or to those who by reason of ancestral links have special entitlements? The preference in some states for the *ius sanguinis*

[304] An important source for a detailed judicial account of the case studies is G. R. de Groot, *Staasangehörigkeitsrecht im Wandel*, Köln, Heyman, 1989; this includes detailed presentations of legislation and references.

[305] For a survey of the position in the EU member states see 'Acquisition of nationality in OECD countries', in Sopemi, *Trends in International Migration*, Paris, OECD 1994, part III; G. de Rham, 'Naturalisation: the politics of citizenship acquisition', in Layton-Henry (ed.), 1990, op. cit., pp.158-185; R. Brubaker, 'Citizenship and naturalization: policies and politics', in ibid. (ed.),

principle means that many second and third generations of immigrant origin born there do not automatically become citizens but hold the citizenship of the country of origin of their parents. Such an approach is a significant barrier to their successful integration into the receiving society. It has been argued that any changes introduced to the legal provisions on citizenship in the receiving countries "will be interpreted, depending on whether they are liberal or strict, as a sign of openness and a positive reception or, on the contrary, as a sign of rejection".[306] Exclusion from citizenship rights can reinforce the marginalisation and social isolation of 'outsiders', making immigrants a target of extreme right mobilisation.

All member states of the EU have adopted legislation defining the criteria for access to citizenship. The procedures vary but the requirements that must be met by a foreigner seeking naturalisation are largely similar. Most west European states offer immigrants the opportunity to naturalise after five to ten years of residence under the principle of *ius domicili* but many do not encourage it and some may even discourage immigrants from taking this step. In France and the UK, for example, at least five years legal residence is required before an immigrant may apply for naturalisation. In some countries, including Germany, this qualifying period can be as long as ten years. Application by foreign spouses married to nationals are normally subject to a shorter residence qualification from two years in France, three years in the UK and up to five years in Germany. Rules governing the acquisition of citizenship often include requirements such as 'being of good character'. This usually refers to the absence of a criminal record but is not specified in detail and lies within the discretion of the authorities. Applicants may also be required to demonstrate sufficient knowledge of the language and integration into the host society. Furthermore, sufficient means of support, and in Germany even proof of sufficiently large accommodation, are common requirements. The rules vary

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1989, op. cit., pp. 99-127.

[306] Commission of the European Communities, *The EC Member States and Immigration in 1993. Closed Borders, Stringent Attitudes*, Brussels, 1993, p. 91.

in detail from country to country and are particularly rigorous in Germany.[307]

Dual nationality is not an option for most immigrants. A number of countries in western Europe require immigrants to renounce the citizenship of their country of origin as a prove that their loyalties lie now with their new country.[308] This has been justified as consistent with the 1963 *Convention on Reduction of Cases of Multiple Nationality* promoting the elimination of dual citizenship. Although the Council of Europe's interpretation of this convention has evolved considerably since its institution, in particular Germany still officially requires renunciation of previous citizenship although a number of exemptions are made in practice. Finally, even if all conditions are fulfilled, naturalisation procedures remain a discretionary process. A refusal is usually formulated on grounds of public interest or national security. Given the restrictions on the acquisition of citizenship it is hardly surprising that naturalisation rates in many EU countries are rather low.[309]

[307] see Sopemi, 1994, op. cit., part III; de Rahm, 1990, op cit.

[308] de Rham, 1990, op. cit.; Sopemi, 1994, op. cit., pp. 163-5. Many states make an exception to this rule if the country of origin does not accept the renunciation of citizenship.

[309] This list is not comprehensive. There are further reasons which may dissuade an immigrant from applying for naturalisation such as loss of inheritance rights in the home country (e.g. Turkey), the wish to retain the national identity or the perception of the receiving country as a hostile environment; see also T. Hammar, 'Immigration regulation and aliens control', in ibid. (ed.), 1985, op. cit., p. 249 and p. 255. On naturalisation statistics see Eurostat, 'Acquisition of citizenship by naturalisation in the European Union', *Statistics in Focus, Population and Social Conditions*, 1997.

4.3. GERMANY: ILLUSIONS OF ETHNIC HOMOGENEITY

The German nation state developed relatively late towards the end of the nineteenth century compared to France or the UK.[310] From the middle of the thirteenth century, Germany meant a territory loosely united under the name of the Holy Roman Empire, and later, after the Council of Constance in 1417, the Holy Roman Empire of the German Nation. Yet the individual states with a German speaking majority did not represent a German nation. For very pragmatic reasons, the use of the *ius soli* principle had increased since the tenth century. Firstly, the rise of feudalism favoured the *ius soli* principle, and secondly, the developing trades and industries needed a reliable commercial-legal system founded on a common status of the inhabitants of each territorial unit.[311]

German nationalism and the idea of an organic nation arose in the context of the Napoleonic wars after the disintegration of the Empire in 1806.[312] The war of liberation against French occupation was perceived as a shared experience by a people. Thus, intimations of a German people preceded the establishment of a German nation state by half a century. After the restoration of the European order by the Congress of Vienna in 1815, the *Deutscher Bund* (German Confederation) was established, a lose association of 35 independent German states and 4 free imperial cities. There was general agreement on the need for reform of the Confederation among the rulers of the various German

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[310] For the debate on the German nation state see L. Hoffmann, *Die unvollendete Republik: Zwischen Einwanderungsland und deutschem Nationalstaat*, 2nd rev. ed., Köln, PappyRossa, 1992; D. Oberndörfer, *Der Wahn des Nationalen. Die Alternative der offenen Republik*, Freiburg, Herder, 1993; R. Brubaker, *Citizenship and Nationhood in France and Germany*, Cambridge/Ma., Harvard University Press, 1992. Generally on nationalism and nation state see footnote 3 of this chapter.

[311] For a review of the history of citizenship see Plender, 1988, op. cit., pp. 10-25. Plender points out that feudal rules of obligation are not comparable to nationality in the modern sense but instructive in explaining the origins of naturalisation.

[312] Cf. L. Greenfeld, *Nationalism. Five Roads to Modernity*, Cambridge/Ma., Harvard University Press, 1992, pp. 358-71.

states but where the frontiers of the new German state should be was a hotly debated question. The general principle of citizenship acquisition in these states was according to *ius soli*. All persons born in the state became citizens. Persons born abroad could acquire citizenship on settlement in the state and by permission of the police. If this permission was missing, citizenship could be acquired after a minimum time of residence, for example, according to a Prussian regulation of 1818 after ten years.[313] As a legacy of French occupation, many south German states had adopted the *ius sanguinis* regulations from the *Code Napoléon*.[314] Prussia moved towards a *ius sanguinis* in the law of 1842, the "*Gesetz über die Erwerbung und den Verlust der Eigenschaft als preussischer Untertan sowie über den Eintritt in fremden Staatsdienst*". This law stipulated that legitimate children of Prussian citizens were Prussian subjects (*Untertan*), also if the child was born abroad. Illegitimate children acquired the mother's citizenship. Furthermore, the law stated succinctly that residence alone within the state territory did not establish Prussian citizenship. Hence, since 1842 Prussia followed the *ius sanguinis a patre* principle, and in the case of illegitimate children the *ius sanguinis a matre* principle.

The predecessor of the currently valid *Reichs- und Staatsbürgerschafts- gesetz* of 22 July 1913, was the *Gesetz über die Erwerbung und den Verlust der Bundes- und Staatsangehörigkeit* of 1870. This law applied to the Prussian dominated North German Federation. In 1871, Bismarck succeeded with the so-called *kleindeutsche Lösung* (little German solution) in unifying German speaking territories under Prussian leadership. He rejected the greater German option that would have included Austria, and thus secured Prussian dominance. Even if it did not include all German speaking territories, the

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[313] Cf. F. Franz, 'Das Prinzip der Abstammung im deutschen Staatsangehorigkeitsrecht', in Institut für Migrations- und Rassismusforschung (ed.), *Rassismus und Migration in Europa*, Hamburg, Argument Verlag, 1992, pp. 237-46.

[314] B. Huber, 'Die Beratungen des Reichs- und Staatsangehörigkeitsgesetzes von 1913 im Deutschen Reichstag', in K. Barwig et al. (eds.), *Aufenthalt – Niederlassung – Einbürgerung: Stufen rechtlicher Integration*, Baden Baden, Nomos Verlagsgesellschaft, 1987, pp. 181-220.

German *Reich* of 1871 was considered to be the first German nation state. Yet Bismarck also included Polish territory occupied by Prussia which had never been part of the Holy Roman Empire.[315]

The Prussian citizenship law was modified for the new polity as "*Reichs- und Staatsangehörigkeitsgesetz*". Due to its federal structure, loss and acquisition of the *Reichsangehörigkeit* was tied to the *Staatsangehörigkeit* of one of the federal states. Legitimate children and children recognised by the father were subject to the *ius sanguinis a patre*, i.e. they acquired their father's citizenship because of the principle of consanguinity. Women married to a foreigner lost their German citizenship. Foreigners who entered the service of the state, municipality, school or church became German. Citizenship could be lost either voluntarily or, for example, by ignoring a recall from the German military or judiciary. With the introduction of the unitary system of the *Reichsgestzlichkeit* with regard to naturalisation, the 1913 *Reichs- und Staatsbürgerschaftsgesetz* entered into force in 1914.

It has been argued that German unification in 1871 under Bismarck was motivated by military strategic concerns rather than by nationalism. It largely succeeded in fusing the traditions of Prussian statism and German nationalism. Two movements forged German nationalism - the Prussian reform movement and the romantic movement. The Prussian reformers wanted to duplicate the success of France's post-revolutionary military. They sought to mobilise the people around a *Staatsvolk*. This was a rational effort of state building by administrators to create a powerful state along legal-rational lines. According to German romanticism, nations are unique, historical narratives of a particular spirit, a *Volksgeist*, that is expressed in its culture, customs, law and the state. Characteristic of the German concept of the nation is the explicit *völkisch*, ethnic understanding of the German nation.[316]

Ethnic nationalism developed as an intellectual movement in Germany in the

[315] Cf. G. Mann, *The History of Germany since 1789*, London, Penguin Books, 1968.

[316] Cf. Greenfeld, 1992, op. cit., pp. 310-52.

eighteenth century, and became a political ideology and social movement in the nineteenth century. In the nineteenth and twentieth centuries the organic concept of the nation became prevailingly ethnocentric, and led to the identification of the *Volk* with race and the assumption that one's own values and traditions are superior to those of outsiders. As a political ideology, ethnic nationalism strives for congruence between ethnic and political boundaries, a culturally homogenous nation state. The basic principle of the ethnically legitimised nation state is the unity of people and state. Multi-ethnic states, any political units that do not correspond to one people, are according to this tradition not nations. The demands of ethnic nationalism often refer to groups of people which represent historically and fictive cultural units. Unity and solidarity are maintained and created in historical projections. The state is conceptualised as a hereditary group of people, related to one another through 'ties of blood'. The unity of the state is based on a sense of kinship, on loyalty to people of a common kind. This form of nationalism can produce a strong pressure towards assimilation and open hostility towards the cultural 'other' or even forcible expulsion of foreigners.

The ethnic nation state is not only a pattern of legitimisation of state organisation but a principle that determines policies towards ethnic minorities. This affects not only policies on citizenship and naturalisation but also on admission, integration and the question of political participation of foreigners. Since the nation is understood as an *Abstammungsgemeinschaft* (community of common origin) with a common culture and history, membership of the nation, nationality and citizenship, are tightly bound together. This is reflected in the use of the term *Staatsangehörigkeit* (belonging to the state) in German law. The foundations of this concept are to be found in the concept of *Volk*, and therefore, the concepts of nationality and citizenship are difficult to disentangle. Since an understanding of the state as a distinct ethnic-cultural unit implies that it cannot admit outsiders indiscriminately, it thus raises the question whom to admit and whom to exclude. In the ethnic view of the state membership is restricted to those connected to it by ties of kinship (common ancestors). This means that if immigrants are admitted they cannot become full members. Even

if they obtain citizenship, they remain marginal to the nation and its collective life. On the other hand, all people who are related to the state by ties of kinship but live outside the state's boundaries belong to it in principle. Ethnic nationalism accentuates cultural diversity as undesirable difference and non-adjustment. In this context, ethnicity acquires a central importance as the principle of political and social organisation. The desire to establish a culturally homogenous nation state transforms the heterogeneous groups, as defined by the national culture, which are living in or immigrating into the state territory into ethnic minorities. Since the ethnic ideology assumes that each people owns a specific cultural tradition (*Volkszugehörigkeit*), the immigration of alien people may be perceived as a fundamental threat to the national culture. Admission into such a nation is difficult and has to be understood as an exception. There remains no space for multi-ethnicity or multiculturalism if it is believed that the foundation of the state is the national homogeneity of its citizens. One can only be a German citizen if one shares the common cultural heritage.

This exclusive understanding of German nationhood developed during the twentieth century. German nationalism, having preceded the political organisation of the nation state, was initially not identified with the state or with the idea of citizenship. As national identity was based on common language and culture, anyone of German descent was after 1871 eligible to be a German citizen whether they had ever lived on German territory or not. Although the ethnic ideology dominated the Empire and the Weimar Republic, these were both multi-ethnic states. Minorities of non-German origin had German citizenship as well as special minority rights. The constitution of the Weimar Republic guaranteed the non-German speaking groups of the population the right to develop their own culture.[317] In fact, until 1935 citizenship of the states which made up the Wilhelminian Empire had priority over the Empire's citizenship. The National Socialist regime introduced a single citizenship (*Reichsbürgerschaft*), and abolished the *Staatsangehörigkeit* of the *Länder*. This citizenship was restricted to those of German descent and explicitly excluded Jews. Further regulations introduced by the national-socialist regime

were with respect to revocation of citizenship and naturalisation of persons living abroad.[318] Yet, in order to explain today's restrictive attitude towards the admission of immigrants in Germany it is important to differentiate between the ethnic-cultural citizenship law of 1913 and the racial laws of the National Socialist regime.[319]

The main elements of today's citizenship law can be traced back to the nineteenth century notion of a congruence of state and nation. The law on attribution of citizenship, the *Reichs- und Staatsbürgerschaftsgesetz* of 1913, stipulates that nationality is decided according to the principle of *ius sanguinis*. German descent alone defines the right to citizenship and this right was reconfirmed in the constitution, the Basic Law (*Grundgesetz*), of the Federal Republic of Germany in 1949. The citizenship law of 1913 was with few modifications retained in 1949. These ties of blood descent are broader than merely parentage for they suggest a larger people to whom one belongs in a kind of fictive relationship. Where such notions of consanguinity dominate citizenship law as in Germany, the political system is capable of distinguishing between an acceptable and unacceptable influx of immigrants, without regard either to the numbers or the economic situation in which the immigrants arrive.

The founders of the Federal Republic of Germany emphasised its provisional character in the constitution. The preamble includes a commitment to the unity of the German people as well as to the reunification of the two German states. Oberndörfer argues that through allegiance to the reunification of Germany in the preamble of the Basic Law, the Federal Republic of Germany renewed allegiance to the notion of a community based on ethnic descent.[320] This is reflected in German citizenship law in two ways. As a first consequence, there is only one German citizenship. The government of the Federal Republic understood itself as the legal successor to the Weimar Republic and never

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[317] Hoffmann 1992, op. cit., p. 71.

[318] Franz, 1992, op. cit., p. 242.

[319] Cf. Brubaker 1992, op. cit., p. 165-7.

[320] Oberndörfer, 1993, op. cit.

recognised the former German Democratic Republic (GDR) as a state; it could not, therefore, logically recognise a citizenship deriving from a non-entity. *Übersiedler* from the former GDR have never been treated as foreigners.

Secondly, the commitment to unity of the German people has been expressed in the inclusion of all *Volksdeutsche* (members of the German people) or so-called ethnic Germans who live outside the boundaries of the Federal Republic. Article 116 of the Basic Law confers automatic rights of German citizenship to those who were citizens of Germany in the boundaries of 1937, including their spouses and descendants:

> "Deutscher im Sinne dieses Grundgesetz ist vorbehaltlich anderweitiger gesetzlicher Regelung, wer die deutsche Staatsangehörigkeit besitzt oder als Flüchtling oder Vertriebener deutscher Volkszugehörigkeit oder als dessen Ehegatte oder Abkömmlinge in dem Gebiet des Deutschen Reiches nach dem Stande vom 31. Dezember 1937 Aufnahme gefuunden hat."[321]

Consequently, Article 116 also encompasses 'Germans' who had long been citizens of other eastern European countries. They have a right (*Anspruch*) to naturalisation by demand. This was a politically motivated decision as the refugee flows after the Second World War should not be treated as foreigners (cf. 3.2). These *Anspruchseinbürgerungen* have constituted the large majority of all naturalisations in Germany.

Article 1(2) of the *Ausländergesetz* (foreigners' law) which includes provisions on the acquisition of citizenship, declares simply that "Ausländer ist jeder der nicht Deutscher im Sinne des Artikel 116 Absatz 1 des Grundgesetzes ist."[322] This means that unless otherwise ordered by law, a German is either one who posses German nationality or one who as a refugee of German origin has been accepted within the territory of the German Reich as it stood on 31 December

[321] Article 116 (1) Grundgesetz; see also chapter 3.

[322] "An alien is anyone who is not a German within the meaning of Article 116 (1) of the basic Law." *Bundesgesetzblatt* 1965, 1, p. 353.

1937. The class of persons comprised within the category *deutscher Volkszugehöriger* is itself divided. Only those ethnic Germans who qualify as *Flüchtlinge* or *Vertriebene* come within the constitutional definition of *Deutscher*. The law gives them the right to be naturalised on demand, provided they do not endanger the internal or external security of Germany. This right is further limited by the constitutional requirement that the individuals concerned should have been born within the territory of the former German *Reich*.

The category of *Personen deutscher Volkszugehörigkeit* has been further elaborated in the *Bundesvertriebenengesetz* 1953. Article 6 stipulates that:

> "Deutscher Volkszugehöriger im Sinne des Gesetzes ist, wer sich in seiner Heimat zum deutschen Volkstum bekannt hat, sofern dieses Bekenntnis durch bestimmte Merkmale wie Abstammung, Sprache, Erziehung und Kultur bestatigt wird."[323]

This concentration on objective signs of belonging to the German nation illustrates the point that this intermediate class of non-citizens is of relevance principally for the purpose of privileged treatment in naturalisation. These provisions of German law are in may ways comparable to the different criteria applicable under UK law to the registration of Commonwealth citizens as citizens of the United Kingdom and Colonies (cf. 4.5).

Further changes in the citizenship law have been influenced by Article 3(2) of the *Grundgesetz* which stipulates that men and women are equal. According to transitional regulations, this was supposed to be implemented in the regulations on citizenship acquisition by 1953. However, this was not achieved and the relevant regulations were repealed by the Federal Constitutional Court. The law of 1957 on the regulation of questions of citizenship was supposed to implement equality between men and women. Nevertheless, foreign husbands of German wives had not the same naturalisation rights as foreign wives of

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[323] "An ethnic German within the meaning of this law comprises anyone who, in his homeland, acknowledged the *Volkstum*, in as much as this acknowledgement is corroborated by positive features such as origin, language, education and culture." *Bundesgestzblatt* 1957, 1, p.1215.

German husbands. Children born of a German mother who was married to a stateless partner became according to the *ius sanguinis a patre* also stateless. This was only changed due to a court ruling in 1962. Illegitimate children could only acquire German citizenship from their mother; German fathers had difficulties to pass on their citizenship to their offspring if the children did not live in Germany (no social ties). Only in 1974 was the *ius sanguinis a patre et a matre* introduced. Attempts in the early 1980s to facilitate naturalisation for long term resident immigrants failed as did another initiative in 1996. Only stateless foreigners who have lived legally for seven years in Germany and have not committed a serious criminal offence have since 1991 a right to naturalisation. This is in line with international conventions on the reduction of statelessness.

German policy on naturalisation was only slightly modified by the new naturalisation regulations in 1990. The changes introduced with the revision of the *Ausländerrecht* did not amount to a qualitative change in the approach to naturalisation.[324] The law of 1990 offered young foreigners aged 16 to 22 with at least eight years continuous legal residence and a minimum of six years schooling in Germany the opportunity to apply for citizenship. In 1993, these changes were consolidated and transformed into a right to naturalisation, the so-called *Anspruchseinbürgerung* as opposed to the discretionary *Ermessenseinbürgerung*.[325]

However, naturalisation remains quite difficult and the onus is placed on the immigrant to accustom themselves to the values, norms and ways of living, respect for German culture and the principles of the constitution, acquisition of some knowledge of German, abandonment of excessive national-religious behaviour and integration into school and professional life.[326] Naturalisation

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[324] Cf. Brubaker, 1992, op. cit., pp. 173-4.

[325] Bade, K., *Ausländer, Aussiedler, Asyl in der Bundesrepublik Deutschland*, Berlin, Landeszentrale für politische Bildungsarbeit, 1994, p. 23; Bundesministeriums des Innern (BMI), *Survey of the Policy and Law concerning Foreigners in the Federal Republic of Germany*, Bonn, 1998, pp. 58-62.

[326] BMI, *Aufzeichnung zur Ausländerpolitik und zum Ausländerrecht in der Bundesrepublik*

remains a discretionary act, a *Ermessenseinburgerung* as opposed to a *Anspruchseinburgerung* (only for *Aussiedler* and *Vertriebene*). With the exception of *Aussiedler* who are treated as citizens under the German constitution,[327] at least ten years of permanent residence are required before foreigners can apply for naturalisation. The latter must also satisfy a number of further conditions: the ability to speak and write German, knowledge of the German political system and loyalty to the basic liberal-democratic order; good behaviour which is not merely defined as the absence of criminal convictions; satisfactory means of support, including the possession of personal accommodation and the ability to maintain one's family.[328] Another important requirement is the renunciation of one's original citizenship and only children of bi-national families are officially allowed to have double nationality. However, there is a large number of 'special cases' due to several exceptions and bilateral agreements, for example for Arabic countries and second generation Turks and Greeks born in Germany. It is estimated that in about a third of all naturalisations double nationality is tolerated.[329]

Two elements characterise German citizenship. First, its attribution is still exclusively based on descent (*ius sanguinis*). There is no automatic acquisition of citizenship for children of immigrant origin born in Germany. German citizenship law does not recognise birth on German soil (*ius soli*) as a basis for citizenship. Secondly, naturalisation of people of non-German origin is, despite some changes in the law, still rather the exception than the rule. There is no right to naturalisation and citizenship is granted on a discretionary basis. Immigrants have the choice either to assimilate or to remain with a second class status and be expected to return to their country of origin.[330] This form of

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Deutschland, Bonn, 1989, pp. 36-9.

[327] Article 116 Grundgesetz

[328] Cf. SOPEMI, 1994, op cit., p. 163-4 (Table III.3); de Rahm, 1991, op cit., p. 174 (Table 8.4); H. Esser et al., 'Federal Republic of Germany', T. Hammar (ed.), *European Immigration Policy: A Comparative Study*, Cambridge, Cambridge University Press, 1985, p. 178.

[329] Brubaker, 1989, op. cit., p. 116.

[330] Hoffmann 1992, op. cit., pp. 38-40.

ethnically justified discrimination is partly laid down in the German constitution. The Basic Law contains contradictory universal human rights and particular rights for German citizens only. Article 1 lays down the inviolability and protection of dignity of man as the norm. From this follows the entitlement of all people to the basic rights of liberty, equality, and religious freedom. Article 3 of the Basic Law provides furthermore that 'nobody shall be discriminated or favoured because of gender, descent, race, language, homeland and origin, creed, religious or political beliefs.' The following articles, however, on freedom of assembly, association and profession as well as on freedom of movement and prohibition of extradition are reserved exclusively for German citizens. This restriction of fundamental basic rights for German citizens only is incompatible with the Articles 2 and 3 of the Basic Law. In this respect, Germany has not broken away from the idea of an ethnic nation state.

4.4. FRANCE: 'NIBBLING AWAY THE IUS SOLI'

France, in contrast to Germany, is an example of a nation that was shaped by the territorial and institutional frame of the state. The French nation state is demarcated by the territorial and institutional boundaries of the state. This sense of boundedness is critical for demarcating the national community. Such a nation is a nation of laws and legal institutions. The laws are derived from the state, and their uniformity and standardisation reflect the sovereignty of the state. The "legal concept of the nation" also showed the way for attaining nationhood through a model of from "state to nation"[331] whereby the nation would legitimate state power. The people had, in effect, to be invented. Emmanuel Joseph Sièyes, a drafter of the Declaration of Rights of Man and Citizen, expressed the prevailing opinion that the third estate was the nation. The nation, in turn, was an orderly association of individuals living under a common law. French nationhood, according to Brubaker, was politically constituted, yet it is expressed in the striving for cultural unity. The French state developed over centuries and served as a point of reference in defining the

parameters of the French nation. This territorial and institutional dimensions of nationhood led to an assimilationist approach to regional and cultural minorities.[332]

With the nation's boundaries set in legal codes and institutions, membership had an ideological, rather than an ethnic, quality. The constitution of 1793, for example, granted voting rights to foreign citizens living in France. Yet, the rational and universal cosmopolitanism had a Janus-faced quality: it also led to tyrannical and imperialistic endeavours. The Revolution's message of liberty, fraternity and equality was spread by the French army to the rest of Europe in the guise of France as the most enlightened and advanced civilisation.[333] As mentioned in the previous section, German nationalism arose in the context of the Napoleonic wars. The conflict between France and Germany that would not end until 1945 was not simply a contest of *Realpolitik* but also of two visions of nationhood. Germany presented a nation in search of a state and a protest against the rationalist and cosmopolitan beliefs of the French Revolution. For the French, the nation is identified with and is a projection of the state. Political unity and beliefs constitute the nation, not an ethnic-culture. Nationhood for the French is thus inclusive and assimilationist, universalist and nationalist, and centred in the state.[334]

The 1789 French Revolution is a fundamental reference point in the development of the French nation state and was decisive in inventing a nation and in creating a link between the state and the nation. Central to the revolution was the belief that the nation is defined through the state and the law. It created the conditions for the emergence of France as a unified post-feudal nation

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[331] A. Smith, *The Ethnic Origins of Nations, Oxford, Blackwell*, 1986, pp. 134-35.

[332] Brubaker, 1992, op.cit., pp.1-6.

[333] On the concept of the French nation see Greenfeld, 1992, op. cit., pp. 154-88.

[334] Brubaker, 1992, op.cit. Though the assimilationist side of French nationhood can be overstated. Horowitz notes an ethnic element in French national identity going back to the Revolution. See D. L. Horowitz, 'Immigration and group relations in France and America', in D. L. Horowitz et al. (eds.), *Immigrants in Two Democracies: French and American Experience*, New York, New York University Press, 1992, p. 8.

whereby the state performed a crucial role in building modern French identity and in imposing cohesion on a divided society. This process began during the *ancien régime*, and advanced during the French Revolution and Napoleonic era (1789-1815). The state justified its mission in terms of the general will. However, throughout the nineteenth century, a largely self-sufficient society co-existed alongside an ambitious state. The French nation remained extremely diverse prior to the Second World War and French remained a minority language in many French regions until the twentieth century.

The French monarchy, reigning over a fairly defined and gradually expanding territory, promoted the concept of citizenship based on the *ius soli* , i.e. all residents on the soil of France, whatever their ethnic or geographical origins, could in principle be subjects (later citizens) of the French state, they were regarded as French.[335] French citizenship legislation can be seen at the root of this legal concept in continental Europe. The various French constitutions during the 1790s regulated access to citizenship. These regulations were quite detailed if short-lived but principally acquisition of citizenship was granted by birth on the basis of *ius soli* or *ius domicili*. Since 1799 naturalisation was possible after ten years residence and a declaration of intent to stay in France.[336] In 1851, a further important *ius soli* element was introduced. Children born in France to French fathers became automatically French citizen. The *Code Civil*, entered into force in 1804, was particularly influential in the Romance areas and by the end of the nineteenth century, known as *Code Napoléon*, it was also implemented in many German states.

Much of the French attitude to both citizenship and to rights of residence for

[335] The term subject stresses the quality of the individual as being subject to the Sovereign and is typical of a feudal concept of nationality which regards nationality as a territorially determined relationship between subject and Sovereign based on allegiance to the King in person. This concept is prevailing in Anglo-Saxon law in contrast to Roman law where nationality is a personal relationship. The term citizen instead of subject is today also used in common law countries and thus the terms nationality and citizenship are regarded synonymous. See also footnote 295.

[336] Smith, 1986, op. cit., p. 136.

foreigners is enshrined in the *Code Civil*.[337] The idea of granting French citizenship to children born in France to foreign parents and living in France dates back to before the Revolution, although the extent to which it has been automatically granted or gained through request has altered from time to time. In 1889, the *Code Napoléon* was fundamentally revised and strengthened the *ius soli* principle. Each child born in France had the option to acquire French citizenship within one year after reaching full legal age. It also stipulated that the *ius sanguinis a patre* was independent from the place of birth. French historians have argued that wars created stronger national feelings which strove for legitimisation by blood relationships.[338] In addition, this was also an opportunity to tie more people to France. French citizenship could be lost through residence, military service or taking up public office abroad.

The 1927 *Code de la nationalité française* formed the culminating point in the attempt to extend French citizenship to as many people as possible. The main reason was low population growth which led to a substantial decline in the population during the nineteenth century. The law of 1927 consolidated the combination of *ius soli* and *ius sanguinis*. There are two remarkable aspects. Firstly, naturalised citizens were not allowed to take a public office during the first ten years. Secondly, French women who married a foreigner could keep their French citizenship and female foreigners who married a French citizen could acquire French citizenship by the exercise of an option. In the following years, countless amendments led to an unclear conglomerate of regulations and in 1945 the revised *Code de la nationalité française* (CNF) was passed.

The CNF adopted in 1945 (*Les Ordonnances*) had a strongly demographic rationale: automatic French nationality was given to children of immigrant origin either born in France of foreign parents or born in France of parents who were themselves born in France. This second provision has been especially important for young Algerians born in France after 1963 whose parents were

[337] J. Massot, 'Français par la loi, Français par le choix', *Revue Européenne des Migrations Internationales*, 1985, Vol. 1, No. 2, pp. 9-19.

[338] Groot, 1989, op. cit., p. 76.

born in Algeria while it was still a French colony.[339] The CNF aimed further at increasing the population of France through the automatic naturalisation of foreign women marrying a French citizen and the transmission of French citizenship to children born abroad to a French mother and foreign father became possible. The law of 1973 liberalised matters further by removing discrimination on grounds of sex. A child born in France to a foreign and a French parent was now automatically French regardless of which parent was foreign.

Yet French citizenship law was not only affected by demographic factors. The law has been equally affected by the colonial history and the distinction drawn between *citoyens français* and *sujets français*, the latter deriving their status from connection with French colonies. In law they were part of the French nation.[340] The distinction was abolished by virtue of the 1946 constitution which introduced the single status of *citoyen de l'union française*. This status was enjoyed by all those who had an association either with France, including its non-metropolitan territories, or with French colonies, the protectorates and the mandated territories.

The idea of a single citizenship was affirmed in the 1958 constitution but in practice special provisions continued to apply to a group known as *ressortissants*. This group has been characterised as follows:

> "Les ressortissants d'un Etat qui relèvent à un titre quelquonque de son autorité. En particulier, ont été considérés comme ressortissants de l'Etat: ses nationaux, les sujets de ses colonies, ceux des mandats qu'il administrait, ceux de ses protectorats; ...".[341]

This description encompasses the group of persons on whose behalf France

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[339] G. Verbunt, 'France', in T. Hammar (ed.), 1985, op. cit., p. 140.

[340] Plender, 1988, op. cit., pp. 34-7.

[341] A. C. Kiss, Répertoire de la practique française en matière de droit international publique, 1966, Vol. II, quoted in G. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, p. 15.

might exercise the right of diplomatic protection. Within metropolitan France, however, *ressortissants* were treated as aliens. For example, a Moroccan subject could be deported as this person is not a French citizen within the meaning of the CNF. Goodwin-Gill observes that

> "again the class of nationals described by international law for the purpose of protection is divided up for the purpose of an application of the immigration laws by the protecting powers."[342]

The 1945 CNF has been re-enacted with substantial amendments by the law of 9 January 1973 which is with some modifications still in force today.
The law of 1973 contains no reference to the colonies. The area of application of this law "s'étend du territoire métropolitain, des départements et des territoires d'outre-mer".[343] Consequently, when non-metropolitan territories achieve independence, the people concerned lose their French citizenship and acquire the citizenship of the new state. There is no provision for a further status comparable to that of British subject or Commonwealth citizen. The independence of former French colonies has not led to the creation of a framework comparable to the Commonwealth. The territorial applicability of French citizenship law receded with the frontiers of the French Empire.
The first comprehensive reform of the CNF of 1973 was carried out only 20 years later. The *Code de la nationalité française* of 22 July 1993 dispensed with most of the distinctions formerly drawn between the nationality regime in metropolitan France and in its overseas territories. Under the new system the principal basis for the acquisition of French nationality at birth continues to be *ius sanguinis* if at least one parent is French. A person who does not acquire French nationality at birth may acquire it thereafter by naturalisation. The minimum residential requirement is five years but this provision has been relaxed for several groups such as, for example, parents with at least three minor children, foreigners who have rendered important services to France, persons who belong to the French cultural and linguistic community, and

[342] Goodwin-Gill, 1978, op cit., p. 16.

[343] Loi No. 73-42 du 9 janvier 1973, article 1, quoted in Goodwin-Gill, 1978, op. cit., p. 15.

citizens of territories which were under French control or protection.[344] These exemptions appear to reflect the demographic element in French citizenship policy as well as the striving for cultural unity.

The CNF introduced two important changes. Firstly, the 1993 CNF removed the automatic *ius soli* for children born in France of foreign parents on reaching the age of majority (18 years). This has been replaced by a procedure requiring them between the ages of 16 and 21 to demonstrate their intention to become French, for example by applying for a certificate of French nationality or registering for national service. Naturalisation may be refused in the case of particular serious offences. Children born in France of foreign parents are no longer entitled to French citizenship while they are minors. Further restrictions concern acquisition of citizenship by marriage to a French national. This entails a waiting period of two years instead of previously six months, unless the couple has a child.[345] The 1993 CNF also abolished the simplified restitution of French citizenship for persons from former colonies who lost French citizenship after independence.

Secondly, the attribution of citizenship at birth in accordance with the *ius soli* principle has been modified in view of the changed territorial definition of France due to decolonisation. Thus, the provision that any child born in France with at least one parent born in France is French (*le double droit du sol*) does not any longer apply to parents born in the overseas territories or pre-1960s colonies. The most controversial provision, however, is regards to children born in France after 31 December 1993 of parents born in those territories. These children are not any longer entitled to French citizenship. This excludes mainly people from former African colonies. An exception has been made for children with at least one parent born in Algeria before 3 July 1962, the year Algeria gained independence. These children are French citizens from birth provided that their father or mother can prove they have resided continually in France for

[344] Plender, 1988, op cit., pp. 34-7.

[345] On the 1993 reform of the CNF see A. Weber, 'Französisches Staatsange- hörigkeitsrecht im Wandel', *Zeitschrift für Ausländerrecht*, 1995, Vol. 15, No. 4, pp. 147-151.

five years.[346] A complaint to the *Conseil Constitutionnel* in 1993 that the different treatment of different groups of persons was unconstitutional was rejected by the court.[347]

The *ius soli* principle has been more and more undermined by a series of legislative and administrative changes in the 1980s which narrowed the eligibility for French citizenship.[348] Criteria such as the duration of residence in France and knowledge of the French language and culture became more important for citizenship applications. This is reflected in the reports by the *Haut Conseil à l'Intégration* (HCI), created by the Prime Minister in December 1989 initially for three years. The HCI has emphasised in its reports the doctrine of republican integration - a republic of citizens not of minorities.[349] Naturalisation is seen as an important part of the integration process.[350] Concern for cultural unity is a central element in the French concept of nationhood until today but there is also a political conception of citizenship derived from the revolutionary origins of the notion of citizenship. In its first report, the *Haut Conseil à l'Intégration* (HCI) has rejected the 'logic of ethnic or cultural minorities' for a 'logic of equality'.[351] The HCI stressed that this does not mean that it would deny the legitimate desire of individuals or groups to develop their own cultures

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[346] Weber, 1995, op. cit., p. 151.

[347] Weber, 1995, op. cit., p. 150.

[348] Cf. J. Costa-Lascoux, 'Chronique Législative. I Politiques d'admission des étrangers dans plusieurs Etats européens, II La politique française de l'immigration (textes législative et réglementaire) (1981-1986)', *Revue Européenne des Migrations Internationales*, 1986, Vol. 2, No. 1, pp. 179-240. On the citizenship debate during the 1980s see Brubaker, 1994, op. cit., pp. 138-164.

[349] The reports are published in J.-C. Zylberstein (ed.), *L'intégration à la française*, Paris, U.G.E., 1993.

[350] See also Patrick Weil who points out that the idea of a process of socialisation has become very important; P. Weil, 'Nationalities and citizenship: the lessons of the French experience for Germany and Europe', in D. Cesarani et. al. (eds.), *Citizenship, Nationality and Migration in Europe*, London, Routledge, 1996, pp. 74-87.

[351] 'Pour une modèle française d' intégration', in J.-C. Zylberstein (ed.), 1993, op. cit., pp. 21-58.

in their private, personal or associative life.[352] According to this official statement, the key to integration is seen in the acquisition of French citizenship and so integration takes place through personal rather than group status.

French policy has always placed great emphasis on the equality of citizenship as the basis of a secular French state which makes no recognition of religious, ethnic or other distinctions.[353] Naturalisation has generally been encouraged and was until 1993 automatic for the children of foreigners when they reached the age of majority. French governments of all political directions have been consistent in their opposition to the recognition of 'ethnic minorities', regarded as a betrayal of the egalitarian republican ideal based on the equality of citizens in a secular state. [354]

French citizenship law today is with regard to the acquisition of citizenship by birth primarily a *ius sanguinis* right, enriched by strong *ius soli* elements. The *ius sanguinis* elements are evident in the regulation that each child born to at least one French parent - legitimate or illegitimate - will become a French citizen. There are two main groups who can acquire French citizenship on the basis of the *ius soli* principle. First, children born in France who would otherwise be stateless, and second, children who by reaching full legal age have lived the last five years in France and continue to live in France. The applicant must be of good character and must not have committed criminal offences involving prison sentences of over 6 months, and there must be a demonstrated intention to integration, principally by showing knowledge of the language.

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[352] *'Les conditions juridiques et culturelles de l'integration'*, in ibid. (ed.), pp. 61-133.

[353] M. Long, *Être français aujourd'hui et demain.* Rapport remis au Premier Ministre par Marceau Long, Paris, La Documentation Français, 1988.

[354] Cf. C. Lloyd et al., 'France: One Culture, One People?', *Race & Class*, 1991, Vol. 32, No. 3, pp. 49-65; Greenfeld, 1992, op. cit., p. 179.

4.5. THE UNITED KINGDOM - "A LEGACY OF CONFUSION"[355]

Historically, British citizenship - which has probably the oldest codified history - is based on allegiance to the Crown.[356] The principle of *ius soli*, i.e. all persons born on the King's territory (or later in 'His majesty's dominions'[357]) became automatically his subjects, can be traced back to the 10th century. Comparable to the development in the German speaking territories, the creation of the Kingdom of England under Alfred the Great (871-99) was accompanied by the growth of the *ius soli* principle. The importance of kinship diminished as the power and unity of the kingdom grew and a system of allegiances based on the *ius soli* principle became pervasive. As in the German territories, the system of feudalism during the Norman period which related the political hierarchy to land tenure, reinforced the *ius soli* principle. Conflicts between the two principles of *ius soli* and *ius sanguinis* led to the parliamentary statute *De Natis Ultra Mare* in 1351. The *ius soli* principle was modified in so far that the principle of *ius sanguinis* was applicable to the heir to the throne, hence, also members of the royal family born abroad could succeed to the throne. In addition, for military and commercial reasons the *ius sanguinis* was extended to children of certain groups of subjects living abroad.[358]

An important point of reference for the British common law tradition which is strongly guided by precedents was the Calvin case in 1608.[359] In the context of the absolutist monarchy, this case represents an early and clear formulation of the *ius soli* principle. The reign and the protection of the Monarch commands loyalty from the individual and confers the status of a subject. This passive obedience was required from every person, including settled foreigners. There

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[355] A. Dummett et al., 1990, op. cit., p. 2.

[356] Cf. V. Bevan, *The Development of British Immigration Law*, London, Croom Helm, 1986, pp. 107-8.

[357] These were territories under British rule in contrast to the Dominions which were self-governing territories and later became known as the Old Commonwealth.

[358] Bevan, 1986, op cit., p. 108; Plender, 1988, op cit., p. 13.

[359] Dummett et al., 1990, op cit., pp. 60-2.

were two exceptions to the *ius soli*; firstly, children born of foreigners in Britain who were hostile towards the state could not become British subjects, and secondly, children born abroad to British diplomats and soldiers became British. The Glorious Revolution of 1688 did not change this concept of subjecthood as the parliament was declared to be sovereign and not the people.[360] The Naturalisation of Foreign Protestant Act in 1708 confirmed that descendants of British subjects born abroad became British subjects.[361] It was later specified that the father had to be the subject. The motive of the Act was mainly a demographic one in order to encourage Protestant immigration to add to the population of the country. In 1711, the taking of the sacrament was introduced and this barred Catholics and Jews from naturalising.

With the expansion of the British Empire in the 18th century, British subjecthood was extended to the population of the colonies. The main source of allegiance remained *ius soli* but subjecthood could be acquired *ius sanguinis*, though this was in addition and not in derogation of the *ius soli* principle. The principle of indelibility of the allegiance was challenged by the American Revolution and the independence of the United States. The Naturalisation Act of 1870 ended this doctrine and introduced important changes in accordance with the Anglo-American Bancroft Convention of 1868. Until then, allegiance to the Crown could only end with death. British subjects living abroad as well as British subjects born abroad could now give up their subject status. Women married to foreigners now lost their British subject status. The Act of 1870 further stipulated that people had the opportunity to acquire British subject status although only within a British colony. During the 19th century, Britain further extended protection to persons who were descendants of British subjects living in countries ruled by Britain but not claimed as British possessions. Such persons actually did not fall under the *ius sanguinis* principle and were known as British protected persons. Until 1949, they had no more rights than aliens for the purpose of immigration law.

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[360] Dummett et al., 1990, op cit., pp. 59-61.

[361] Strictly speaking, one can use the term British subject only after the Act of Union in 1707.

By the end of the 19th century, regulations regarding transmission and acquisition of British subject status were quite complex and it was felt that a common Nationality code throughout the Empire would be sensible. In particular the self-governing Dominions were aiming for a system of naturalisation which would enable them to confer full British subjecthood, recognised throughout the Empire, to alien immigrants. Following the Imperial Conferences of 1902 and 1907, the British Nationality and Status of Aliens Act of 1914 was formulated which declared that British subjects comprised a) any person born within His Majesty's dominions and b) any person born outside His Majesty's dominions if the father was born within His Majesty's dominions. The Act retained *ius soli* as basis of British subjecthood and the acquisition of subject status by descent was only initially restricted to one generation. The Act ensured that there was a common code of nationality and common status throughout the Empire.[362] Yet this was never applied uniformly and did not prevent discrimination in the policies followed within the Commonwealth.[363] The common status was respected in the law of the United Kingdom and restrictions on entry imposed during the First World War were directed solely at aliens, i.e. any person who is not a British subjects.[364]

The movement towards greater independence and growing national confidence among Old Commonwealth countries after the Second World War was reflected in the radical changes introduced by the British Nationality Act of 1948 but also the many regulations needed to be brought into a coherent form.[365] Canada made the start in 1946 when it single-handedly passed its own

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[362] Goodwin-Gill, 1978, op. cit., pp. 11-4; Plender, 1988, op. cit., pp. 20-1.

[363] Canada, Australia, South Africa and New Zealand severely restricted the immigration from India and Pakistan despite their common status as British subjects.

[364] This definition was also preserved by the British Nationality Act 1948. A British subject may be treated as an alien by virtue of the Aliens restrictions Acts 1914 and 1919 and Aliens Order 1920, unless he could prove his status.

[365] On the various British Nationality and Status of Aliens Acts during the inter-war period see Plender, 1988, op. cit. Relevant is here that after the First World War subjecthood was transmissible *ius sanguinis* indefinitely subject to certain requirements.

citizenship law and reduced British subject status to a secondary role.[366]. According to Goulbourne, the British Nationality Act of 1948

> "was to become a watershed in British nationality legislation. It reflected the concern to maintain the common status whilst recognising the necessity for newly emergent nation states to exercise their independent rights in international relations with regard to who would be citizens and who aliens."[367]

The Act introduced two kinds of formal citizenship, the Commonwealth Citizenship and the Citizenship of the United Kingdom and Colonies. Commonwealth Citizens were all citizens of the newly independent Commonwealth countries like Canada who retained in addition to their new nationality the common status of being British subjects. Both categories of British subjects defined in this Act had full rights of access to the United Kingdom.[368] The 1948 Act aimed at preserving the common British subject status. The Act stipulated that each Commonwealth country would have its own citizenship and would determine its own criteria for naturalisation. Each Commonwealth country would also recognise the citizenship of every other Commonwealth country. The UK and its colonies would be treated as a unit. Those who acquired citizenship of a Commonwealth country would automatically acquire a second status known as British subjecthood or Commonwealth citizenship.[369] Yet this did not happen in all Commonwealth countries. Even were mutual recognition of the citizenship status was assured, this did not necessarily confer rights in other member states. In particular, a Commonwealth citizen did not enjoy the right to enter another Commonwealth

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[366] Dummett et al., 1990, op. cit., p. 134.

[367] H. Goulbourne, *Ethnicity and Nationalism in Post-Imperial Britain*, Cambridge, Cambridge University Press, 1991, p. 96.

[368] See also C. Holmes, *A Tolerant Country? Immigrants, Refugees and Minorities in Britain*, London, Faber and Faber, 1991, p. 53; S. Juss, *Immigration, Nationality and Citizenship*, London, Mansell, 1993, pp. 48-53.

[369] These two terms are interchangeable but have certain political overtones. The new Commonwealth countries avoided the term British subject and the term was only used in the UK and the old Commonwealth countries.

country of which s/he was not a citizen.[370]

An important feature of the Act was the introduction of *ius soli* based on birth in the Commonwealth states which formed the basis of the BNA 1948. A person could become a United Kingdom and Colonies Citizen by a) birth on the territory of the United Kingdom and Colonies; b) birth outside the territory to a father there born or there naturalised; c) naturalisation at the discretion of the Secretary of State.[371] Apart from acquisition by birth, the law also provided for acquisition by descent. The first generation born abroad acquired British subjecthood according to *ius sanguinis a patre*. Further generations as well as foreign wives and persons who had lived for one year on British territory could register for citizenship. This did not amount to an option right, but it was a simplified naturalisation procedure. Otherwise, the minimum residence requirement for naturalisations was five years. There were now four main national groups: British subjects, British protected citizens, citizens of the Republic of Ireland and aliens.[372] Basically, three main rights came with Commonwealth citizenship: the right to enter the UK, the right to work in the civil service and the right to vote in parliamentary and local elections.

Although Ireland had left the Commonwealth after declaring herself a Republic in 1949, the British government granted Ireland a special status that put her and her citizens on a legal par with Commonwealth countries. Irish citizens can enter Britain freely, vote and stand for political office, and they are allowed to work in the civil service. In addition, Irish persons who had been born before

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[370] This was particularly the case in the 'old' Commonwealth countries Australia, Canada and New Zealand which have already before 1948 discriminated against non-white immigration. Plender, 1988, op. cit., pp. 22-4.

[371] In addition a few important changes were made with regard to the citizenship of women married to an alien, and the right for minors, women married to United Kingdom citizens, certain stateless citizens, and Commonwealth-country and Irish citizens to register for citizenship instead of applying for naturalisation. Cf. Dummett et al., 1990, op cit., pp. 135-36; Juss 1993, op cit., p. 52.

[372] There was a precedent for a structured system of this kind in the French legal distinction between *citoyen français*, *sujet français* and *étranger*.

1949 could apply for a British passport and hold dual nationality after declaration to the British Home Secretary that "they had never ceased to be subjects".[373]

The unconditional right of entry and residence for both to citizens of the United Kingdom and Colonies and to the citizens of independent Commonwealth countries has been progressively cut back since the Commonwealth Immigrants Act 1962. Since then, citizenship law has become entangled with, and eventually become based on, immigration law. Immigration from the New Commonwealth countries resulted in an anti-(black)immigration atmosphere and a political campaign in favour of controls. These were introduced by the Conservative government in 1962 and tightened by the Labour government following the immigration of Asians from Kenya in 1968. These people had retained their British citizenship following Kenya's independence in 1963 and thus were not subject to immigration control under the 1962 Act (cf. 3.4.). According to the 1968 Act only those citizens of the United Kingdom and Colonies were free to enter who had at least one parent or grandparent who was born, adopted, naturalised or registered in the United Kingdom.[374] The genesis and political outcome of legislation concerning immigration and citizenship from the late 1940 to the late 1960s is summarised by Hiro as follows:

> "A generation of coloured immigration (1948-68) also gradually translated the previously latent contradiction in British society between regard for 'human dignity' and a general contempt for poor, dark humanity into an open conflict between the moral principle of equality for all British subjects and the very real social fact of racial antagonism towards racial minority settlers in their midst."[375]

In the context of Britain's entry into the European Community, in 1971 a third

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[373] Dummett et al., 1990, op. cit., p. 129.

[374] Dummett et al., 1990, p. 202.

[375] D. Hiro, *Black British, White British. A History of Race Relations in Britain*, London, Grafton, 1991, p. 216.

Immigration Act was introduced that formally defined British citizenship for EC purposes. However, as in the case of previous legal efforts to define citizenship, the 1971 Immigration Act emanated within the context of a further restriction of immigration. According to Juss and Dummett the reasons for the Bill were first, that the Conservative Party had to fulfil an election promise made during the election campaign in 1970 to further cut down immigration, and second, that Home Office officials had for the past decade wanted to revise the 1948 Nationality Act and regarded legal EC necessities as a convenient formal excuse to finally draw a line between colonial citizens and citizens of the United Kingdom.[376]

At the heart of this bill stands the new concept of patriality, the differentiation between citizens of the United Kingdom and Colonies who were 'patrial' and held the right of abode in Britain and those who were not. Admission to the United Kingdom depended now not on citizenship or subjecthood but on belonging to the UK. Patrial Citizens of the United Kingdom and Colonies were a) - similar to the 1968 'grandfather's provision' - all persons who had been, or those whose parents or grandparents had been, born, adopted, registered or naturalised in the UK. b) Furthermore, a person who had lived in the UK for at least five years continuously and who had not been subject to control at the end of the five year period. A non-patrial Citizen of the United Kingdom-and-Colonies was any other - predominantly black person - holding this particular citizenship.[377] In principle, the Act corresponded with legally enshrined concepts of who belongs and who does not that had been formulated during the 1960s.[378] New was the fact that non-white Commonwealth immigrants were for the first time formally put on a par with aliens vis-à-vis their right of abode and acquisition of citizenship.[379]

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[376] Dummett et al.,1990, pp. 212-19; Juss 1993, op. cit., p. 47.

[377] Dummett et al.,1990, op. cit., pp. 217-19.

[378] Juss, 1993, op. cit., p. 46.

[379] The Act introduced the following categories: Patrial citizens of the United Kingdom and Colonies (patrial CUKC); Non-patrial CUKC connected with an existing dependency; Non-patrial CUKC connected with a former dependency; Non-patrial British subject without

Immigration control legislation brought about a situation whereby the status of citizens of the UK and of the colonies no longer defined who had the right of entry and settlement in the UK. People of British descent, born in Britain and primarily of white origins were privileged. It became increasingly inconsistent to define people as British subjects or citizens when in fact some had and others did not have the citizenship right to enter the UK. Restricting the right of abode to certain categories of citizens also exposed the racist nature of the immigration laws and the "process of racial categorisation"[380] which lay at the heart of the legislation since 1962 aimed largely at excluding black immigrants.[381] The immigration law had created a single citizenship with different rights. In the decade between the 1971 Immigration Act and the 1981 British Nationality Act, both the Labour Party and the Conservative Party were involved in a debate about redefining citizenship.

Whereas in Germany and France citizenship law forms the basis for the imposition of immigration control, in the UK immigration law provided the inspiration for the British Nationality Act 1981. By the end of the 1970s, the imposition of immigration controls on certain citizens of the United Kingdom and Colonies had become well established. The British Nationality Act of 1981 defined three major categories of citizenship with different rights which replaced the citizenship of the United Kingdom and Colonies:

i) British citizenship: persons with close connections with the UK whose parents or grandparents had been born, adopted, naturalised or registered as citizens of the UK.
ii) Citizenship of the British Dependent Territories: citizens of the UK and Colonies who had that citizenship by reason of their own, their parents' or grandparents' birth, adoption, naturalisation or registration in an existing dependency or associated state.

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citizenship of any Commonwealth country; British protected Person; see Dummett et al., 1990, op. cit., pp. 216-27 for further details.

[380] Holmes, 1991, op. cit., p. 61.

[381] Cf. J. Solomos, *Race and Racism in Britain*, Macmillan, Basingstoke, 1993, pp. 64-70; I. Spencer, *British Immigration Policy since 1939*, London, Routledge, 1997, pp. 129-46.

iii) British Overseas Citizenship: mainly Malaysians and East African Asians entitled to enter the UK under the quotas established in the 1968 Act; this status cannot be passed on to children.

Yet only the first category has attached the right of abode in the UK. The latter two - as well as two further categories, namely that of British Protected Persons and British subjects - received a citizenship status that was practically "valueless".[382] The Nationality Act of 1981 has not ended the confusion surrounding citizenship. It has created a number of citizenships with different rights and has given people of British descent - who are more likely to be white - privileged access to Britain. Due to Britain's imperial legacy and the political desire to maintain its central and superior position within the Commonwealth, "the United Kingdom does not have, as other countries do, a single nationality with a recognisable name."[383] Many citizens of independent Commonwealth countries (Canada, Australia, Republic of South Africa) have thus the right of access to the UK because they are defined as patrials. Special arrangements have also been made for groups such as Gibraltarians and the Falkland Islanders.[384]

The 1981 Nationality Act marks a major break with the *ius soli* principle as it limited the previous automatic right to citizenship according to *ius soli* for the children of foreign residents. Any child born on or after 1st January 1983 (date of entry into force) would only become a British citizen when one of the parents was either a British citizen or was resident in Britain for at least five years. Similar to the current discussion in the US, this excluded automatically the children of immigrant parents who had no leave to remain or stayed illegally in the

[382] Dummett et al., 1990, op. cit., p. 245.

[383] Dummett et al., 1990, op. cit., p. 3.

[384] Further Acts were passed in 1996 and 1997 with regard to Hong Kong before it was returned to China in July 1997. The main provision was to allow non-Chinese ethnic minorities to register as British citizens who would otherwise been have stateless. The handing-over of Hong Kong to China has probably paved the way for the granting of full citizenship to the remaining British Dependent Territories as announced by the British government in February

country, children of asylum seekers or of temporary workers or students becoming eligible for British citizenship.[385] The objective was to restrict the acquisition of British citizenship according to the *ius soli* principle in the interest of immigration control. Citizenship was not to be acquired by children born in the United Kingdom of parents who had no indefinite right to remain in Britain at the time of the birth of the child. Under the new law, a person born in the UK acquires British citizenship at birth only if either parent had that status and is not subject under the immigration law to an restriction on the length of stay. Thirdly, the Act of 1981 introduced the principle of sexual equality in the regulation of nationality. Thus, citizenship was to be transmissible on marriage to husbands and wives, and to children in the female as well as the male line. However, transmission of citizenship *ius sanguinis* was restricted to the first generation born overseas to any person who was at the time of birth a British citizen other than by descent.[386] The two main exceptions are, firstly, a child born to a person who was recruited in the UK to serve in the Crown service under the government and is serving overseas. Secondly, a child born to a British citizen who is working in one of the European Communities' institutions.[387]

The various amendments amount, in the end, to an implicit system of *ius sanguinis*. The tendency towards the *ius sanguinis* principle which can be traced back to 1351, has become much stronger during the middle of this century and has been accepted with the BNA of 1981. Principally, it is a *ius sanguinis a patre et matre*. Besides the many detailed regulations, remarkable is that children born in the UK who are stateless do not acquire British citizenship automatically. There are exceptions to the rule, but in general British citizenship which is not acquired by birth may be acquired only by naturalisation. This is a matter of discretion rather than entitlement. This is also

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1999. This would affect around 125.000 people - far less than the population of Hong Kong.

[385] S. Suss, *Immigration, Nationality and Citizenship*, London, Mansell, 1993, pp.45-6.

[386] Plender, 1988, op. cit., pp. 25-9.

[387] There are further regulations regarding the second generation born overseas but not set out fully at this point.

the case for British protected persons, British subjects, British Dependent Territory citizens and British Overseas citizens who can acquire British citizenship after five-years' residence in the UK and if the applicant was not in breach of the immigration laws at any time during this period. The Act of 1981 makes provision for two further cases: one in consequence of residence or Crown service and the other in consequence of marriage. The residence qualifications are the same as for the four groups named above (three years if married to a British citizen). In addition to the requirements of residence, the applicant must fulfil conditions similar to those in Germany and France: being of good character, linguistic ability and intention to make his home in the UK. The previous citizenship does not need to be renounced. The implementation regulations are not very precise, and in the end, the final decision lies within the discretion of the Home Secretary.

All four legislative interventions since the end of the Second World War illustrate that formal citizenship in Britain is predominantly understood in terms of immigration. Citizenship legislation has been implemented on the basis of one central motive, namely to restrict the right of abode to a particular group of British nationals. With the decline of Britain's empire her citizenship shifted formally from a concept of 'imperial' Britishness to one that is characterised by its 'whiteness' and exclusivity. The British definition of citizenship is, beginning with the first British Nationality Act in 1948, a pragmatic response to the decline of the Empire, the independence of overseas territories, and a reaction to the Canadian citizenship law of 1946. Access to Britain has been restricted for British subjects without close connections to Britain by birth or descent from a British citizen and are designed to control the immigration of non-white British subjects from colonial and Commonwealth countries. This is demonstrated by the fact that immigration legislation exempted certain categories of people from control, namely those with close ties to the United Kingdom by birth, naturalisation, or descent from a British parent or grandparent. The 1962 Act narrowed access on the basis of colour. All subsequent legislation has only served to widen the racial divide. In particular the 1968 Act introduced to deal with the predicament of the British Asians in Kenya who held British passports,

drew severe criticism from the European Commission on Human Rights. The Commission found that the 1968 Act "had racial motives", that it gave "preference to white people" and that it amounted to "degrading treatment".[388] Holmes argues that with its emphasis on patriality, the 1971 Immigration Act "reflects Britain's retreat from the status of an imperial power", a process which started with the 1962 Immigration Act.[389] This law gave the British government complete control over the entry of non-patrials to the UK. The concept of patriality is one example of the way in which states may, for the purpose of controlling immigration, distinguish between various classes of citizens. Present UK law has created the paradoxical situation where the category of those who have the right to abode by no means corresponds with the category of citizens on whose behalf the UK may exercise diplomatic protection.[390]

The increasing restriction of Black and Asian immigration between 1962 and 1988 and the new definition of citizenship in the 1981 British Nationality Act came about as Britain moved closer towards Europe. The issue of immigration is linked to wider political debates about the impact of European integration on national identity in Britain and fears about the threat to British identity. It was the decline of Britain as an imperial power combined with post-war immigration from former colonies which created a new restricted view of rights to membership and access to British territory.[391] In a European perspective, British citizenship laws are historically quite liberal. The recent trend, however, has been in line with developments in France to a more restrictive concept of citizenship which emphasises ethnic affiliation.

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[388] Quoted in Plender, 1988, op. cit., p. 23.

[389] Holmes, 1991, op. cit., p. 61.

[390] Cf. Goodwin-Gill, 1978, op. cit., p.14.

[391] Holmes, 1991, op. cit., p. 81; Z. Layton-Henry et al., *Race, Government and Politics in Britain*, London, Macmillan, 1986, pp. 86-7; Solomos, 1993, op.cit., pp. 227-9; Rahm, 1990, op. cit., p. 183.

4.6. COMPARISON: CONVERGENCE OF MAIN TRENDS

Considering the legal regulations on citizenship in the case study countries, there are mainly six criteria which have been used to define membership of a nation: sex, family membership, consanguinity, the territorial (*ius soli*) or residence principle (*ius domicili*) and the principle of cultural ties, and possibly membership to another nation. The changing relevance of these criteria is an expression of cooperation and conflict between states, a reaction to population movements, to demographic and political demands as well as a consequence of an increased 'identity management' of societies.

The criteria sex, family membership, consanguinity and the principle of cultural ties can be called particularistic as they are based on criteria which have been developed within a nation state and are aimed at a certain group of people.

> "(P)articularism [is] the orientation of any culture or human grouping in which the values and criteria used in evaluating actions are internal to the group, without any reference to values or criteria which apply to human beings universally."[392]

By definition, these criteria do not universally apply to all people. This does not mean that within a particular society universally applicable criteria and norms have not been used. However, the effective scope of universally formulated norms has been limited by the particularistic definition of citizenship and the territorial limitations to the legal system. The above mentioned criteria are ascribed rather than acquired criteria with the exception of the territorial or residence principle. To what extent cultural ties and citizenship itself are acquired will be discussed below. According to systematic theory, 'ascribed/ acquired' characterises criteria and norms that refer to :

> "... judgements about 'social objects', including actors according to their membership or not of specified social categories as against judgements made in terms of more general criteria which apply to the actual

[392] D. Jary et al. (ed.), *Collins Dictionary of Sociology*, Glasgow, Harper Collins, 1991, p. 455.

performance of actors..."[393]

The terms 'ascribed/ acquired' as well as the terms 'particularistic/universal' do not describe one dimension but four independent variables which can occur in different compositions.[394]

Increasing equality between men and women and declining relevance of the family is demonstrated by two developments. Firstly, by the development in family law from the unitary system to the dual system, and secondly, by the passing on of citizenship to legitimate as well as illegitimate children. In all three states, citizenship of family members was tied to the husband's and/or father's citizenship, emphasising the unity of the family in terms of citizenship. It was politically desirable that the whole family could be clearly assigned to one nation. Based on the Roman law tradition, this led to a patriarchal definition of citizenship for women and children. This principle was loosened when the idea of avoiding statelessness became prevalent as women and children of stateless men were also stateless. The Hague Convention of 1931 stipulates that in case of statelessness a woman's citizenship will take effect. This break with the male defined family unit was further developed in the New York Convention of 1957 which condemned the automatic acquisition of a husband's citizenship and the loss of the wife's own citizenship on marriage. The dual system became increasingly accepted, however, with important rights of option for the woman so that formally women had the choice of citizenship but not men. This did not only discriminate against men but also forced the woman - if both partners wished to have the same citizenship – to take on her husband's citizenship. Meanwhile, this regulation has been abolished in most west European states. Facilitated acquisition of citizenship for both partners is now not justified by marriage but by the attachment developed by living together. The logical step to facilitate acquisition of citizenship also for unmarried couples has so far only been taken by the Netherlands.

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[393] Jary et al. (ed.), 1991, op. cit., p. 458.

[394] Cf. J. Wood, The role of systematic theory in Parsons' general theory of action: the case of pattern variables, *Berkley Journal of Sociology*, 1968, Vol. 13, pp. 28-41.

Increasing equality between men and women is also shown in the attribution of citizenship to children if this has been regulated by the principle of *ius sanguinis*. Originally, citizenship of children has often been defined by a *ius sanguinis a patre*. Increasing independence of women led to demands, and this is today also accepted, for a *ius sanguinis a matre* as well as a *ius sanguinis a patre*. Though some countries have been concerned about increasing cases of double nationality. The equal treatment of legitimate and illegitimate children does not pose a problems in *ius soli* countries since each child born there acquires the citizenship of the country, though this is different in *ius sanguinis* countries. In the states of the Germanic legal area, citizenship of an illegitimate child is usually defined by the *ius sanguinis a matre*.

Sex as well as family status are today not any longer regarded as useful criteria for membership to a state. In both cases, it was implicitly assumed that a woman's citizenship ties were less strong or important than a man's. 'Membership' to a sex was connected to a certain quality; a woman's citizenship was for her rather ascriptive.This argument was undermined by the universal demand for equality between men and women. The turn away from sex and family status to other demarcation criteria also contributed to a stronger potential of internal solidarity. Although this process has been largely completed with regard to the formulation of legal norms, this does not mean that such criteria do not take any effect in the often very specifically formulated naturalisation regulations.

Considering the development of citizenship criteria such as consanguinity, the territorial and residence principle as well as cultural ties, one can observe as a main trend the increased importance of *ius sanguinis* and cultural ties. Citizenship evolved from subjecthood (*Untertanentum*) and thus was linked to the place of residence and could be acquired by any person. The starting point of the historical development of the concepts of citizenship in the case study countries was a *ius soli* or rather a *ius domicilii*. Only after the creation of political units has citizenship been partly tied to consanguinity. In particular French historians stress that the legal codification of consanguinity was

politically desirable in order to emphasise one's special quality against the stranger, for example, during times of war.[395] The use of consanguinity as a criterion for citizenship is a result of the endeavours to encourage a general belief in the consanguinity of a people. In his commentary on the debate on the German citizenship law of 1913, Huber points out that during the nineteenth century the principle of *ius sanguinis* could be regarded as the 'more modern one'.[396] The idea to strengthen a common political future through the belief in a common cultural heritage was relatively early recognised in the legal codex throughout Europe.[397]

Since the middle of the nineteenth century, basically all continental European states were proceeding from the *ius sanguinis*. Differences between states existed only in the more or less numerous exceptions. In France, Belgium, Italy and Spain, for example, children born in that country had a option right. A provision in the French *Code Civil* of 1889 stipulated that children born of at least one parent born in France are French citizens. The reason behind this was a demographic policy premise that long term foreign residents should become French. Further exceptions were usually made with regard to foundlings and children whose fathers were not known. The implementation of the *ius sanguinis* principle has been followed more strictly in the traditional states of the Germanic legal area (Germany, Austria, Switzerland) than in the states of the Romance legal area (France, Belgium, Netherlands, Italy, Spain).[398] Entirely different is the situation in the Anglo-Saxon area where traditionally the *ius soli* principle has been prevalent. Since 1981, the UK has introduced a *ius sanguinis* for children born abroad and has restricted the *ius soli* for children born in the UK. Similarly, France restricted drastically the *ius*

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[395] See for example G. Noiriel, *Population, immigration et identité nationale en France XIXe – Xxe siècle*, Paris, Hachette, 1992.

[396] B. Huber, 'Die Beratungen des Reichs- und Staatsangehörigkeitsgesetzes von 1913 im Deutschen Reichstag', in K. Barwig et al. (eds.), *Aufenthalt – Niederlassung – Einbürgerung*, Baden Baden, Nomos, 1986, pp. 181-220.

[397] Cf. Smith, 1986, op. cit.

[398] de Groot, 1989, op. cit., p. 315.

soli for children born in France to foreign parents in 1993.

Citizenship policies always contain aspects of population policy. Thus, *ius soli* has often been used to increase the indigenous population. *Ius sanguinis*, on the one hand, excludes immigrated persons but, on the other hand, ties emigrated citizens and their children to the home country. This binding effect of *ius sanguinis* can also have an immigration promoting effect as Article 116 of the German Basic Law has shown.[399] As a rule, however, *ius sanguinis* can be interpreted as a process of closure. In particular the reform of the Nationality Act in the UK in 1981 is a classic example of how through the introduction of *ius sanguinis* a process of closure with respect to immigrants was created. With increasing homogeneity and consolidation of the European state system, the element of consanguinity has been legally modified and more and more importance has been attached to cultural characteristics. Citizens have to show a deep, special relation to the state which is commonly expressed in language, way of living and even interests. Here, the German law is, in its consequences, difficult to outdo. The ideal person of the German naturalisation regulations is a kind of 'cultural defector' who with the acquisition of citizenship not only renounces his or her previous citizenship but demonstrates clearly to be from now on in terms of language and way of living a proper German. The foreigner finds him or herself in the paradoxical situation to be already 'German' before s/he is legally entitled to be German. This is stark contrast to the French tradition where naturalisation is traditionally understood as a part of the integration process and not the end of the integration process.

Another consequence of the formation of European nation states and related demarcation processes has been the problem of statelessness and of double nationality. The reasoning against double nationality has usually been in terms of power and control: one cannot serve two masters. The important aspect of the interpretation of citizenship as a loyalty relationship has been increasingly redefined from loyalty to the ruler to loyalty to a peoples' community

[399] The original meaning of Article 116 of reparation has been lost today. In particular paragraph 1 is an implicit immigration regulation for a certain group of people.

(*Volksgemeinschaft*). Around the turn of the 20th century statelessness occurred increasingly, mainly, because citizenship could be withdrawn as a punishment because of disloyalty (for instance, military service in another country) and the status of statelessness was passed on to the descendants. The abolition of statelessness was one of the most important objectives of The Hague Convention of 1931. Although the convention was not ratified by many states, it had far reaching consequences on the respective national regulations and marked the beginning of a series of international conventions on citizenship. The final convention on statelessness and double nationality was the New York Convention on the Abolition of Statelessness of 1961. Subsequently, national regulations concerning the loss of citizenship were formulated in a way that statelessness does not occur any longer in western Europe.

Yet efforts to abolish double nationality were less successful due to internal opportunistic considerations. Countries which aimed to tie immigrants closer to the receiving society saw a chance to at least partially allow these people double nationality. Dual nationality may be desirable for the purpose of integration of immigrants into the receiving society. In 1963, the view that double nationality should be avoided succeeded with the adoption of the Convention on Reduction of Cases of Multiple Nationality (cf. Table 4.1.). The two central arguments against allowing double nationality are the loyalty conflict and the question of diplomatic protection. Both these problems can be solved through the introduction of an active and a passive citizenship whereby the criteria are the place of abode and a personal declaration. A practise which requires bilateral agreements but is otherwise practised in a relatively unproblematic way as, for example, in Spain.[400]

Summing up the above discussed trends, it is argued here that citizenship as

[400] H. Rau, ' Doppelstaatsangehörigkeit mit aktivem und ruhendem Teil – Erfahrungen', in Barwig et al. (ed.), 1986, op. cit., pp. 233-44. See on the discussion on double nationality for example T. Hammar, 'State, nation and dual citizenship', in Brubaker (ed.),1989, op. cit., pp. 81-96.

an expression and a reinforcement of collective self-definitions and differentiation has moved away during its development from the acquired criteria of place of residence to the attributed criteria of ethnic affiliation and cultural ties. The UK as well as France have come to define the national community in terms of ethnic affinity while changes in citizenship law in Germany confirmed the *ius sanguinis* basis in Germany.

Legislation used to define access to citizenship falls back on specific characteristics which are in sociological terms understood as characteristics of an ethnic group:

> "Wir wollen solche Menschengruppen, welche aufgrund von Ähnlichkeiten des äusseren Habitus oder der Sitte oder beider oder von Erinnerung an Kolonisation und Wanderung einen subjektiven Glauben an eine Abstammungsgemeinschaft hegen, dass dieser für die Propagierung von Vergemeinschaftung wichtig wird ... ethnische Grupen nennen."[401]

Common culture and origin are the two elements which are used to describe ethnicity.

According to numerous international agreements, citizenship is a universal human right. This universal right, however, is granted according to particularistic criteria. The modernisation process expressed in the globalisation of legal norms of citizenship is at the same time characterised by particularity and universality. Although all countries define citizenship as a specific quality of a person, the acquisition of citizenship is, in principal, possible for every person. In international law as well as in the legal system of individual states citizenship is ascriptive, i.e. it is interpreted as a quality of a person. Differences exist with regard to the time it takes to establish this 'quality'. In explicit countries of immigration, such as the United States, specific openings have been built into the citizenship law. This has been done by specifying certain cultural minimum requirements. Implicitly, however, this system is also based

[401] M. Weber, *Wirtschaft und Gesellschaft*, Tübingen, J. C. B. Mohr, 1985, p. 237.

on the ethnic homogeneity of the traditional countries of emigration in western Europe, and with increasing diversification of the immigration flows the 'ethnic problem import' has increased.[402] European countries such as the UK and France have tried to counter this problem with stricter naturalisation regulations. Yet naturalisation is principally viewed as desirable in those countries and since there is a certain belief in the power of assimilation of one's own culture, at least persons born in the country of immigration are granted the right to possess the 'quality' of being French or British.[403] At the time the German citizenship law was formulated in 1913, Germany was still a country of emigration and it appeared opportune to assert in principle the *ius sanguinis*. After the Second World War, as Germany became a country of immigration but changes to the citizenship law were inconceivable. Firstly, any changes to the citizenship law would have needed to take into account the separation of Germany, and thus would have consciously destroyed the intentional character of the former Federal Republic as a provisional agreement. Secondly, the large influx of refugees and displaced persons after the war was being concealed by an extensive application of the term German.

Even though there has been a trend to define citizenship increasingly according to ethnic and cultural criteria, the decisive point is how these cultural ties are defined. Examining the case study countries, the legally codified criteria turned out to be surprisingly similar. A real attachment is assumed if the language is spoken, the commitment to integration is proved by knowledge of culture and constitutional order, and if the applicant has not a criminal record. This attachment to the new country is acquired either over a certain period of time, or by birth in the country. Germany is in this aspect an exception as even in the case of fulfilment of all criteria there is no right to naturalisation (except for the age group 16 to 22 years under certain conditions) but naturalisation depends on a more or less strict granting practice of the authorities.

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[402] Cf. R. Kreckel, 'Ethnische Differenzierung und 'moderene' Gesellschaft – Kritische Anmerkungen zu Hartmut Esser, *Zeitschrift für Soziologie*, 1989, Vol. 18, pp. 162-67.

[403] Cf. Brubaker, 1990, op. cit.

In all three case study countries the naturalisation procedures contain a strong element of discretion with regard to, for example, the interpretation of the 'good character' of an applicant or proven willingness to integrate. The administrative authorities have a substantial choice in either granting or refusing citizenship. An optional naturalisation procedure, in contrast, is offered to certain categories of immigrants. In both discretionary and optional naturalisation procedures the state defines the groups eligible for naturalisation. The difference lies in the balance of power. In discretionary decision state authorities have the last word, in optional procedures the last choice is the individual's after the state has defined him or her as entitled to citizenship. All three case study countries have defined privileged immigrant groups who are eligible for an optional, usually facilitated, naturalisation procedure. Whereas in Germany this is strictly reserved to 'ethnic Germans', the UK and France have offered optional procedures to certain immigrant groups from their former colonies. In both countries, however, these provisions have been restricted in recent citizenship legislation.

4.7. CONCLUSION

The historical starting point in the case study countries was the territorial or residence principle for the acquisition of citizenship. The principle of *ius sanguinis* has been introduced during a process of increasing external demarcation and a striving for homogeneity internally. Rules on naturalisation, initially strongly patriarchal influenced, moved towards criteria of blood relationship. The decline of certain primordial codes such as sex and family has been accompanied by the development of new ones such as kinship and cultural ties which may appear archaic but are of modern origin. These demarcation criteria of nation states in western Europe appear to be similar to those of ethnic groups. Parson pointed to the double function of citizenship of

Table 4.1. Principal legislation and agreements with regard to citizenship

Germany	France	United Kingdom	International Agreements
	1791 first French constitution (*ius soli, ius domicilii*)	before 1066 codified *ius soli* (within his Majesty's dominions)	1930 The Hague Protocol on non-discrimination, double nationality and the reduction of statelessness
	1804 *Code Napoléon* (ius sanguinis) influential in continental Europe	1351 *De natris Ultra Mare* (*ius sanguinis* for the British heir to the throne)	1948 Universal Declaration of Human Rights
1842 Prussia: *Gesetz über den Erwerb und den Verlust der Eigenschaft als preussischer Untertan*		1708 Naturalisation of Foreign Protestant Act ('soft' *ius sanguinis*)	
1870 *Reichs- und Staatsanghörigkeitsgesetz* (RStG) (*ius sanguinis*)		1870 Naturalisation Act (option to give up citizenship)	1961 New York Convention on the Reduction of Statelessness
	1889 *Code Napoléon* revised, *ius soli* elements introduced		1963 Council of Europe Convention on Reduction of Cases of Multiple Nationality
1913 revision of RStG		1914 British Nationality and Status of Aliens Act	
since 1933: several laws passed under the NS regime, e.g. revocation of naturalisations	1927 strengthening of *ius soli* and *ius domicilii* elements		1965 International Convention on the Elimination of all Forms of Racial Discrimination
	1945 *Code de la nationalité française* (CNF)		1973 Bern Convention on the Reduction of Statelessness
1949 Grundgesetz (§16 para 1, §116 para 1), confirms *ius sanguinis*		1948 British Nationality Act (differentiated *ius soli*)	1979 Convention for the Elimination of all Forms of Discrimination against Women
1957 Third law on the regulation of citizenship	1973 revision of the CNF	1962 changes to *ius sanguinis*	
		1981 revision of BNA according to (roman) continental model, combination of *ius sanguinis* and *ius soli*	
1990 and 1993 Aliens Act, modified RStG of 1913; very restricted *ius soli*	1993 revision of the CNF, abolition of automatic *ius soli*		1993 establishment of European Union citizenship
	1997 loi Debré, small modifications of 1993 CNF		1997 European Convention on Nationality (Council of Europe)

external demarcation and internal creation of solidarity.[404] Here it is further argued that even if citizenship was originally defined according to universal and acquired criteria – as has been argued for the case of France[405] - the criteria for the definition of citizenship have shifted to particularistic criteria such as ethnic affiliation and cultural ties in order to consolidate internal solidarity.

The origin of citizenship law in continental Europe goes back to the *Code Napoléon* in France. In the Germanic legal area the regulations of the *Code Napoléon* had experienced a transformation to an almost pure application of the *ius sanguinis*. Despite an older historical tradition, its basic principles have also been adopted by the UK in 1981. The diffusion of legal norms was accompanied by a globalisation of legal norms through the emerging body of international law. Here, equality between men and women and the avoidance of statelessness are two important developments. The French example illustrates well the interplay of endogenous and exogenous instigated developments. The necessity of 'identity management' after the French Revolution and of external demarcation in times of war explain the combination of *ius soli* and *ius sanguinis* elements. Immigration was considered in the context of demographic needs. If an increase of the French population was desired, naturalisation was facilitated.

The tendency of ethnic closure as expressed in the European legal system, i.e. closure on the basis of a belief in consanguinity and a certain way of living, is a secondary phenomenon. It has been preceded and facilitated by a political process of nation building. The principle of *ius sanguinis* was not the starting point but the consequence of the definition of a national community, the *Staatsvolk*, in the European state system. With the exception of the UK and France, this process was completed before European states became democratised. The tension between universal norms of democratisation and the particularistic regulation of citizenship reveals the deeply undemocratic nature of this internal closure as it contradicts the universal right to self-

[404] T. Parson, *Das System moderner Gesellschaften*, Weinheim, Juventa Verlag, 1985.

[405] Cf. Brubaker, 1990, op. cit.

determination and political participation of each person living in the polity. The initial external closure led to a discrepancy – as cross border migration could not be prevented – between the total population and the political-participatory population of a state, i.e. an internal closure process. The practice in the Romance and Anglo-Saxon legal areas is here much more pragmatic than in the Germanic legal areas. Problems arising from the discrepancy between the national community and the total population living within a state territory have been met in the UK and France with territorial regulations in the naturalisation procedures. However, the *ius soli* principle has to be understood as complementary to the prevailing *ius sanguinis* principle. The *ius soli* provisions apply to those persons of immigrant origin who due to a longer period of residence have developed personal ties to the receiving state. This has been made very explicit in the restrictive changes to the CNF in 1993 and was also the justification for the introduction of rudimentary *ius soli* provisions in Germany in 1990 for a selected group of persons of immigrant origin.

The assumption that states with more generous naturalisation regulations than Germany are more open and tolerant towards foreigners does not correspond with the evidence. Also in countries with apparently more liberal naturalisation regulations, those foreigners are welcomed who can demonstrate the ability and willingness to culturally integrate. The introduction of *ius soli* elements is based less on tolerance but rather on a conviction in the assimilation power of one's own culture. Assimilation as well as ignorance towards foreigners are two forms of an ideological closure of modern societies. To do justice not only to the diffusion processes of goods and ideas but also of people poses a challenge to national legal systems. Nation states face the task to find the right balance between a productive opening towards other cultures and identity-stabilising closure.[406] In contrast to arguments that the relevance of citizenship is declining,[407] it is precisely the concept of citizenship which is a central feature

[406] For a constructive proposal on Germany see D. Cohn-Bendit et al., *Heimat Babylon*, Hamburg, Hoffmann & Campe, 1992.

[407] See for example Y. Soysal, *Limits of Citizenship*, Chicago, The University of Chocago Press, 1994.

in today's world in the legitimate production of inequality between people. The statement by the former UK foreign secretary Douglas Hurd that "the essential focus of loyalty remains the nation state" is still widely accepted today.[408]

The global process of nation state formation is characterised by ethnic boundary definitions. Political demarcation is achieved through the coupling and congruence of territory, population and government within the state territory. These three elements are thought of as a unit against a specific cultural background: on its own, with regard to other, similar units; and with regard to a global community. The proliferation of the nation state model has led to the territorial segmentation of the world and the discontinuity of cultural traditions, a discontinuity that also sanctions models of political rule and authority. Cultural demarcation is characterised by the definition of a autonomous people living within a nation state, tied together by shared ideas about the national community. This is understood as a specific membership in political, territorial and cultural terms. Based on inclusion processes and a striving for homogeneity, the basis for solidarity of the people and legitimacy of the state is created (e.g. national history and culture). The nation state is a means for the exercise of power but also an expression of shared ideas of organising a society and a certain way of living. Inherent in the model of modern western societies is that the universal, the *bien commun*, is more important than the particular. This is an inherent contradiction in the model of modern western societies which implement the universal values of liberty and equality in the particularistic structure of the nation state (cf. 2.4). The expansion of universal norms implies that demands to the individual are increasing, and thus the need for legitimisation of the nation state model. Because of its rational construction the nation state admits, in principle, foreigners. Yet the integration of new groups often leads to the exclusion of other groups or the reaction to the legal integration of one group are other forms of discrimination. In principle, due to the emphasis on universality, the nation state admits foreigner but the increased demands this poses for the

[408] quoted in *The Financial Times*, 7.8.1996.

national community exclude the foreigner.[409] Each society regulates this tension between the universal and the particularistic, the relationship between inclusion and exclusion, in its own specific way.

Nation states have developed internal and external demarcation processes which create as a reaction to the tensions inherent in the relationship between the world population and the national community complex inclusion and exclusion processes. Nation states have defined politically selective immigrant categories and at the same time have become more and more integrated into international migration systems. Inclusion on the basis of the concept of international human rights has challenged ideas of national solidarity and has created tensions when the particularistic implementation of demarcation systems of nation states has been ignored.

Despite their differences, the three case study countries have used their citizenship legislation to differentiate rights of access. Each state has defined privileged groups in line with the definition of privileged categories of immigrants. The reasons which underlie such provisions are perhaps best exemplified by the development and demise of the 'common status' of Commonwealth citizens. The creation of privileged categories are important for the purposes of immigration and the right to entry into a state. Principally, this has meant increasing restrictions for non-European immigrants. Like the Commonwealth ideal, France and its colonies were meant to form an indissoluble unity. With increased immigration from the former colonies, especially from Algeria to France, both countries experienced racist, anti-immigrant violence. By the mid-1970s, the UK and France had established tightly regulated, racially discriminatory immigration systems that involved making distinctions about the desirability of particular nationality and racial groups as immigrants.[410] In both countries the immigration of non-white, non-

[409] Cf. W. Schiffauer, 'Die civil society und der Fremde – Grenzmarkierungen in vier politischen Kulturen', in F. Balke et. al. (eds.), *Schwierige Fremdheit*, Frankfurt/M., Fischer Verlag, 1993, pp. 185-99.

[410] Cf. G. Freemann, *Immigrant Labor and Racial Conflictin Industrial Societies. The French*

European workers and their families, mostly uncontrolled in the beginning, eventually became severely restricted. During this process, citizenship law has been an important part of regulating immigration. This has been evident in the UK since 1971. In France citizenship regulations became explicitly part of a bundle of measures to regulate immigration in the 1990s. The 1993 CNF is part of a comprehensive legislative parcel to restrict immigration and forms one important pillar of the immigration legislation formulated by the Balladur government. Opposition from conservative and far-right parties during the 1980s against the *ius soli* as producing *français de papier* or *français malgré eux* and the subsequent restrictions of the CNF indicate a policy shift closer to the German position that naturalisation requires the acquisition of language and social skills needed for commitment to a new country.[411] The close connection between citizenship law and immigration law, the use of citizenship law to define groups of immigrants with privileged access to naturalisation procedures in accordance with the respective national histories and interests of the case study countries, demonstrates the importance of naturalisation regulations as part of national admission policies.

The relationship between internal and external closure processes is interesting in two respects. Firstly, it can be understood as an internal dynamic of nation states which leads to tensions with the external demarcation process. In the three case study countries, a differentiated citizenship law stands in contrast to a rather inconsistent conglomerate of immigration regulations. These two institutional structures are connected through a relatively complex residence permit system. The relationship between internal and external closure is influenced by the individual nation state's tradition. Countries like France and Germany tend to negate immigration in the public discourse or to present it as an exceptional situation. Continuing immigration has resulted in Germany in a form of internal closure expressed in the refusal to give immigrants and their descendants the opportunity to naturalise. This political inequality is not

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and British Experiences 1945-1975, Princeton, 1979; Lloyd et al., 1991, op. cit.

[411] Cf. the report by M. Long, *Etre français aujourd'hui et demain*, Rapport de la Commission de la Nationalité, Vol. 2, Paris, La Documentation Français, 1988, pp. 82-109.

acceptable from the point of view of the French nation state concept and has been resolved through – though increasingly restrictive - *ius soli* and option rules.

Internal demarcation processes are more likely to be determined by endogenous factors than external demarcation processes. While citizenship legislation developed in a 'consistent' way, immigration policies and the various regulations on residence and work permits for immigrants have been considerably differentiated and form a complex internal and external demarcation system. In sum, one can argue that different endogenous traditions can determine the reaction to external closures

Secondly, the interaction between nation states and global processes can lead to new internal and external closures. The interaction between global and national dynamics creates contradictions and ambivalences. The first problem for nation states concerns the difficulties to differentiate between legal and illegal immigration. International human rights obligations guarantee asylum seekers and illegal immigrants certain minimum rights, ranging from the right to legal representation and basic health care, education for children to protection from deportation. The EU governments responded to the growing number of asylum seekers arriving in European Union countries, the perceived increase in illegal immigrants and the work of organised traffickers by restricting the rights of asylum seekers and illegal immigrants. This process is well demonstrated by developments in Germany which led to the abolition of the constitutional right to seek asylum. Similarly, the *sans-papier* movement in France and anti-deportation campaigns in the UK highlight the inhumanity of immigration rules and illustrate the ambivalent relationship between internal and external closure, when long-term residents are declared to be 'illegal' or parents of children with a right to stay in the UK are issued a deportation order. The Commonwealth Immigration Act 1962 exemplifies how the resulting restrictions have altered the definition of citizenship towards the idea of a community of common descent within a bounded territory. The emphasis in the case study countries and in the EU as a whole on combating illegal immigration has shown that notions of

illegality based on transgressions of boundaries are strictly enforced.

The second difficulty is the differentiation between citizens and immigrants. In western European societies immigrants enjoy similar economic, social and cultural rights and duties as do citizens. Today, the principal meaning of naturalisation lies in the granting of political rights though these are tied to very few duties such as military service. However, all this is not reflected in the social construction of citizenship. In all industrialised states the concept of citizenship refers to a special relationship between state and individual that suggests a balanced relationship between rights and duties.[412] Non-citizens - even if they pay taxes – tend to be viewed as less reliable members of the society. The far-reaching inclusion of immigrants, in particular into the legal system, has led to an approximation of the (legal) position of immigrants and citizens. This, however, is not reflected in the insistence on the differentiation between citizens and non-citizens in the public discourse. The tension between internal and external demarcation processes increasingly creates the problem to differentiate between legal and illegal immigrants as well as between citizens and immigrants. Both distinctions, however, are constitutive elements for the (self-) construction of the modern nation state. The case studies have shown that the tension and ambivalence created by the interaction between national and global processes has reinforced national demarcation processes, and thus national policy-formulation on immigration.

[412] Brubaker, 1989, op. cit.

CHAPTER FIVE

COOPERATION IN THE EUROPEAN UNION

5.1. INTRODUCTION

This chapter turns to policy-making in immigration affairs at the European Union level. It examines the emergence of a common policy on immigration on the European Union level. The process of European integration has been closely associated with the establishment of the European internal market. Integration has been and continues to be largely about economics, but this has wider political ramifications. The chapter opens with a brief review of the development of the European Union, placing the need for a common immigration policy or control measures in the context of European integration. The following section 5.2. looks at the institutional framework of policy-making in immigration matters on the EU level as well as on the role and powers of the European Union institutions in this area. This is followed by an analysis of cooperation in admission policies and external border controls (5.3.). A common European immigration policy requires, first, agreement on the definition of persons eligible for admission to the EU, and second, the definition of the external frontiers of the EU. Section 5.4. turns to the issue of citizenship of the European Union as an example of an internal demarcation process on the EU level.

Why is there a need for a common European immigration policy?

The Treaty of Rome, which became operative on 1 January 1958, established the European Economic Community (EEC) between the original six member states France, Germany, Italy, Belgium, Luxembourg and the Netherlands. The EEC built upon a number of principles and institutions developed within the European Coal and Steel Community (ECSC) which was created in 1951 by the Treaty of Paris. The scope of the ECSC was limited to developing a common strategy for coal and steel. Similarly, the European Atomic Energy Community (EURATOM), established in 1958, was limited to achieving a

common policy for nuclear energy. The EEC, in contrast, covered a whole range of economic activity. The early stages of European integration were mainly about the abolition of trade barriers and increased cross border cooperation among firms. This brought about a, still incomplete, customs union and the rapid growth of trade interdependence.[413]

The elementary relationship between migration and welfare was one of the basic ideas behind the forming of the Common Market in the 1950s. Article 48 of the Treaty of Rome which established also the European Economic Area (EEA) contains the provision for free movement of labour. It stipulates that "freedom of movement for workers" entails the "abolition of any discrimination based on nationality between the workers of the member states with respect to employment and other conditions of work and employment".

After a long period of stagnation, things started to move again in the second half of the 1980s, and at a very rapid pace. The EEC Treaty was amended by the Single European Act (SEA) in 1986. The main objective of the SEA was the implementation of the Single Market, the enlargement of Community competencies, the modification of decision-making methods including majority voting and the cooperation procedure with the European Parliament, and the improvement of European Political Cooperation. The SEA entered into force on 1 July 1987. The Treaty made significant procedural amendments and made a relatively rapid creation of the internal market possible. The main objective of the Treaties establishing the EEC, and then the SEA, was to establish a common market. The SEA specifies that from 1 January 1993 the 'four freedoms' - the free movement of capital, goods, services and people - have to be realised in order to achieve a common market. This implies the abolition of any restrictions of labour mobility within the European Union, including the abolition of internal border controls. The EEC Treaty already contained

[413] Since 1967, the three Communities - the European Steel and Coal Community, the European Atomic Energy Community and the European Economic Community - have been grouped together under the title of the European Communities. One Council of Ministers and one Commission was established for the three European Communities.

provisions for the free movement of citizens of the member states within the European Community (EC) for the purpose of work.

Immigration of third country nationals or their movement within the EC is not covered. In the 1987 revision of the Treaty of Rome, the relevant Article 8a reads:

> "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."

Hence, free movement of labour is one of the central objectives of the EEC Treaty, yet third country nationals are not included, and thus upset one of the central foundations of the Community. The legal status of third country nationals living in an EU member state is not contained in the Single European Act. In fact, it is the lack of consensus on the interpretation of Article 8a that has represented a major barrier to the development of a common immigration policy in the European Union.[414] Some member states, particularly the UK and Denmark, have interpreted free movement of persons as free movement of EU citizens only. The European Commission, however, has stated clearly in its communication to the Council and European Parliament that

> "(t)he phrase 'free movement of ... persons' in Article 8a refers to all persons, whether or not they are economically active and irrespective of their nationality. The internal market could not operate under conditions equivalent to those in a national market if the movement of individuals within this market were hindered by controls at internal frontiers."[415]

Before 1985, cooperation in immigration matters was not an issue on the level of the European Community. Cooperation and information exchange occurred

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[414] K. Schelter, 'Innenpolitische Zusammenarbeit in Europa zwischen Maastricht und Regierungskonferenz 1996, *APuZ*, 1996, B1-2, p. 20. Schelter was *Staatssekretär* in the German Interior Ministry.

[415] Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament on the Abolition of Border Controls*, SEC(92) 877 final, Brussels, 8 May 1992, p. 23.

only selectively in the fight against terrorism. The turning point came in 1985 with the Adonino report on the creation of a citizen's Europe which laid out the fundamental framework of the further development of the European Community: abolition of internal border controls complemented by compensatory measures. This is reflected in Article 61(a) of the Amsterdam Treaty on European Union:

> "In order to establish progressively an area of freedom, security and justice, the Council shall adopt ... measures aimed at ensuring free movement of persons ... in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration".

The period from the mid-1980s on has been a critical one in the development of immigration policy within the EC. The SEA pointed clearly in the direction of policy harmonisation on the free movement of labour within the EC. The member states of the Schengen Group moved ahead with the abolition of internal border controls and free movement within the Schengen area. At the same time, the countries of the European Free Trade Area were increasingly brought into the frame in the form of the European Economic Area in 1992. The events of 1989 have added a new dimension to immigration policy in western Europe with the need to incorporate the Central and East European countries (CEEC) and the former Soviet Union into immigration control strategies. The rise in asylum seekers left some governments feeling they were in danger of losing control of their asylum procedures and led to new developments in asylum policy such as the concepts of 'safe havens' and 'temporary protection' and calls for burden sharing within the EU. The interception of growing numbers of illegal immigrants at the EU's eastern and southern borders has put control of the external borders of the EU high on the agenda.

The dismantling of borders within the European Union gives every member state an obvious interest in the immigration policies of its fellow member states as each state will be affected by the policies of the others. One could assume that this vulnerability would make immigration issues a prime candidate for transference to the level of European Community decision-making. That this is

not the case is part of what has been described by Kapteyn as the "European dilemma":

> "fear of their weak national position leads these countries to join forces, yet it is the same fear which holds them back".[416]

5.2. INTERGOVERNMENTAL DECISION MAKING AND THE ROLE OF EU INSTITUTIONS IN IMMIGRATION POLICY

Initially, cooperation in immigration matters has taken place mainly within the framework of the *Ad Hoc Group on Immigration* and other intergovernmental body whose work has been highly confidential.[417] As of 1 November 1993, the date of the formal establishment of the European Union, the various inter-governmental bodies dealing with immigration and asylum issues, were officially replaced by new structures. Their activities are now divided among three new bodies: Steering Committee I (migration and asylum issues - replacing the Ad Hoc Group), Steering Committee II (police matters, previously dealt with by the TREVI group), and the Steering Committee III (judicial cooperation). These committees forward their statements and proposals to the newly established Coordinating Committee (K 4 group) which has replaced the Rhodes Group. This working arrangement has found formal recognition in Article K of the Treaty on European Union. As Niessen states this

> "provides for a formal and strong basis for intergovernmental cooperation in the field of Justice and Home Affairs" and outlines a

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[416] P. Kapteyn, "Civilization under Negotiations'. National Civilizations and European Integration: the Treaty of Schengen', *European Journal of Sociology*, 1991, Vol. 32, No. 1, pp. 34-59.

[417] On cooperation in immigration affairs pre-1993 see, for example, A. Cruz, *Schengen, Ad Hoc Immigration Group and Other European Intergovernmental Bodies*, Brussels, CCME, 1993; T. Bunyan (ed.), *Statewatching the new Europe*, London, Statewatch, 1993; G. Callovi, 'Regulation of Immigration in 1993: Pieces of the European Community Jig-Saw Puzzle', *International Migration Review*, 1992, Vol. 26, No. 2, pp. 353-72.

decision-making process in which "the role of the Member States and of the Council ... is predominant".[418]

The intergovernmental conferences in 1991 on political union and monetary union respectively led to the Treaty on European Union (TEU), also known as the Maastricht Treaty. The then twelve member states of the European Communities established among themselves a European Union (EU) under the Maastricht Treaty with effect from 1 November 1993.[419] The EU's objectives are set out in the preamble. Its fundamental task is to establish a common market, Economic and Monetary Union and to create "an ever closer union among the peoples of Europe".[420] The common market is to be achieved by the realisation of the four freedoms: free movement of goods, persons, services and capital. To this, the Maastricht Treaty added the political goals of a Common Foreign and Security Policy together with cooperation in the fields of Justice and Home Affairs. The European Communities have not been replaced by the EU, rather the EU has been formed as a functionally wider entity which embraces the European Communities. This has often been described as a three pillar structure. The first pillar is constituted by the existing three Communities, the EEC, ECSC, and EURATOM, albeit with new institutions and powers added to those provided for in the Treaty of Rome. The EEC and the EEC Treaty have been renamed the European Community (EC) and the EC Treaty to emphasise its broader scope. The second pillar relates to the Common Foreign and Security Policy (CFSP) and the third pillar concerns issues in the field of Justice and Home Affairs (JHA). These three pillars taken together constitute the European Union. The importance of distinguishing between the three pillars is the distinction between the roles of the institutions

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[418] J. Niessen, *European Migration Policies for the Nineties after the Maastricht Summit*, CCME, Brussels, 1992, p. 11.

[419] The European Union has gone through a steady process of enlargement, beginning with the accession of the UK, Ireland and Denmark in 1973, then Greece in 1981 and Spain and Portugal in 1986. Most recently, Austria, Sweden and Finland became members of the EU in 1995.

[420] Treaty on European Union, Article A (Article 1 Amsterdam Treaty).

and the different legal effect of Community law compared to intergovernmental measures.

The main institutions of the EU are the European Commission, the European Council, the European Parliament and the European Court of Justice (ECJ). They are established by the Treaties. The Commission is the executive and administrative organ of the EU and of central importance to its functioning. The Commission has three main functions: initiation and preparation of legislation; implementation; and supervision. In most cases, the Commission has the sole right to initiate legislation. In this sense, it is the catalyst of the EU. It may act on the basis of submissions by other EU institutions, by interest groups or on its own initiative. However, in the case of cooperation in justice and home affairs, the Commission does not have the exclusive right of initiative. It shares this with the member states. Yet, apart from one failed attempt to bring asylum under the first pillar, the Commission has not used this instrument again. Implementation of decisions taken by the Council in JHA does not fall within the Commission's responsibility but is the responsibility of the national governments and administrations. Equally, the supervision of the implementation is the individual member state's responsibility.

The Council of the European Union is the most powerful of the EU institutions. It is the primary law and policy-making body in the EU. The Presidency of the Council rotates every six months between member states. The European Council which represents the highest form of the Council, normally meets in the member state holding the Council Presidency. The Justice and Home Affairs Council is usually composed of the Interior Ministers but may also include the Justice Ministers or Ministers may decide to second a junior minister to the meetings. The JHA Council meets usually twice during each Presidency. Since the Irish Presidency in 1996, one of the two JHA Council meetings tends to be an informal meeting. This makes it even more difficult than usual to obtain information on the issues and draft documents being debated, the press release is often not longer than half a page. Experience shows that it is very difficult for the European Parliament, national parliaments and certainly for non-governmental organisations to find out "when discussions take place, what is

being discussed and what progress has been made".[421] Members of Parliament are dependent on the good will of national ministers for information.[422]

The European Parliament is the only directly elected institution of the EU by the citizens of the member states and, as such, adds an element of democratic control and accountability. The EP's functions in matters under the first pillar can be categorised as legislative, budgetary and supervisory. Yet, as in the Commission's case, the role of the EP in the area of justice and home affairs is very restricted. The EP has no legislative or supervisory function, and only a limited possibility to influence the work of the Council through its budgetary powers. Much of the work of the EP is carried out by its standing committees, each of which covers a different area. The relevant committee in the area of immigration is the Committee on Civil Liberties and Internal Affairs. The main work of the Civil Liberties Committee is the drawing up of reports and opinions on legislative proposals from the Council and the Commission. In the case of JHA, the Council of Ministers takes notice of the report but in no way does the opinion expressed in the report put any obligation on the Council. Furthermore, Members of the European Parliament have the opportunity to obtain information from the Council or to highlight issues which they consider important through written questions, although they usually take months to be answered, and it takes again several months before they are published in the Official Journal of the European Communities.

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[421] Committee on Civil Liberties and Internal Affairs, *Draft Report on the setting up of Europol*, Rapporteur: L. van Outrive, 1992, PE 202.364, p. 8. Interviews with non-governmental organisations (NGO) working in the areas of asylum and immigration have shown that lobbying of the Council or COREPER, either on single issues or in general such as in the run up to the Amsterdam IGC, is rather futile.

[422] Interviews with German Members of Parliament from the Green Party and the PDS between 1995 and 1996. Since 1997, the German Interior Ministry holds informal meetings with MPs to inform about progress in JHA and on the Schengen Group on the condition that information is not passed on. Van Outrive complains about a similar situation which makes any public debate impossible; Committee on Civil Liberties and Internal Affairs ,1992, op. cit., p. 8.

As explained above, only the Council, i.e. the member states' governments, is responsible for decision-making in justice and home affairs. Hence, this area is referred to as intergovernmental cooperation. Intergovernmentalism relates to decision-making in international organisations where member governments are the only or major actors. Governments have a right to veto decisions and can resist any restriction of their national sovereignty.[423] Control of compliance with agreements and of implementation of policies is very difficult in an intergovernmental framework. The debates about the jurisdiction of the European Court of Justice (ECJ) to interpret legislative instruments in justice and home affairs, particularly vehemently resisted by the UK government, illustrates the difficulties.[424] Moreover, as decisions have to be adopted unanimously by the Ministers, the decision-making process is generally slow and the result is usually a compromise based on the lowest common denominator. The unanimity requirement means that only one member state may block a proposal although all the other member states are in favour. The intergovernmental method of reaching international agreements is generally slower and less far reaching than Community legislation.[425]

One of the most ardent critics of intergovernmental decision-making has been the European Parliament. The EP's Committee on Civil Liberties and Internal Affairs has often expressed in its reports the preference for a Community approach in justice and home affairs.[426] The legislative instruments provided for in Article K.3 (2) TEU, joint actions and common measures, are not seen to be adequate.

> "[Joint] actions and measures are generally based on purely administrative agreements, which never reach the legislative and judicial

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[423] Cf. C. Webb, 'Theoretical perspectives and problems', in: W. Wallace et al. (eds.), *Policy Making in the European Community*, Chichester, John Wiley & Son, 1983, pp.1-42.

[424] See for example the protracted negotiations on the jurisdiction of the ECJ in the Europol Convention establishing a European Police Authority. In order not to jeopardise the Convention, the other member governments eventually agreed on an opt-out clause for Britain.

[425] Cf. J. Lodge, *Internal Security and Judicial Cooperation: Beyond Maastricht*, European Community Research Unit, Hull, 1992.

[426] For example Committee on Civil Liberties and Internal Affairs, 1992, op. cit.

branches of government (e.g. the setting up of information networks, exchange of police officers)."[427]

The adoption of a work programme by the Maastricht Council meeting in December 1991 based on a report on asylum and immigration policy submitted by the ministers responsible for immigration questions,[428] and the decision to create the new Title VI in the TEU, constituted an attempt to bring the cooperation in justice and home affairs out of its semi-clandestine institutional setting and to integrate it into the single institutional structure of the EU. Title VI (provisions on cooperation in the fields of Justice and Home Affairs) states in article K1 the areas member states should regard as matters of common interest, including asylum policy, immigration policy and policy regarding nationals of third countries, conditions of entry and movement, and conditions of residence by nationals of third countries on the territory of the member states.[429] Article 100c of the TEU maintains that intergovernmental cooperation is to remain in operation until their substance has been replaced by Union instruments. Article K 6 assigns an information and consultation role to the European Parliament, and article K 9 the entitlement of the Council (based on unanimous decision) to transfer asylum, border crossing and immigration to the area of Community competence. The Commission may submit proposals to co-ordinate the actions of member states. It is then up to the Council to respond to these proposals either by adopting joint action or by deciding to apply article 100c TEU.[430]

Despite the declaration of intention and good-will expressed in terms of coordination of immigration policies in the TEU, the measures introduced were vague and non-binding on central issues. The basic signal is that member

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[427] Ibid., p. 9.

[428] Report from the Ministers responsible for immigration to the European Council meeting in Maastricht on immigration and asylum policy, 3 December 1991, SN4038/91 WGI 930.

[429] European Communities, *Treaty on European Union*, Luxembourg, 1992, pp. 131.

[430] For a detailed examination of the working of the third pillar see J. Monar et al. (eds.), The *Third Pillar of the European Union. Cooperation in the Fields of Justice and Home Affairs*, Brussels, European Interuniversity Press, 1994.

governments want to retain control over immigration issues. The Maastricht Treaty has consolidated the intergovernmental rather than the federal approach to immigration policy. It did not succeed in profoundly strengthening the role of the European Commission nor of the European Parliament. Title VI TEU grants the Commission a co-initiative power, together with the member states, in the majority of issues covered under the 'third pillar' (Article K.3). This right, however, applies only to joint action and conventions. Resolutions and recommendations adopted by the ministers responsible for immigration are not legally binding for the member states; nevertheless, they are, according to former EU Commissioner Flynn, "not without importance or effect as they have both a political and moral weight which member-states will always be slow to ignore."[431] In his view, Title VI does represent an advance for both the Commission and the European Parliament "whatever its imperfections."[432]

Third pillar activities are still confined to intergovernmental cooperation. From a technical, bureaucratic point of view this has proved to be a disadvantage when it comes to the adoption of legally binding instruments. More seriously, however, is the lack of transparency and accountability of decision-making. This process is not open, nor is the result amendable by the European Parliament or national parliaments. National parliaments can only, in the case of conventions, demand amendments or refuse ratification. This, however, has rarely happened and had no significant impact on the work of the Justice and Home Affairs Council. The Council of Ministers, the individual relationship of Ministers to the national parliaments, has been the way by which the EU has sought to solve problems of accountability and representation. Such indirect democratisation has been most popular in member states with a low sense of the EU constituting a single sovereign people and a high sense of national parliamentary sovereignty. This approach is, for example, highly compatible with the Westminster model of inalienable parliamentary sovereignty. However, there are once again structural problems with this model. Firstly, due to the

[431] At a European Parliament meeting on 15 July 1993, quoted in *Migration News Sheet*, 1993, p. 2.

[432] Ibid., p. 1.

requirement of unanimous voting and the possibility of national vetoes, the JHA Council now frequently resorts to an informal kind of majority voting: the minority drops its objection, sometimes it demands that its opinion is published in a statement, but in principle allows the Council to go ahead with the majority decision.[433] Combined with the practice of not publishing voting behaviour, this is scarcely compatible with a real accountability of ministers to national parliaments. Secondly, attempts to democratise one political arena, the EU, through the apparatus of another, the nation state, are bound to be flawed. Ministers may be individually authorised in their member states, but at no time is the Council of Ministers authorised as a collective entity. The idea, that the national parliament can bring the EU to account fails for two reasons: first, on lack of information, and, second, because national representatives can only ask their own ministers for information and explanation and not the many others who may also be responsible for decisions. In sum, the legitimacy of EU institutions appears to be weak, both in an intergovernmental and supranational conception of authorisation and accountability. At the same time, the inability of representatives at the national level to scrutinise EU legislation, let alone Justice and Home Affairs Council decisions, weakens the authority of their parliaments. The effects of such erosion could be expected to be most corrosive in states such as the UK where the central parliament claims a monopoly of decisional authority and representative legitimacy.

One could argue that a subtle shift within the European Union has taken place as to a balance between inter-governmental and supra-national power. According to a senior advisor to the Commission, Giuseppe Callovi, the Commission has been fully aware of the delicate nature of this balance, and it has considered "that attention should be focused on practical effectiveness rather than on matters of legal doctrine."[434] On the other hand, the Commission would not

[433] F. Hayes-Renshaw et al., 'Executive Power in the European Union: the Function and Limits of the Council of Ministers', *Journal of European Public Policy*, 1995, Vol. 2, No. 4, pp. 559-82.

[434] Callovi, 1992, op. cit., p. 360.

"rule out the possibility of coming forward with additional proposals, particularly if it becomes clear that intergovernmental cooperation is not the most efficient or cost-effective method, or if a consensus were to emerge among member states that further harmonisation and coordination is desirable."[435]

This does not give the impression of a clear programme of action but rather that the Commission is waiting for events to create their own impetus. The question is if this pragmatism reflects what the Malangre Report has characterised as the "continuous fewer ambitions of the Commission."[436] The European Commission, lacking extensive formal competence in immigration matters, is a restricted actor. The Commission has to avoid proposals that are obviously doomed to lose in confrontation with the member states as this would render the Commission without credibility in the long run, and very little would have been achieved. At the first meeting of the Justice and Home Affairs Council on 29-30 November 1993, a report of the Commission to the Council discussed the possibility of applying article 100c TEU to asylum policy, i.e. bringing asylum policies under Community competence.[437] The report put forward a whole range of advantages: transparency, full involvement of the EP, and possible quicker decision-making procedures. Nonetheless, the Commission concluded that "time is not right yet", and added that the issue should be re-examined "in the light of experience" at a later date.[438]

In October 1991, the Commission submitted two Communications on immigration and asylum respectively to the Council of Ministers, followed by a

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[435] Callovi, 1992, op. cit., p. 360.

[436] European Parliament, *On the Free Movement of Persons and Security in the European Community*, 1991, DOC DA/RR/112531/brp, p. 14.

[437] Commission of the European Communities, *Report to the Council on the possibility of applying Article K.9 of the Treaty on European Union to asylum policy*, SEC (93) 1687 final, Brussels, 1993.

[438] Ibid.

Communication on immigration and asylum policies in 1994.[439] These Communications are seen as contributions to the discussion and not as draft legislation. However, the Commission's proposals are no less restrictive than the JHA Council decisions. They are part of the agenda-setting process, and as such, a source of political power in their own right that ensure many possibilities are never discussed at all, while those that are, are problematised in a restrictive manner.[440] In the original conception of the European Community, the Commission has been seen as representing the interests of the Community as opposed to the Council of Ministers that represents the interests of the member states.

The functioning of the European Union was reviewed by an Intergovernmental Conference (IGC) in 1996 and 1997 which culminated in the signing of the Amsterdam Treaty in October 1997. The main objective of the reform of the Maastricht Treaty in the policy field with which this study is concerned with has been communitarisation of justice and home affairs, and thus increased competencies for the European Commission and the European Parliament in this area. Nearly all member states had their own national sensitivities and political concerns which are reflected in numerous exemptions in the final text of the Amsterdam Treaty. Germany, Austria, the Benelux states and Italy all favoured the proposed transfer of JHA to the first pillar; the UK and Denmark wanted to retain the intergovernmental arrangements under the third pillar; France, along with Greece and Finland, was reticent about incorporating the inter-governmental Schengen arrangements but eventually agreed. Ireland found itself in a tricky position. As the UK was determined to maintain passport controls at its internal EU border, Ireland was forced to do likewise in order to preserve the common travel area with the UK.

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[439] Communication from the Commission to the Council and the European Parliament on immigration policy, SEC (91) 1857 of 11.10.1991; Communication from the Commission to the Council and the European Parliament on asylum policy, SEC (91) 1855 of 23.10.1991; Communication from the Commission to the Council and the European Parliament on immigration and asylum policies, COM (94) 23 of 23.2.1994.

[440] B. Guy Peters, 'Agenda-setting in the European Community', *Journal of European Public Policy*, 1994, Vol.1, No.1, pp. 9-26.

Reiterating the objective of developing the EU into an

> "area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime",[441]

the compromise agreed in the Amsterdam Treaty transferred immigration, asylum, visas and external border issues, and judicial cooperation in civil matters into the first pillar, forming the new Title IV, but with substantial differences from the first pillar under the Maastricht Treaty. Police and judicial cooperation in criminal matters remain within a revised third pillar. The Schengen *aquis*, that is, the original agreements, decisions by the Executive Committee and relevant decisions by other Schengen working groups on immigration, border controls, police and judicial cooperation, was incorporated into the EU framework, and subsequently split between the first and third pillars to match the appropriate parts of the treaty. The implications of this new institutional framework for immigration policy making are outlined below (5.3.).

The implications of the TEU are far reaching in many fields of public policy. But whilst neo-functionalist theorists of European integration have long argued that 'communitarisation' of one policy area almost inevitably has a 'spill-over effect' on other areas, the example of immigration policy indicates that policy areas affected by such 'spill-over effects' are not inevitably brought within the Community structure of decision making.[442] The member governments have maintained the intergovernmental approach to immigration affairs in the revision of the Maastricht Treaty in 1997. There is an ongoing dispute among the member states - with the UK government taking a very determined stance

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[441] Treaty on European Union, Title 1, Article 2; European Communities, *Consolidated Versions of the Treaty on European Union and the Treaty establishing the European Community*, Luxembourg, Office for Official Publications of the European Communities, 1997, p. 12.

[442] For an overview of the different theoretical approaches to European integration see A. Moravcsik, 'Preferences and power in the European Community: a liberal intergovernmentalist approach', *Journal of Common Market Studies*, 1993, Vol. 31, No. 4, pp. 473-524; S. Hix, 'The study of the European Community: the challenge to comparative politics', *West European Politics*, 1994, Vol. 17, No. 1, pp. 1-30.

that these matters are for national governments only - as to whether the EU has competence to draft laws in this policy field. Also due to a lack of agreement between the UK and its continental partners, the other member states have resorted bypassing UK opposition by giving their cooperation a legal foothold outside Community law, as in the case of the Schengen Agreement. Another reason for the resort to intergovernmental agreements in immigration and asylum has been to avoid accountability in the EP which has been considerably more liberal in its approach than either the Commission or the JHA Council. Given the special characteristics of the third pillar, this is an area were national differences have largely survived the 'spill-over effect' of economic integration. This in turn explains why the role of EU institutions has remained relatively marginal. Attempts to add a political and social dimension to the internal market have come with a considerable time-lag, in particular with regard to immigration and the rights of third country nationals resident in the EU.

5.3. DEFINING AND DEFENDING THE EXTERNAL BORDER OF THE EU

Developments towards the abolition of controls at internal borders and the establishment of the European Union have experienced a decisive acceleration since 1985. The objective was specified in the Preamble of the Single European Act of 1987 that by 1992 an "internal market" should be established, described as "a space without internal borders" with "free circulation of goods, persons, services and capital". Out of the 'four freedoms', free movement of persons has appeared to be the most problematic one. Several intergovernmental fora were involved in the formulation of so-called compensatory measures and discussions about the harmonisation of immigration and asylum policies in the run up to the completion of the internal market envisaged for 1993. Common immigration and asylum regulations developed on an *ad hoc* basis under the umbrella of intergovernmental

cooperation between the member states of the European Community.[443] Already in 1991, the Group of Coordinators concluded that the implementation of most of the "essential measures" had reached a satisfactory stage, provided that the Convention on the crossing of external frontiers were adopted by the member states.[444] However, the External Border Convention has still not been signed due to the dispute between the UK and Spain about the status of Gibraltar. A 'core group' of EU member states – France, Germany, The Netherlands, Belgium and Luxembourg - pushed ahead with the extent of cooperation in policing and movement of people and concluded the Schengen Agreement in 1985. The aim was to abolish internal border controls within the area of the Schengen member countries.[445] Over the years, the Schengen Agreement has become the blueprint for the European Union. The German government has repeatedly emphasised the role of the Schengen group as the "Schrittmacher der eurpäischen Integration" – the motor of European integration.[446]

The unpredictable events in Eastern and Central Europe in 1989 completely changed the background against which European integration was taking place. The fall of the Iron Curtain changed the nature of the European Community's eastern border and led to new migration movements from east to western Europe. Within this context the European Community quickly took action to

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[443] Cf. A. Cruz, *An insight into Schengen, Trevi and other European intergovernmental bodies*, CCME, Brussels, 1990; T. Bunyan, Trevi, Europol and the European state, in ibid (ed.), *Statewatching the new Europe*, London, 1993, pp.15-36.

[444] Coordinators' Group on Free Movement of Persons, *Report to the European Council in Maastricht*, Circular 3677/91. Ad Hoc Group Immigration, *Convention between the member states of the European Communities on the crossing of their external frontiers*, SN 2528/91 WGI 822. On the Schengen Group, TREVI, the Ad Hoc Group on Immigration and the Coordinators' Group see Cruz, 1990, op. cit. and 1993, op. cit., Bunyan (ed.), 1993, op. cit.

[445] Cf. H. Meijers et. al, *Schengen: Internationalization of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and the Police*, Den Haag, Kluwer, 1991. Today, all EU member states - except for the UK, Ireland and Denmark - have ratified the Schengen Agreement.

[446] Bundesminsterium des Innern, *Jahresbericht zur Anwendung des Schengen Abkommens für den Zeitraum 26.3.1995 bis 25.3.1996 Erfahrungen und Perspektiven*, Bonn, 1996, p.2.

strengthen relations with the Central and Eastern European countries (CEEC), specifically with Poland, then Czechoslovakia, Hungary, Bulgaria and Rumania. The response time was remarkable for the Community, fuelled by a sense of urgency to promote democracy and human rights as well as to support the economic transformation in these countries. A programme was announced by the end of 1989 to support the process of political and economic reform in the CEEC and the European Council declared its intention to consider appropriate forms of association of the Community with the CEEC.

Negotiations towards the conclusion of Association Agreements (subsequently called Europe Agreements) began in 1990 with Czechoslovakia, Hungary and Poland. The intention was to provide a context for aid and assistance to the CEECs and, in the longer term, integration into the Community. These agreements were signed in December 1991. Similar agreements were signed between the European Communities, Bulgaria, Rumania and the Baltic States in 1993. By 1996, Association Agreements which contain an effective right of establishment had been concluded with ten states in central and eastern Europe, the Baltic states and former Yugoslavia.[447] The object of the Association Agreements is to promote economic development and to strengthen links between those states and the EU with a view to accession to the latter.[448]

Moves towards a European supra-national authority and perceived loss of sovereignty have led to tensions among the member governments on issues such as abolition of internal border controls, jurisdiction of the European Court of Justice, and the degree of harmonisation of policies. The growth of extreme right political parties and the increase in racially motivated violence, the resurgence of separatist movements and the disclosures of nation-wide corruption cases in many member states may be interpreted as a "growing

[447] Other cooperation agreements have been signed with successor states of the former Soviet Union which do not contain a right of establishment for companies or individuals.

[448] See E. Guild, *A Guide to the Right of Establishment under the Europe Agreements*, London, Baileys Shaw & Gillet, 1996.

crisis of the nation states across Europe".[449] The construction of a supra-national community is faced with conflicts about the re-definition of its internal boundaries which may lead to a strengthening of a supra-national community or bring it to a halt. The debate on immigration - who is going to be allowed into the EU and who not - is an important part of the controversial process to redefine the external and internal boundaries of the EU.

The logic behind the abolition of internal border controls is that the alleged security deficit needs to be compensated by strict external border controls and a common policy on immigration. This is not only a question of improved surveillance of the border and exchange of information between the member states. Traditionally, each sovereign nation state controlled its own borders and decided about the entry of foreigners according to its national interests and its international relationships. Control of a common external border implies that each national authority responsible for border check points carries out the control and makes the decision about admission or refusal while taking account of "the interest of all Contracting Parties." This includes not only the "verification of travel documents" but also "checks to detect and prevent threats to the national security and public order of the Contracting Parties".[450] Each national authority acts on behalf of the other member states in matters which are at the core of national sovereignty. Such a change in perspective has two important implications. It requires, first, the definition of persons eligible for admission to the EU, and second, the definition of the external frontiers of the EU.

The 'harmonisation' of controls at external borders presupposes a common definition of who may be admitted to the European Union. Visa and admission policies are the main tools to define who may be allowed into the EU, for what reason and under what conditions. The adoption of common visa policies - either in the form of a common list of "Third States, the nationals of which are subject to visa arrangements common to all Contracting Parties" as specified in

[449] P. Schlesinger, 'A question of identity', *New European*, Vol. 5, No. 1, pp. 10-14.

[450] Schengen Convention of 1990, Article 6. The draft External Frontiers Convention is modelled on the Schengen Agreement.

Article 9 of the Schengen Agreement or in the form of the 'Eurovisa' introduced by the Maastricht Treaty[451] - is the first step to the adoption of a uniform visa valid for the whole territory of the contracting parties.[452] On the other hand, access to the common area will denied to any person whose name is included in a common list of inadmissible aliens. According to the Schengen Agreement, aliens may be refused entry because their presence is considered "a threat to public order or national security and safety" or they have been sanctioned with a "deportation, removal or expulsion measure ... based on non-compliance with national regulations on the entry or residence of aliens" (Article 96). Access to the common area is becoming increasingly difficult for third country nationals as the common visa list has been time and again extended.

Along with visas and border controls, the outline for the future rules on legal immigration into the EU was part of the 1991 report of Immigration Ministers to the Maastricht European Council.[453] The report argued that immigration pressure was increasing on all member states and called for an early common response. A restrictive approach to immigration for most purposes, except for family reunion and asylum, had to be accompanied by an integration policy increasing the rights of third country nationals resident in the EU. The Immigration Ministers' plans did not bear fruit. All of the Resolutions on admission to the EU adopted after 1993 are vaguely drafted and give no rights that individuals could enforce in national courts. The first Resolution on family reunion was agreed in June 1993.[454] This Resolution only covers persons with "an expectation of permanent or long-term residence", a concept left to national laws and policies to define. Furthermore, while EU member governments could

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[451] Article 100c of the revised EEC Treaty.

[452] Council Regulation (EC) No. 2317/95 of 25 September 1995, determining the third countries whose nationals must be in possession of visas when crossing the external border of the Member States, *Official Journal*, L 234, 3.10.1995, pp.1-3.

[453] SN 4038/91, 3 December 1991, published in E. Guild et al., *The Emerging Immigration and Asylum Law of the European Union*, Den Haag, Kluwer, 1996, p. 449.

[454] Ad Hoc Group Immigration, *Resolution on harmonisation of national policies on family reunification*, SN 2528/1/93, 1 June 1993, published in Guild et al., 1996, op. cit., p. 251; T. Bunyan (ed.), *Key Texts on Justice and Home Affairs in the European Union*, London, 1997, p. 98-100.

agree on principles they already supported, such as admitting spouses and children, they did not agree on important issues such as the waiting periods to be imposed before entry into the EU or access to employment. There is not even a common definition of 'children' who could be admitted, except that the age of first admission has to be prior to either 16 or 18 years, depending on the jurisdiction. Member states have to restrict entry of family members other than spouses and children, except for compelling reasons. They are free to examine 'false' marriages and refuse entry on such grounds. This latter provision is formulated broadly enough to allow all member states to adopt the much criticised 'primary purpose rule' then in operation in the UK. Member states agreed to ensure the "conformity" of national law with the Resolution's principles by 1 January 1995.

The next measure, the Council Resolution on admission for employment, was not agreed until June 1994.[455] A range of categories of persons are not covered by this Resolution: asylum seekers, refugees, persons granted temporary protection, au pairs or persons on a mobility scheme or under an EC Agreement. Nor does the Resolution address the status of third country national immigrants resident in one member state who have no right to move to another member state. The final version was more restrictive than the first version proposed by the UK Presidency in 1992. The central principle is that admission for temporary employment is to be "purely exceptional". Each member state must refuse entry to its territory for employment unless a vacancy cannot be filled by its own citizens, citizens of other member states or third country nationals "lawfully resident on a permanent basis" in that member state. Yet there is enough scope for specific national implementations of this Resolution. Exceptions to the principle can be made for individual specialists, a temporary labour market shortage, seasonal and frontier workers, trainees and intra-corporate transfers of key personnel of a company. Initially, the period of entry is restricted to four years at most (much less for seasonal workers and trainees) and the scope of employment to a specific job with a specific employer. Member states must examine the "desirability" of granting a

[455] *Official Journal*, C 274, 19.9.1996, pp. 3-6.

permanent residence permit to persons who have had employment restrictions lifted. Pre-existing agreements with third countries for entry of workers can be retained but have to be re-negotiated as soon as possible. Conformity of national law with the Resolution's principles should have been ensured by 1 January 1996.

The next two Resolutions agreed were on the admission for the purpose of self-employment and for the purpose of study.[456] The former became less restrictive during negotiations because the Council ultimately admitted that persons "who add value ... to the economy of the host country" were beneficial. Consequently, rules distinguishing between employment and self-employment have been tightened and anti-switching rules prevent the employed becoming self-employed and *vice versa*. The Resolution on the admission of students covers only higher and further education, not school pupils or apprentices. The possible admission of family members is left to national law. Again, a set of anti-switching rules provides that students return home after their studies and do not take up employment or become self-employed. Conversely, persons entering for employment or self-employment should not take up studies. These anti-switching rules inevitably weaken national integration policies.

In 1997, the European Commission presented its proposal for a "Council Act establishing the Convention on rules for the admission of third country nationals to the Member States".[457] This proposal sets out common rules for the initial admission of third country nationals for the purpose of employment, self-employment, study and training, non-gainful activity and family reunification. It also - for the first time - defines basic rights for long-term resident third country nationals, including provisions related to the possibility of moving to another member state to take up work there. The proposal has been discussed by the Council of Ministers and the EP but failed to receive support from either institutions. The EP tended to view the proposal as more of a framework than actual legislation, granting member states significant latitude in adopting

[456] Respectively *Official Journal*, C 274, 19.9.1996, pp. 7-9 and pp. 10-12.

[457] COM(97)387 final, Brussels, 30.7.1997.

implementing measures. Most members of the Council of Ministers considered the proposal too liberal. Furthermore, the Commission certainly considered its proposal to be an important contribution to the debate but maybe the timing was less well chosen. Submitted just after the IGC in Amsterdam, member states had no intention to discuss the Commission proposal any further. Legislative measures in this area would continue to be adopted within the structure of intergovernmental cooperation.[458]

Immigration policy is covered in the Amsterdam Treaty in the new title IV. Article 63(3) stipulates that the Council "shall within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: ... measures on immigration policy within the following areas:

> (a) conditions of entry and residence, and standards on procedure for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion;".

Article 63 goes on to specify that "[m]easures adopted by the Council ... shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and international agreements" and, crucially, that the five year transitional period does not apply to point 3(a). All policy decisions on borders and immigration will continue to be taken by unanimity (except on short term visa). Thereafter, member states can choose by a unanimous vote to switch these policy areas to qualified majority voting and a full legislative role for the European Parliament. The Commission will for the first five years have to share with member states the right to initiate legislation so that it is unable to set the policy-making agenda in its usual fashion under the first pillar. Furthermore, immigration provisions are also subject to the 'emergency' derogation and the reserve of member states' powers in the event of a sudden inflow of third country nationals (Article 64).

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[458] This impression was confirmed during an interview with a civil servant from the German Interior Ministry, June 1998.

Monar has argued that "occupational admission" and "measures regarding the social integration of ... immigrants" are not within EC competence under the new Title IV.[459] With regard to the free movement of third country nationals resident in one member state, Hailbronner discusses a letter from the German government to the UK Presidency in 1997. In the letter it is argued that "it will still be possible to deny third country nationals" seeking admission to the labour market or lacking sufficient means "a right of residence".[460] This letter is not attached to the Amsterdam Treaty and Hailbronner describes its legal effect as doubtful, concluding that the powers of the German government to invoke such national powers will depend on future EC legislation in this area.

The Strategy Paper on migration asylum policy proposed by the Austrian Presidency a year later was the first attempt to influence policy under the new provisions. The Strategy Paper was largely concerned with restrictions to asylum policy and encouraging the greater use of readmission agreements. The paper argued for a system of "concentric circles" of third states assisting with various aspects of the EU's policy and tying trade and development aid to third states' willingness to comply.[461] The paper contributed to the creation of a High Level Working Group on Migration and Asylum, including both interior and foreign ministry officials, "to establish a common, integrated, cross-pillar approach targeted at the situation in the most important countries of origin of origin of asylum-seekers and migrants". [462] The High Level Working Group is charged with drawing up action plans for a list of 'problem countries'. The aim is to present a cross-pillar response to migration and its causes, coordinating trade, development and foreign policy with migration policy.[463] The aim of this

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[459] J. Monar, 'Justice and Home Affairs in the Treaty of Amsterdam: Reform at the price of fragmentation', *European Law Review*, 1998, Vol. 23, No. 2, p. 320.

[460] K. Hailbronner, 'European immigration and asylum law under the Amsterdam Treaty', *Common Market Law Review*, 1998, Vol. 35, No. 5, pp. 1047-67.

[461] Austrian Presidency, *Strategy Paper on Immigration and Asylum Policy*, 9809/98, 1 July 1998 and the modified version 9809/1/98, 29 September 1998.

[462] General Affairs Council Press Release, 6-7 December 1998.

[463] High Level Working Group on Asylum and Migration, *Final Report*, 10950/99, 14 September 1999.

cross-pillar strategy is the removal of refugees and migrants and to press third countries to readmit them, to prevent migration movements and to deter potential migrants from coming to western Europe.

This leads on to the second point - the definition of the external frontiers of the EU. One consequence of the attempt to achieve control over the external borders of the EU, and the belief that migration movements can be steered by government action, is the transfer of external border controls beyond the geographical boundaries of the EU's territory, a process also referred to as the extra-territorialisation of immigration control. Moreover, enlargement of the EU is not any longer pure speculation since the Amsterdam Intergovernmental Conference in 1997 identified Poland, the Czech Republic and Hungary as the first eastern European countries to join the EU and specified the timetable for the accession of new member states. This development introduces further uncertainty about the external border of the EU.

Many measures are aimed at preventing third country nationals from reaching the EU's external border by stopping them in their country of origin. The extension of visa requirements, coupled with the introduction of carrier sanctions and pre-entry controls make it more and more difficult for third country nationals even to leave their country of origin. Carrier sanctions or carrier's liability refers to legislation passed by EU member states imposing fines on carriers for bringing in passengers without valid entry visas or travel documents or forged passports.[464] This measure affects in particular asylum seekers and has contributed to the expansion of trafficking in persons as a lucrative business. Cruz points out that

> "what is unprecedented in the measures of sanctions imposed on carriers is the combination of circumstances and situations which were

[464] A. Cruz, *Shifting Repsonsibility. Carriers' Liability in the Member States of the European Union and North America*, London, Trentham Books, 1995.

often linked to human rights matters and to which governments could not provide an adequate response."[465]

Those who succeed in reaching the borders of the EU, are stopped at airports or other points of entry in designated international zones which are legally not part of the state's territory. Asylum seekers and visitors alike may be kept there while their documents and applications are examined by the border police and immigration officers. They can be sent back without going through the normal legal procedures provided for by national legislation and often have no right to in-country appeal as the international zones are not part of the national territory.[466] EU governments argue that these zones are not part of national jurisdiction and therefore there is no obligation to respond to asylum claims. The European Court of Human rights has ruled that such an approach represents a 'legal fiction'.[467]

Policies aimed at moving border controls beyond the geographical borders of the EU also involves the cooperation of neighbour states to stop undesired aliens at their external borders or in their territory. To this purpose, the EU has created a buffer zone by extending its sphere of influence to third countries, notably to the east and central European countries but also to North African countries. This has happened in the form of Association Agreements which let potential new EU members already enjoy some preferential treatment and financial assistance, and more specifically through the conclusion of readmission agreements. Readmission agreements have become a substantial part of the external border control system, in particular along the EU's eastern

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[465] A. Cruz, 'Compatibility of carrier sanctions in four Community states with international civil aviation and human rights obligations', in Meijers et al. (eds.), op. cit., 1991, pp. 37-56, here p. 38.

[466] UNHCR, *Comments to the draft guidelines to inspire practices of the member states of the Council of Europe concerning the arrival of asylum seekers at European airports*, Geneva, 20.9.1993a.

[467] N. Mole, *Problems raised by certain aspects of the present situation of refugees from the standpoint of the European Convention on Human Rights*, Strasbourg, Council of Europe, 1997.

external border.[468] The member states to the Schengen Agreement have provided a model for such agreements by signing a readmission agreement with Poland in March 1991. According to its provisions, the contracting parties assume the obligation

> "to readmit their nationals and other persons, who crossed their external borders and who are found to be irregular in the territory of one of the other Parties, with the exception of those who carry visas or residence permits issued by another State Party".[469]

The mutual readmission obligation among the Schengen States is confined to Polish nationals, while between Poland and the Schengen member states it concerns persons of all nationalities. In this way, Poland functions as the border guard of Schengen's, and thus also the EU's, external border. It is in Poland's interest to "scrutinise whether an alien meets the national entry requirements (and is not a threat to the public policy, national security or international relations) of each of the Schengen States" when issuing a visa as "a State being lenient with border controls risks having many persons returned to its territory, which persons it would then have to expel at its costs".[470] The readmission agreement "determines the State responsible for an alien being found in the territory of one of the Parties in contravention of that Party's national aliens law".[471] In exchange for the signing of the readmission agreement, the Schengen member states exempted Polish citizens from visa requirements for stays up to three month and for reasons other than work.

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[468] Cf. UNHCR, *Overview of Readmission Agreements in Central Europe*, Regional Bureau for Europe, 1993b.

[469] Standing Committee of Experts on International Immigration, Refugee and Criminal Law, *Readmission Agreement between the Schengen States and Poland*, Utrecht, 1991, p. 1.

[470] .Ibid., p. 1.

[471] .Ibid., p. 1.

5.4. CITIZENSHIP OF THE EUROPEAN UNION: BEYOND THE NATION STATE?

The establishment of the European Union has linked the issue of immigration to the issue of citizenship. The demarcation of the external boundary of the EU and the question of its control is complemented by internal demarcation processes related to the question of European identity. Border controls have not only been seen as essential for a sovereign state to protect itself against terrorism, international crime and unwanted immigration but also as a symbol of sovereignty. Historically, states have had to rely on control of national borders for their own security. The prospects of removing this national instrument have called forth claims for compensatory measures, both in terms of reinforced controls at the European Union's external borders, and through strengthened internal (national) control mechanisms. At the heart of the problem, however, is not just the decision of how to control the movement of third country nationals, but the decision of who to include and who to exclude, which has consequences far beyond the immediate question of 'who gets in'.[472]

The EU has to define its membership requirements, in other words, it has to answer the question 'who is European'?. This implies a relocation of boundaries insofar as traditionally Europe and the European Union are divided into nation states, and thus into different foreign peoples. The establishment of citizenship of the European Union has created a 'people' of the EU and at the same time the EU foreigner, or in Euro-speech, the third country national. A similar development has occurred earlier with the definition of the 'Schengen alien', that is "any person other than a national of a Member State of the European Communities".[473] Already the Schengen provisions on the "movements of aliens" within the territory of the Schengen member states confirmed the tendency to divide the European population into insiders and outsiders with unequal rights. Immigrants resident in one of the Schengen

[472] See for example A. Evans, 'Nationality law and European integration', *European Law Review*, 1991, Vol. 16, No. 1, pp. 190-215.

[473] Article 1 of the 1990 Schengen Agreement.

member states have been granted very limited rights of movement after the abolition of internal border controls. Full free movement rights are still regarded by the Schengen member governments as a privilege only granted to citizens of EU member states. Immigrants are allowed to move within the Schengen area for up to three months and for reasons other than work. Yet even this 'right' is open to the discretion of the relevant national authorities. Immigrants have to "declare" themselves to "the competent authorities of the Contracting Party the territory of which [they] enter" (Article 22 Schengen Agreement); they have to submit "documents substantiating the purpose and the conditions of the planned visit" and to demonstrate that they have "sufficient means of support" (Article 5).

With effect from 1 November 1993 the European Union Treaty created the citizenship of the European Union (Article 8).[474] However, acquisition of citizenship of the Union is dependent on the holder already having at least one other citizenship of a EU member state. Its character is therefore derivative and consequently, access to EU citizenship depends on the respective national legislation of the country of residence. This is of great importance as the right to freedom of movement in the European Union means that the possession of citizenship of any member state gives access to the labour market and welfare benefits available in any other member state. The question of who is 'in' and who is 'out' thus ceases to be a matter that concerns only the individual state involved.

Loss of the national citizenship will result in loss of the derivative citizenship of the Union. Such a legal position is unusual in that the institutions of the Union which are required to ensure the application of the treaties appear to be powerless to

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[474] On the history and origin of citizenship of the European Union see for example C. Closa, 'The concept of citizenship in the Treaty on European Union, *Common Market Law Review*, 1992, Vol. 29, pp. 1137-69; S. O'Leary, *The evolving concept of community citizenship. From the free movement of persons to Union citizenship*, European Monographs Series, Den Haag, Kluwer, 1996a. On the development and state of implementation of EU citizenship see Commission of the European Communities, *Report from the Commission on the Citizenship of the Union*, Brussels, 1993, COM(93)702 final; Europäisches Parlament (EP), Generaldirektion Wissenshaft (ed.), *Die Unionsbürgerschaft*, Luxembourg, 1995.

prevent a conflict arising between the obligation of the European Union to observe fundamental human rights in the field of application of Union law[475] and the limitations of citizenship of the EU to citizens of the member states only. Article 15 of the Universal Declaration of Human Rights expresses the right of everyone to a nationality and not to be deprived arbitrarily of that nationality or denied the right to change his or her nationality. The Universal Declaration holds a special place in the legal order of the European Union as interpreted by the European Court of Justice. Therefore this right can be considered a fundamental principle applicable in the Union. All states connect a whole string of rights with the possession of citizenship. While a host country may grant a foreigner the right to residence, work, education and welfare, but almost never political participation, a citizen is entitled to these rights. The notion that certain fundamental rights are universal and thus transcend citizenship is widely accepted and some EU states like the Netherlands and the Scandinavian countries have extended local voting rights to third country nationals. The degree to which this precept is enforced is, however, debatable; the right to family life for immigrants, for example, is far from being realised.[476]

The introduction of citizenship of the European Union is tied to the needs of the functioning of the internal market. Article 3 (c) of the Treaty on European Union lists as one of the common policies the creation of

> "an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital."

From the beginning of the European integration process, the free movement of workers has been an integral part of the EEC, and citizenship has been the connecting factor for determining the beneficiaries of free movement rights. In the Preamble to the Treaty of Rome of 1957 the six founding member states declared their intention to "ensure the economic and social progress of their countries by common action in eliminating the barriers which divide Europe".

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[475] European Communities, Consolidated Treaties, 1997, Article 6 (Article F Maastricht Treaty).

[476] S. Spencer, *Migrants, Refugees and the Boundaries of Citizenship*, London, IPPR, 1995, pp. 112-13.

The establishment of a common market was a main objective to achieve economic growth and reduce disparities between member states. Article 48 of the Treaty of Rome stipulates that "freedom of movement for workers" entails the "abolition of any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work." In the Treaty of Rome free movement is understood as the right to seek employment and the right to establishment for EC nationals. The Single European Act prepared the way for the creation of an internal market, defined "as an area without internal frontiers".[477] In response to several decisive decisions by the European Court of Justice in the early 1990s, the right of free movement has been extended to non-workers. The Maastricht Treaty established a more general right for EU nationals to move and reside within the Union. The concrete rights the citizenship of the Union confers do not go very far. They do not in any way take the place of national citizenship. They are essentially limited to the right to assistance from consular officials of other member states, in places where one's own country is not represented; the right to vote or to be a candidate in local and European Parliament elections in any EU country where one is resident; and the right to petition the European Parliament or make a complaint to the European Ombudsman.[478]

EU citizenship is also regarded as part of the project to develop the European Union from an economic to a political union. While EU citizenship confers few rights on EU citizens it may nonetheless stimulate a European political identity which is largely linked to a prior communitarian national 'belonging'.[479] Feldstein concluded already in 1967 that intra-EC migration fostered political integration because "time may indeed be the melting pot's flame and ... the influx of ex-Community workers may distinguish the 'Community we' from the

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[477] former Article 7a; Article 14 Amsterdam Treaty on European Union.

[478] Articles 17 – 22 consolidated version of the Amsterdam Treaty. See also S. O'Leary, *European Union Citizenship. Options for Reform*, London, IPPR, 1996b, pp. 2-5.

[479] Cf. M. Martinello, 'Citizenship of the European Union. A critical view', in R. Bauböck (ed.), *From Aliens to Citizens*, Aldershot, Avebury, 1994, pp. 29-47.

'foreign they' all the more sharply."[480] Arguably, the creation of a European citizenship can be seen as an instrument to gain support for the 'European project' and to give further European integration a certain legitimisation by giving the citizens of the member states a series of political and social rights beyond their home country. Citizenship of the European Union was established partly in view with the aim of creating a sense of identity and belonging for the people within the EU and reducing the democratic deficit between the citizens of the EU member states and the EU institutions.[481]

The institution of a EU citizenship as the sum of citizenships of the member states, defining a common set of civil, political, social and economic rights for its holders, does not solve "the ever more pressing question of European identity".[482] Neither the Treaty of Maastricht nor the revised Treaty of Amsterdam refer to the terms 'nation' or 'nationality'. EU citizenship does not imply the constitution of a European people in the sense of a nation. The objective is to create a political community, a direct political link between EU residents and the EU institutions.[483] However, commentators not associated with EU institutions see the identity-forming impact of EU citizenship more sceptically. It has been criticised as suggesting a *de facto* non-existant political link between EU citizens.[484] The primary aim of EU citizenship is economic, that is the improved functioning of the internal market, and not the granting of real citizen's right.[485]

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[480] H. S. Feldstein, 'A study of transaction and political integration: transnational labour flow within the European Economic Community, *Journal of Common Market Studies*, 1967, Vol. 6, No. 1, pp. 24-55, here p. 46.

[481] O'Leary, 1996b, op. cit., p. 89.

[482] E. Balibar, 'Es gibt keinen Staat in Europa: racism and politics in Europe today', *New Left Review*, 1991, No. 186, pp. 5-19, here p. 11.

[483] So the Commission in its 1993 report on Union citizenship, op. cit., and the EP, 1995, op. cit., p. 2.

[484] O'Leary, 1996b, op. cit., p. 90.

[485] Cf. Martinello, 1994, op. cit.; O'Leary, 1996b, op. cit., pp. 90-96.

> "In conclusion, the present minimal political union and Citizenship of the European Union seem to be just a means to achieve economic goals and nothing more."[486]

The development of the European Union from an economic to a political union has not led to the de-coupling of citizenship from ascriptive criteria. EU citizenship does not constitute the first step towards a post-national or supra-national citizenship nor was that ever the intention of the EU member governments. The Treaty of Amsterdam states clearly in Article 17(1):

> "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship."

Citizenship of the Union has evolved as an extension of national citizenship and does not constitute an alternative, let alone a competing concept. Acquisition of citizenship of the Union is dependent on the national law of the member states which has not been subject to any harmonisation. Therefore, the circumstances of acquisition of citizenship of the Union are random in that it does not conform to any standardised set of rules. In February 1994, a Communication of the Commission to the Council and the European Parliament reasserted the right of member states to determine their own nationality laws. The German commissioner rejected proposals to facilitate or harmonise the procedures for long-term resident third country nationals to acquire the citizenship of the member state in which they are living.[487]

The national determination of access to transnational rights, one can argue, has further marginalised the status of resident third country nationals in the European Union. Non-EU citizens are excluded from the social, economic and political rights granted on the EU level. This, in combination with ever stricter entry control at the EU's external borders, has led to an increased differentiation between EU and non-EU citizens. Bauböck argues that

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[486] Martinello, 1994, op. cit., p. 33.

[487] Commission of the European Communities, 1994, op. cit.

citizenship of the European Union provides a model for the extension of traditional rights of citizens to aliens and for the harmonisation of citizenship rights in the EU.

> "It has opened a window of opportunities for including third country immigrants in this process. Generally, these opportunities have been missed so far. Given the current strong efforts for a harmonisation of asylum and immigration policies European institutions ought to press for a parallel process of creating common standards with regard to the rights of third country residents." [488]

Long term resident non-EU citizens have in fact lost out in the process of European integration in terms of rights. Resident third country nationals do not enjoy free movement rights within the EU. External control measures, often expressed in the image of 'Fortress Europe', have been complemented by internal moves to restrict resident third country nationals from participating economically and politically in the EU. Citizenship of the EU is only the last step of a long process which led Balibar to conclude that

> "discrimination is written into the very nature of the European Community, which in each country directly leads to the definition of two categories of foreigners with unequal rights. The developing EC structures – particularly if they give rise to thorny issues of individual movement, frontier controls, social rights, and so on – can only sharpen this trend and make 'difference' between Community 'insiders' and 'outsiders' as such a locus of overt or latent conflict."[489]

The establishment of a citizenship of the European Union in the Maastricht Treaty has created new boundaries and contributed to the relative decline in the status of resident third country nationals.[490] The treaty prohibits any discrimination on grounds of nationality between nationals of member states. In

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[488] R. Bauböck, *The Integration of Immigrants*, Strasbourg, Council of Europe, 1994b, CDMG(94)25, p. 43.

[489] Balibar, 1991, op. cit., p. 6.

[490] On the unequal treatment of EU and non-EU citizens see for example A. Dummett et al., *Immigration and Citizenship in the European Union*, Brussels, CCME, 1993.

contrast, non-EU citizens have no right to move and reside freely within the EU, and family reunification has become more difficult. European Union citizenship has no significance for third country nationals living in the EU. Access to political participation on the national as well as on the European level remains linked to national citizenship law. EU citizenship has created new rights on the basis of origin so that, for example, a British person living in France for one year has more rights than an Algerian person living in France for 10 years. This creates new boundaries.[491] A further frontier has been erected dividing third country national immigrants into non-European immigrants and immigrants from central and eastern Europe whose countries have concluded Europe Agreements with the EU. The latter have been granted the right of establishment in the EU.[492] The Association Agreement between the EU and Turkey has improved the legal position of Turkish immigrants though it does not amount to a right to an indefinite residence permit.[493]

Moves towards further European integration and the abolition of internal border controls carry a significant symbolic value whose consequences can already be observed in the conflicts arising inside the European nation states about access to resources. Balibar has commented that "the state today in Europe is neither national nor supra-national", and that this anomalous situation that has "no historical precedent" is creating the conditions "for a collective sense of identity panic to be produced and maintained".[494] The abolition of (internal) border controls, traditionally one of the strongest symbols of state sovereignty, is likely to add to this sense of insecurity, and in turn, to trigger new demarcation efforts. The supra-national unit does not (yet) offer an alternative

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[491] Cf. P. Weil, 'Nationalities and citizenships: the lessons of the French experience for Germany and Europe', in D. Cesarani et al. (eds.), *Citizenship, Nationality and Migration in Europe*, Routledge, London, 1996, pp. 74-87.

[492] See Guild, 1996, op. cit. and chapter 3.6.

[493] See K. Sieveking on the legal situation of third country nationals subject to Association Agreements: 'Die Rechtsstellung von Drittstaatsangehörigen nach Assoziationsrecht', *Zeitschrift für ausländisches und internationals Arbeits- und Sozialrecht*, 1995, Vol. 9, No. 2, pp. 227-52.

[494] Balibar, 1991, op. cit., p. 16-17.

for identification. As Smith points out, the European "enlarged unit ... could not be an artificial construct, dreamt up in a bureaucratic office".[495] Yet this is still in many ways the case.

There is a potential for societies in the EU to turn increasingly to negative symbols of identity, to rely more on the negative bases for legitimisation, i.e. what society needs to be protected from. In this context immigrants may provide a target group of 'significant others' on which to base a communal identity.[496] Immigration may also provide the state or a group of states with a new concept of what is threatening, perhaps replacing, the threat formerly represented by the Eastern bloc. Anti-immigrant campaigns and the legal definition of the 'EU alien' – as opposed to the EU citizen – provides for a powerful external source of identification (cf. 2.4.). Yet the definition of internal boundaries only in terms of opposition to 'foreign' cultures is not a satisfying solution in the long term. It may give rise to counter-effects such as an openly racist 'European identity', or lead to the resurgence of (regional) national identities that could lead to new shifts of boundaries. The formation of the European Union, and earlier of the European Economic Area, has also changed the definition of previously linear, political borders between states to an "economic definition of a border as a dividing line across which the movement of goods, capital, services and people can be controlled, restricted to applying exclusively to the 12 Member States of the European Union".[497] The growth of global ideologies of universal human rights have corresponded with - at least on a perceptional level - increasingly porous national boundaries. The fear exists that the advocacy of universal rights will undermine them.

In the context of European integration and increasing globalisation the traditional boundaries of the nation state and the assumption of exclusive

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[495] A. Smith, 'The myth of the 'modern nation' and the myths of nations', *Ethnic and Racial Studies*, 1988, Vol. 11, No. 1, pp. 1-26, here p. 18.

[496] A. Smith, 'National identity and the idea of European unity', *International Affairs*, 1992, Vol. 68, No. 1, pp. 55-76, here p. 75.

[497] A. Stanley et al., *The Rights of Third Country Nationals in the new European Order*, London, INRIC, 1994, p. 3.

membership to one country are being challenged. The permanent settlement of large communities of foreign citizens who are excluded from political participation threaten the liberal democratic values and institutional procedures valued by western states. They are in many respects members but not citizens of the societies in which they live. The formation of multi-ethnic states has laid open to question the ideas western European states have about their national identity and the nature of their political community. The prevailing idea that the status of citizens in the modern world is bound up with the nation state has been called into question. Immigration adds to the diversity of social and cultural identities of the receiving societies and can exacerbate the conflict between universal principles of constitutional democracies on the one hand and particularistic demands of communities to preserve their culture and way of life on the other hand.[498] Some commentators have argued that the creation of a citizenship of the European Union has challenged the link of citizenship to a (nation) state in the same way as the economic, political and social boundaries of the nation state have been challenged by global developments (cf. chapter 2). The state in western Europe is no longer the sole provider and guarantor of citizenship rights. Debates on post-or transnational citizenship models have been emerging, arguing about means and possibilities of overcoming the contradictions inherent in the ideal of universal citizenship and the implication that it transcends particularity and difference.[499] The concept of the European Union citizenship is still an exclusionary and a purely 'market citizenship' concept as founded in the Treaties of Rome. The core of the EU citizenship remains confined to the four rights of market citizenship: freedom of movement for labour, goods, capital and services. This concept can only lead to self-

[498] Cf. J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt/M., Suhrkamp, 1994; W. Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights*, Oxford, Oxford University Press, 1995.

[499] See for example R. Aron, 'Is multinational citizenship possible?', *Social Research*, 1974, Vol. 41, No. 4, pp. 638-56; I. Young, 'Polity and group difference: a critique of the ideal of universal citizenship', *Ethics*, 1989, Vol. 99, No. 2, pp. 250-74; Y. Soysal, *Limits of Citizenship. Migrants and Post-National Membership in Europe*, Chicago, 1994; R. Bauböck, *Transnational Citizenship. Membership and Rights in International Migration*, Aldershot, Edward Elgar, 1994a; B. Turner, 'Outline of the theory of human rights', in ibid. (ed.), *Citizenship and Social Theory*, London, Sage, 1993, pp. 162-90.

interested citizens, reflecting national interests as there is no sovereign actor on the market (the European Parliament is not a sovereign organ). The idea that only a sovereign actor can protect the individual is still prevalent.[500]

5.5. CONCLUSION: FROM NATIONAL TO REGIONAL EXCLUSION

Migration policy has always been an area over which member states have been reluctant to give up control to Community competence. The Treaty on the EU reflects this in two respects. First, a declaration attached to the Treaty states that the issue of who are a member state's nationals and therefore who is entitled to citizenship of the Union, is completely outside the Treaty. The question whether an individual possesses the nationality of a member state is settled solely by reference to the national law of the member state concerned.[501] Secondly, migration policy and hence provisions concerning third country nationals fall under the third pillar of the TEU. As the Council of Europe Convention on Nationality of 1997 has demonstrated, issues of citizenship remain firmly within the domestic jurisdiction of each state. This principle has been confirmed in the Treaty on European Union. It thus seems likely that the existing variations between the case study countries, and EU member states in general, will remain. The intermingling of citizenship legislation with immigration control does not indicate a good prospect for common EU policies on citizenship.

Immigration policy on the EU level is a continuation of national policies. The mechanisms of internal and external demarcation processes also exist on the EU level and both are used to 'seal off' the European Union externally as well as to define internally who belongs to the EU. As on the national level of the case study countries, the external and internal demarcation lines are not clear cut but show the emergence of several categories of immigrants with different sets of rights. There is little or no self-dynamic of EU institutions in immigration

[500] So Bauböck, 1994a, op. cit. - who can guarantee rights if not the state?

[501] Cf. Decision of the Heads of State and Government, Meeting with the European Council, Concerning Certain Problems Raised by Denmark on the Treaty of European Union, Edinburgh 12 December 1992, section A.

matters but rather national governments pursue their interests on the EU level whereby, paradoxically, co-operation on the EU level seems to reinforce the national prerogative to control immigration and a re-nationalisation of policy-making in immigration matters.

Different aspects of the development of economic integration in the European Community have often been classified as positive or negative integration. These terms focus on the role of EU/EC or national institutions. Negative integration removes or restricts the power of member states' institutions to regulate the flow of services and persons in order to facilitate their movement across the EU. However, this leads to a risk of a development towards the lowest common denominator ('race to the bottom'). In order to stay competitive, other member states will reduce their regulatory standards to lower and lower levels in order to attract investment. The answer to this is positive integration, the building of Community-level institutions so that the Community can regulate in place of the member states. Positive and negative integration are usually discussed in political terms by reference to the constructions of institutions. An additional analysis of positive and negative forms of legal integration may also assist in understanding the nature of European cooperation. Because it is left to the member states' institutions to implement Community law, an analysis of legal integration focuses on the methods used to introduce rules, and then on the effect which those methods have on the institutional structure. There is a risk that the Community system of legal integration will not operate effectively as it is so indirect because its implementation is largely left to national administrations and in the case of Directives to national legislation. Little negative integration allowing for greater free movement of persons and services or positive legal integration (which has been avoided) would encourage member states to engage in a 'race to the bottom' toward more unfavourable treatment of non-nationals.

This is equally relevant to JHA cooperation. Within the field of immigration the negative legal integration is the abolition of border controls and related conflicts of law. Positive legal integration is the adoption of rules on admission and the legal status of third country nationals. These apparently abstract models have

real practical consequences. The EU has in some cases achieved a mix of positive and negative legal integration (harmonising some external border and migration law along with the abolition of internal border controls between most member states) but positive legal integration has been unbalanced in the direction of restrictive admission policies and greater control of migrants with little done to encourage their legal integration.

The result of the EU's patchwork approach is that in some cases member states have assumed that there need be no or little positive legal integration at EU level to accompany negative legal integration on the grounds that all member states have standards, for example such as specified in the European Convention on Human Rights. With little negative integration allowing for greater free movement of third country nationals or positive legal integration which has been avoided – strengthening controls on illegal immigration and admission – this does encourage member states to engage in a 'race to the bottom' toward more unfavourable treatment of third country nationals.

The EU immigration policy shows the danger in favouring some aspects of positive legal harmonisation over others. The initial 1991 plan for a more balanced policy on admission, integration and control of illegal immigration appears to be forgotten. While the resolutions on admission have not been amended, the Council has devoted substantial time to the formulation of measures combating illegal immigration. The Amsterdam Treaty contains a five-year deadline to adopt measures on illegal immigration (Article 63(3)(b)) but not on legal immigration. The Community has no clear competence to adopt integration measures. The Council is obviously unconcerned that the failure to improve the legal position of resident third country nationals damages the internal market, infringes basic principles of equality and contributes indirectly to racial discrimination. EU policy emphasises control over a rational admission and integration policy – and the gap between ambition and reality is getting worse.

CHAPTER SIX

CONCLUSION:
PROSPECTS FOR A EUROPEAN IMMIGRATION POLICY

This study has argued that, despite continuing European integration and increased cooperation in immigration matters during the last decade, a 'Europeanisation' of immigration policy has not occurred. National variations of policies are in contrast with European convergence processes. These convergence processes are the result of common experiences and problem perceptions. Yet, instead of developing a common European immigration policy, a reassertion of the national prerogative to formulate immigration policy can be observed. The argument turns around a contrast between the processes of exclusion and inclusion which are the twin faces of immigration policy. The interaction between the demarcation processes of the nation state on the one hand, and European integration and processes of globalisation on the other hand, have led to a re-affirmation of national immigration policy making. This is demonstrated here with the example of two demarcation processes: the political control of immigration as an example of an external demarcation process and naturalisation policies as an example of an internal demarcation process.

Nation states have developed internal and external demarcation processes which create complex inclusion and exclusion processes in reaction to the tensions inherent in the relationship between the world population and the national community. The broad thrust of these processes has led to similar outcomes in the three case study countries but the context for these processes at the national level is strongly influenced by different national historical traditions which have influenced responses to immigration. This accounts for the divergence in specific national situations and in specific national policy formulation. As a result, immigration policy continues to differ greatly between the case study countries despite convergence at the decision making level.

Interaction between the European Union and the outside world has led to increased closure and there is great agreement in the defensive mechanisms of control and restrictive measures on admission. This has been accompanied by an opening process restricted to EU citizens with the establishment of free movement within the EU for EU citizens, creating new internal boundaries in the European Union by excluding immigrants who at the national level have largely the same rights as nationals (apart from political rights) from a set of transnational European rights. A closer analysis shows that the processes of international migration and European integration have eroded the clear citizen/alien distinction. This reinforces the need to define the citizen, the national community. The three case study countries show a development to more restrictive moves in citizenship legislation, and criteria of ethnic affiliation and cultural ties are increasingly used to determine access to citizenship. Each state has defined privileged groups in line with the definition of privileged categories of immigrants.

Referring to Table 1.1. 'parameters of national policy making', one can conclude that the relatively stable policy-specific factors determine, to a large extent, immigration policy formulation by the member states with regard to European cooperation. These policy specific factors such as the principle of 'no immigration' common in all three case study countries interrelate with stable country specific factors. These latter factors give political responses to immigration their specific national stamp. They have a formative influence on the interest of the member states and their position in negotiations. In sum, parameters of immigration policy formulation with regard to European cooperation are relatively stable. Unique historical events such as the opening of the borders in eastern Europe followed by increased migration movements to western Europe or current problems such as increased numbers of asylum applications and illegal immigration are common experiences and have led during the last decade to common problem perceptions by the EU governments. But each EU state has been affected very differently by these events. Common problem perception is here not a sufficient basis to reach agreement on the priority areas for common action on the EU level such as quotas for labour migration. There has been a convergence of policies along

broad lines expressed in the legally codified political harmonisation attempts in the EU but the more detailed legislation formulated at the national level to transfer European agreements into the national context in the member states remains very different.

For all their similarities, the EU member states Germany, France and the UK have only limited common interests in immigration and occupy different starting points in terms of their immigration experience and their specific political responses to certain immigrant groups. An important factor is the case study countries' different positions within the European migration context which influence strongly a government's eagerness for multi-lateral cooperation in immigration matters. This has been well illustrated by the behaviour of Germany, the main immigration country in the European Union largely because of its borders with east European countries, which forms the EU's external border. It is hardly surprising that German governments, irrespective of political orientation, have been among the leaders of the effort to develop a common immigration policy and demands for 'burden sharing'. Moreover, Germany externalised the immigration control problem to its east European neighbours in the form of readmission agreements, supported by resources made available for the improvement of border control infrastructure in the context of Germany's agreements with those countries. Other EU states with a limited capacity to control immigration, like the southern EU member states Spain, Italy and Greece, are being pushed by the other member states to get up to speed. Italy, in particular, has also advocated a multi-lateral approach. Meanwhile the UK, the country with the most effective border controls, has spearheaded the resistance to such initiatives. Harmonisation will help Germany curtail entries but it will impose costs on the UK in the form of less strict polices and susceptibility to the failure of the Mediterranean EU states to police their borders adequately.

A more independent national approach is also evident from France's preferential treatment of citizens of former French colonies in Africa. The determination of governments to maintain and increase control over immigration is further illustrated by their preference for temporary labour

migration and the work permit system in the UK. Temporary work systems are dependent on the interests of national governments. It allows them greater flexibility in the question of numbers of workers, duration and even the sector of employment. Restrictions in immigration law in the case study countries are in tandem with exclusion of immigrants from the mainstream national labour market as only a flexible and temporary migrant work force for specified work is admitted. Exclusion from the work and residence permit system which entails the possibility for immigrants to improve and secure their legal status is connected to an exclusion from the welfare system as well as exclusion from political participation in form of restricted access to citizenship.

Although there have been processes of convergence, national interests and problems differ to a significant extent. National policies still have important functions such as bilateral relations and the pursuit of particular historical interests. These will at times be compatible with collective positions, but on others problems cannot be avoided. During the deliberations of the Justice and Home Affairs Council, national reservations or positions are always respected by the other member states.[502] This suggests negative coordination, in contrast to a solution-orientated approach that assumes a co-operative interplay. Measures on immigration are thus based on the lowest common denominator. This is a reminder that the EU today still remains essentially an economic union based upon the assumption that it is in each member state's economic interest to be a member. The contradiction continues between attempts at European harmonisation of admission policies and unilateral initiatives that maintain diversification. Cooperation in a policy field characterised by differences in national priorities is likely to lead to conflicts and obstructions on the supra-national level. The main principle governing negotiations in multi-lateral immigration policy cooperation is reciprocity. Yet when the principal EU member states to the negotiation do not have common or complementary interests, and when the do not begin from roughly the same starting points,

[502] Interview with Klaus Peter Nanz, Bundesministerium des Inneren, June 1998. Before his move to the German Interior Ministry, Nanz held a senior position in the Schengen Secretariat in Brussels.

positive outcomes are less likely and reciprocity will be more difficult to sustain. The latter situation is by far the most common in the European Union.

The formulation of a common immigration policy illustrates the problems of constructing consistent policy when the members' traditional spheres of interest differ so largely. Both geography and history play roles in complicating policy development. The most consistent supporters of a common approach to external border control are the countries which form geographically the EU's external border and are most 'affected' by migration inflows: this is above all Germany and also Austria.[503] They are also the countries which are historically most closely linked to eastern and central Europe. France, together with the Mediterranean member states, is most concerned about security problems and migration in the Mediterranean region, from or via North Africa. The migration profiles of Germany, France and the UK also reflect their respective foreign policy interests.[504] The geographical composition of the main flows into France is much closer to those of her southern European neighbours than to the immigration profile of Germany or the UK. Important in this context is France's view of her role within the EU as the representative of the migration-political interests of the southern EU member states. Apart from her 'model' function in the area of combating illegal immigration, mainly power political interests come into play here. In fact, the promotion of privileged relations to the former colonies within the framework of a Mediterranean 'solidarity community' under French leadership aims at forming a counterpart to the strengthened German neighbour. Germany's influence in the EU – or what France perceives as a German dominated north-western region of the EU – has increased with accession of the Scandinavian countries and of Austria. The opening of the borders between west and eastern Europe has re-established Germany's role

[503] In response to a question regarding Germany's negative attitude towards the 1997 Commission proposal on admission of third country nationals, Ulrich Weinbrenner from the German Interior Ministry (Referat IA) declared that only Austria has comparable motivations for a restrictive regulation. The UK representative has not indicated in the Council how important this proposal is for the UK. (Interview, June 1998)

[504] See also the *Joint Note by France and Germany concerning asylum/immigration for the European Council in Tampere 15/16 October 1999*, Berlin/Paris, 17 September 1999.

in *Mitteleuropa* and turned its attention increasingly eastwards. Since the late 1980s, France has emphasised the common interests of the countries of the northern and southern shores of the Mediterranean and succeeded with her definition of a EU Mediterranean policy. In so far as it is real, the often quoted French fear of loss of sovereignty seems to be connected to internal EU power distributions. This is probably also a significant factor for the UK which has no traditional sphere of influence close to western Europe, except for Ireland.

An interesting indication of changes in the perception of the strategic importance of certain regions to the EU is financial assistance. Since 1990, foreign development and assistance spending in the EU budget (that is, on top of the Lomé budget) has risen from ECU 2bn to ECU 4.8bn in 1995.[505] According to projections agreed at the Edinburgh summit in 1993, it will reach a ceiling of ECU 6.2bn in 1999. About a quarter of foreign aid spending is for food or humanitarian aid, and about twelve per cent to Asia or Latin America. But the big programmes are eastern Europe and Russia (about a third), with another ten per cent going to the Mediterranean. The reason behind the shift away from the Lomé countries seems to be a change in strategic objectives. The new priorities may have never been explicitly spelled out and agreed by the member states but it is hard to resist the conclusion that they are the reflection of the priorities we can observe in practice. The EU is starting to respond to two new strategic imperatives: eastern Europe and the Maghreb. Eastern Europe is a German imperative because Germany is at the eastern frontier of the Union and neither Germany nor its European partners can contemplate the idea of instability in eastern Europe. The civil war in Algeria guarantees that the Maghreb will be an imperative for France as well as for its south European neighbours. A serious policy of support and influence towards the regions closest to the EU - eastern Europe and the Mediterranean - is becoming an unavoidable strategic necessity. Yet, the former British Foreign Minister Douglas Hurd expressed doubt about the large sums going to CEE countries and the former Soviet Union and called for greater coherence in European

[505] *Financial Times*, 15.2.1995.

policy "towards the developing world".[506] The UK found itself isolated after it cut its contributions to the European Development Fund, the EU largest aid programme, arguing that it wanted to concentrate on its bilateral aid programmes.[507]

The German government has been one of the most eager member governments to expand cooperation in immigration issues and to communitarise immigration policy, that is, to bring it under the first pillar of the European Union. After the German advance during the Luxembourg summit in 1991 to expand cooperation in immigration and asylum policy beyond 'compensatory measures', the member states agreed on a comprehensive approach to immigration policy. The *Declaration on principles of governing external aspects of migration policy* stressed the importance of measures to prevent migration from outside the Community, including trade, development aid and readmission agreements.[508] These principles express a minimum consensus and are rather restrictive with regard to the prevention of migration to the Community. Despite its restrictiveness, the declaration constituted a relatively comprehensive approach to migration policy which the Justice and Home Affairs Council has failed to use as a working basis.

This is symptomatic of two fundamental problems with European Union cooperation in immigration matters. First, the problem of coherence, and second, the problem of efficiency. The analysis in the previous chapter has shown that neither the Commission nor the member governments pursue a coherent immigration policy on the European Union level but that there are rather disjointed measures for different policy areas. There is no effective coordination instrument within the Commission for the migration policy aspects of economic cooperation and development aid. This is also the case for the member states and the Justice and Home Affairs Council where the national ministerial departments and the relevant working groups on the EU level seem to work parallel to each other and not to coordinate their efforts. Yet coherence

[506] *Financial Times*, 16.2.1995.

[507] *Financial Times*, 17.2.1995.

is not alone or primarily an organisational question but also question of common interest.

There are two provisions in the Amsterdam Treaty that could indicate a trend towards 'flexible integration' in immigration cooperation, that is, a core of EU member states pushes ahead with closer cooperation without being held back by the reservations or political sensitivities of other member states. This was successfully done by the member states to the Schengen Agreement, which eventually provided the blueprint for cooperation on the EU level. The Schengen Agreement has been incorporated into the Amsterdam Treaty but the UK, Ireland and Denmark secured an opt-out. Under the opt-out the UK is wholly exempted from EU provisions removing internal border controls, and from those on immigration and asylum. In the latter two areas, however, the UK retains a right to opt in to EU arrangements at a future date. Any opt-in, however, will be subject to unanimous approval by the other member states. This unanimity condition could be a real obstacle for the UK as the Spanish government has hinted that it might block any British attempts to opt-in as long as the Gibraltar question is unresolved.

With regard to new measures on border controls and immigration, the UK and Ireland merely have to notify the Council of Ministers that they wish to opt in. However, if after a 'reasonable period of time', the measure cannot be adopted with Ireland and the UK taking part, the other member states will proceed without them if. In other words, if the UK government tried to withhold approval from a particular measure in order to achieve a particular objective, the other member state could go ahead without it. This will seriously undermine the UK's bargaining ability on immigration matters. EU member governments will resist a complete *à la carte* freedom on justice and home affairs matters for the UK. Even though most member states are well disposed towards British participation and concede that the UK would be foolish to give up its geographical advantages as an island, they will want reassurance that the UK is not going to cherry-pick the easy parts of cooperation.

[508] Conclusions of the Presidency, Edinburgh, 12 December 1992, SN 456/92.

The second difficulty of cooperation in immigration matters concerns the *problem of efficiency. Over the last decade, European policy making in* immigration has been characterised by a piece-meal approach and a concentration on enforcement measures. It is not a policy in the sense of authoritative allocation of power, of a capacity to act by law. The resolutions on the admission of third country nationals are legally non-binding and fall far behind a common policy formulation and leave the formulation of substantial regulations to give these measures 'substance' to the individual member states. In fact, in the area of intergovernmental cooperation a transfer of power has occurred from the legislature to the executive of each country with the JHA Council exercising the legislative power behind closed doors. The capacity to act lies still with the member states in this policy area. In addition to reasserting national immigration policy making, EU immigration cooperation has allowed member governments, the national executive, to enhance their autonomy in the *domain reservé* and to reduce national judicial and parliamentary accountability, thereby seemingly reinforcing national sovereignty.

The efficiency problem concerns mainly the formal instruments the member governments have agreed to use. The harmonisation of legal framework conditions does not go beyond a policy of non-binding resolutions. The only convention directly relevant to immigration policy, the External Borders Convention, has still not be signed by all member states. Although the communitarisation of aspects of immigration policy was an explicit option in the Maastricht Treaty, this has never happened. The institutional arrangements under the Maastricht Treaty have often been blamed for the subsequent patchy progress. The Commission was unable to drive forward the policy agenda as it does in other policy areas because of the limits placed on its role.

More important, however, is the question of the effect on migration movements. Member governments still pretend that immigration policy (as well as asylum policy) can shape reality on the national as well as on the European level. This illusion of the ability to manage migration movements seems still to be prevalent in immigration policy. It would be a first important step to acknowledge that international migration movements can only be influenced at

the most in the long term and that border controls can only be at best a filter and a deterrent to those seeking to enter illegally. The enormous complexity of demographic, economic, social and ecological 'push' and 'pull' factors, and the fears and hopes of potential migrants should make this apparent. Immigration policy (as discussed here as admission policy) cannot be limited to the realisation of abstract objectives such as a certain immigration quota but can only be about influencing migration processes. This efficiency problem of immigration policy has become clear during the last twenty years. A policy based on the illusion of being able to control immigration, on ever harsher admission restrictions and controls has not stopped nor reduced immigration to the EU member states. To apply the same means to a larger geographical unit, the European Union, was bound to fail.

But the slow progress was also due to a lack of political will. Even in the those countries that are committed to further integration, there are domestic sensitivities about various aspects of justice and home affairs cooperation. One of the biggest shortcomings of the Maastricht arrangements was the failure to produce a list of policy objectives that could be used as a commonly accepted work programme. Instead, there were only 'matters of common interest' listed in the Maastricht Treaty. The real challenge lies ahead for the EU member states to agree on substantial policy issues and positive legal integration under the Amsterdam Treaty.

The Amsterdam Treaty appears at first sight to constitute a shift from intergovernmental to supranational cooperation in immigration matters. But this shift is more apparent than real. Without a monopoly of Commission initiative the Commission will rarely make proposals as the experience under the Maastricht Treaty has shown or they are disregarded by member governments like the Commission draft Directive on the admission of third country nationals. The European Parliament's consultation rights are purely nominal. Even after the five year transition period, there will be no substantial shift in power as long as the Council retains a unanimous vote on most immigration matters. The new provisions in Title IV present a façade of a supranational arrangement but in fact the previous system under the Maastricht Treaty will remain barely altered

for at least five years after the entry into force of the Amsterdam Treaty in 1998. The switch to qualified majority voting has to be decided unanimously and the JHA Council is free to extend the new procedure to only parts of Title IV. The intention underlying the new provisions in the Amsterdam Treaty is to retain as much power over immigration matters (and over justice and home affairs in general) as possible while making some gestures towards involvement of supranational institutions. The overall direction of immigration policy on the EU level and speed of its evolution after the Amsterdam Treaty is unclear, though progress is likely to be slow. Immigration is a highly sensitive policy area for all EU governments and the decision to move certain policy areas on immigration to the first pillar, due in 2002, may well be overshadowed by the national parliamentary elections in Germany and France in the same year. It remains to be seen how the member states use the five year 'grace period' and whether after these five years immigration policy will be communitarised.

The opportunity to formulate a comprehensive approach to migration policy was missed but there is a real possibility after Amsterdam that the problem of coherence can at least be defused. An effective long-term strategy will need to include activities to counter migratory pressures as well as common activities on border control. Yet the activities proposed so far under the 'cross-pillar strategy' - coordinating migration policy with foreign, development and trade policy - has focused on expulsion and enforcement measures. It remains to be seen to what extent the Commission can carve out a role for itself and whether member states allow the Commission to assume a 'co-ordinator's role' to formulate a more comprehensive migration policy, including issues such as development aid and economic cooperation. It is less realistic to expect progress in the form of a comprehensive harmonisation of legal framework conditions in national immigration and citizenship laws. More promising is the possibility to extend financial instruments in migration policy. As in the case of humanitarian aid, the coordinating role of the Community, i.e. the Commission, is more accepted and member states move on known territory. Projects under the Mediterranean policy and the Lomé Convention have been increased. The development of financial instruments in migration policy could also include

elements of 'burden sharing' among the EU member states with regard to the admission of refugees. This area offers also a chance for the European Parliament to move things on through its full participation right in the EU budget.

However, the general trend recently has been towards an increase in intergovernmental activity. It is national governments which pass the laws proposed by the Commission and which write and revise the EU treaties. The Commission has only the powers that governments have agreed to give it. Several of the more ambitious recent initiatives, such as a programme of social and economic reforms to create jobs, have been decided at European Council summits by national leaders. In addition, the Commission has little or no power over the main post-Amsterdam projects such as the Euro or the emerging Common Foreign and Security Policy. This shift in the EU's institutional balance will mean a Union which relies much less on leadership from a supranational institution, the European Commission, but much more on concerted action by governments and a preference for intergovernmental cooperation.

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