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Migration Studies Unit
London School of Economics and Political Science
Houghton Street London WC2A 2AE

www.lse.ac.uk/MSU
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Enhanced competences for the European Court of Justice: "Re-shuffling" the dynamics of EU migration policy-making?

Marie De Somer

Abstract

The Lisbon Treaty has been hailed for significantly enhancing communitarisation of policy-making in the area of Justice and Home Affairs (JHA). Besides extending the ordinary legislative procedure to all JHA matters, the Treaty has also abolished the restrictions previously placed on the ECJ's jurisdiction in this area. As can be inferred from both literature on the Europeanisation of migration policies (in particular Guiraudon's account of 'venue-shopping'), and studies of the role of the ECJ on policy processes, this development is likely to have significant consequences for future policy-making dynamics in this area.

On the basis of pre-Lisbon Treaty case law on the right to asylum and the right to family life, this paper sets out to explore what the consequences of extended ECJ jurisdiction will be. Taking into account both the substantive changes to EU migration policies ECJ rulings have often generated, as well as Member States' sometimes fierce reactions to rulings perceived as overly 'liberalizing', the paper presents a mixed conclusion. It is suggested that a constant balancing-out of liberalizing trends versus restrictive tendencies is likely to continue as far-reaching ECJ rulings trigger restrictive Member State responses - an effect the Court in return appears to take into account as it sometimes adopts 'self-restricting' policy positions.

The solution to Fortress Europe, from this perspective, is 'more' not 'less' Europe in response to fortress like tendencies.
(Geddes, 2003, 7)

Introduction

The Lisbon Treaty has been hailed for importantly enhancing the communitarisation of policy-making in the area Justice and Home Affairs. Such communitarisation, as a number of commentators put forward, can be expected to lead to a more 'balanced' approach towards the management of migration flows (e.g., Lavenex, 2007, 313; Thielemann & El-Enany, 2009, 24; Geddes, 2003, 7). However, as will be argued below, the connection is almost never satisfactorily elaborated upon.

This paper seeks to explore the perceived connection between the institutional dynamics of European cooperation in the area of migration policies on the one hand, and the substances of these policies on the other. It is argued that a relation between the two indeed exists – however, that it is more complex than a first cursory overview would lead us to believe.

I start off on the basis of academic accounts on the Europeanisation of migration policies. Building upon Boswell's and Lavenex' division of research in this area, the paper first explores the debates within the literature on the institutional dynamics of migration policies, and then continues with those of the literature accounting for the substances of these policies. The second part of this paper elaborates on an observed disconnection between these two sets of accounts, and suggests an avenue for increased mutual engagement by proposing a hypothesis which connects the core debates of the two subfields.

In the third and final part, this hypothesis is further explored against the background of the Lisbon Treaty's enhanced competences for the European Court of Justice in the area of migration policies. By analyzing pre-Lisbon Treaty case law on the right to asylum and the right to family life, certain assumptions are put forward regarding the substantive impact these increased competences can be expected to have.

On the basis of this exploration a number of conclusions regarding the connection between the 'institutional dynamics' at play on the one hand, and the substances of these policies on the other will be drawn. The concluding part elaborates on the character (and direction) of the observed connection and suggests two possible implications of the Lisbon Treaty's enhanced communitarisation for the further Europeanisation of migration policies.

1. The Europeanisation of Migration Policies: The Dialectics of 'Intergovernmentalism vs. Supranationalism' and 'Rights vs. Control'

1.1 The Europeanisation[1] of Migration Policies

In her overview of literature on the Europeanisation of Justice and Home Affairs (JHA) policies, Boswell states that this area of research is characterized by a rich theoretical diversity with important progress in a number of diverse fields of enquiry (Boswell, 2010). What is lacking however, she argues, is rigorous mutual engagement across the different subfields, and the area as a whole is overly compartmentalized (Ib., 288-290).
With regard to migration policies, Boswell identifies three different subfields of enquiry (Ib.). The initial literature in this field, she states, was highly descriptive and involved essentially normative critiques of the impact of harmonization on the rights of immigrants (Ib., 280). The second strand of literature she denotes is concerned with explaining the institutional dynamics of this harmonization, while a third strand addresses the question of increasing EU cooperation by drawing on literature concerned with the 'politics of migration' (Ib., 280-282). In a similar overview, Lavenex identifies three subfields of enquiry as well (Lavenex, 2007, 310-316). She demarcates two sets of research that address the topic from an institutionalist point of view: the first seeking to explain the relationship between intergovernmental and supranational elements in this policy field, while the other focuses on the interplay between developments at the EU level and the domestic level (Ib.). A third subfield, she contends, comprises the works of scholars who are concerned with the policy field in itself and analyze the changes in the substance of these policies, rather than the intricacies of EU politics and policy-making (Ib.).
A common element to be found in these overviews is the perception of both authors that a division can be found between, on the one hand studies focusing on the institutional components of this policy field, and on the other studies concerned with the policy contents themselves. In what follows, this paper will build upon this perceived division between two sets of research questions.[2]

1.2 'Intergovernmentalism'[3] versus 'Supranationalism'

From its 'genesis' within intergovernmental fora during the 1980s, up onto the most recent changes brought forth by the Lisbon Treaty - a number of scholars have sought to account for the particular evolution of this area of European integration as it slowly advanced; increasingly taking on a 'supranational character' but always retaining a legacy of its 'intergovernmental' origins.
To begin with, a number of studies have sought to explain European cooperation in this area by drawing (explicitly or implicitly) on the classic theories of European integration. In a simplifying manner one could summarize such explanations as follows: from a 'neo-functional' point of view integration in this area can be explained as (inevitably) resulting from functional spill-over effects

[1]The term 'Europeanisation' is, for the purposes of this paper, understood in a broad sense as 'adaptive processes triggered by European regional integration' (Vink and Graziano, 2007, 7). These processes are interpreted as including both top-down processes of domestic change, as well as bottom-up processes of changing capacity building at the EU level (Börzel, 2002; Bulmer, 2007, 48).

[2] It is important to note that this dividing line is adopted for the analytical reason of demarcating different fields of research. In other words, it should not be interpreted as absolute in any sense (which surely was not the intention of the authors quoted above either). A number of interesting studies combine a focus on policy-making dynamics with analyses of changes in the substances of these policies (see below). However, it seems fair to say that an even larger amount of studies chooses to take either one of the two research foci as principal point of analysis - bestowing upon the other focus only a secondary status, and thereby contributing to Boswell's diagnosis of literature on JHA as a fragmentized field of research in which different subfields fail to rigorously engage with each other (Boswell, 2010, 288-296).

[3]In this paper I refer to 'intergovernmentalism' as a mode of governance (as differentiated from 'intergovernmentalism' as a theory for explaining European integration).

created by the Single Market project (and its requirement to remove internal borders) - whilst scholars taking on a more 'intergovernmental/rationalist' perspective stress the resilience of nation states and their use of the EU as a device for attaining their nationally defined policy objectives (for an overview see: Geddes, 2003, 3-11 or Messina, 2007, 147-152). As such, when providing accounts of the integration process the former school of research will stress the importance of the gradual emergence of supranational competencies and logics in an area of cooperation initially based exclusively on intergovernmental cooperation – while the latter strand of authors will stress the importance of the intergovernmental legacy, and the continuing dominance of Member State' agendas even in the face of increased supranational elements. To exemplify, whereas Uçarer in her account of the institutional structures of EU migration policy-making highlights the scope for the European Commission's supranational entrepreneurship – Stetter, in a similar account, bases himself on Principal-Agent delegation theory to explain how the increased competences of this same institution are resulting from, and dependent upon, rational choices of Member States aimed at increasing regulatory efficiency (Uçarer, 2001; Stetter, 2000).

An interesting way to overcome this dichotomy between on the one hand a focus on increasing supranational leadership and on the other, state-centrist supremacy consists of those studies examining the way these two sets of forces have over the years continuously been balanced out against each other. An interesting account has for instance been put forward by Niemann (2008). To explain the outcomes of the IGCs leading to the Amsterdam Treaty up to those preceding the Constitutional Treaty, he conceptualizes European integration in the field of migration policies as a dialectical process in which on the one hand functional pressures, supranational agency, and socialization processes constitute dynamics pushing for further integration, whilst on the other hand countervailing forces (domestic constraints and sovereignty-consciousness) go against these integrational logics (Ib.).

However, whether integrated in a continuum in which they are balanced out against one another, or treated as each other's direct opposite; most literature accounting for European migration policy cooperation from an 'institutional' perspective touches – in one way or another – upon the dichotomy between intergovernmental and supranational cooperation. Boswell notes in this regard that the debate on EU migration policies is characterized by 'bipolar tendencies', with commentators adhering to opposite extremes (e.g. intergovernmentalism vs supranationalism) (Boswell, 2010, 290). Before elaborating upon Boswell's observation which will be of much use for the further discussion, we first turn our attention to an overview of the literature analyzing EU migration policies taking the substances of these (rather than their institutional structure) as their primary focus. Again the paper will draw on Boswell's observation of 'bipolar tendencies' to analyze what she calls the debate between the opposite extremes of 'securitizing versus liberalizing' (Ib.).

1.3 'Rights' versus 'Control'

This debate ('securitizing versus liberalizing') corresponds, broadly speaking, with what others have termed the 'Fortress Europe' debate. Thielemann and El-Enany have aptly summarized the contentions of the 'Fortress Europe–thesis' as arguing on a theoretical level that EU cooperation has fostered restrictiveness through processes of 'venue-shopping', 'securitisation', and the legitimisation of 'lowest common denominator standards'; whilst on an empirical policy level EU actions are criticized for undermining the rights of migrants and refugees (Thielemann & El-Enany, 2009, 1-2). All of the three theoretical arguments cited have found a large resonance within studies analysing the contents of EU migration policies, and thus merit a brief review.

To begin with, the 'securitization' thesis, as put forth by scholars such as Bigo (2002) and Huysmans (2000, 2006), draws on the critical security studies literature to explore the ways in which migration policies were increasingly impregnated with security concerns (Boswell, 2007, 589). According to Huysmans for instance, the security framing of migration emerged as early as the 1980s when policy responses to immigration were conceived of within frameworks related to

other security issues such as terrorism and drugs (e.g. the Trevi Network) (Huysmans, 2006, 72). As such, a security continuum was articulated which incorporated migration and connected it with borders, terrorism and crime – legitimizing the adoption of policy measures that would otherwise have been considered infringements on civil liberties (Ib.).

The second 'Fortress Europe' theory identified by Thielemann and El-Enany concerns the legitimising cover the EU is reported to provide for restrictive initiatives of Member States (Thielemann & El-Enany, 2009, 4). Within these studies the argument is made that lowest-common-denominator standards set at EU level are used by national officials to legitimise restrictive reforms at home by the need to bring them into line with European initiatives (Ib.). At the same time, the tightening of laws in one country is also said to enforce a downward 'spiral of restrictionism' in which other countries subsequently strengthen their laws as to not become 'magnets' for unwanted immigration (Ib.; see on this for instance: Hathaway, 1993, 727; Lavenex, 2007, 312-314).

Thirdly, drawing on literature of 'policy venues', Guiraudon contends that European integration in the area of migration policies has been driven by strategies of national officials seeking the policy forum most suitable for the formulation of 'restrictive' policy objectives (Guiraudon, 2000). In order to escape from constraints imposed on them by judicial control of national courts, parliamentary scrutiny, attention from pro-migrant NGOs, competition from other ministries etc. – bureaucrats have created transnational co-operation mechanisms at the EU level, which have allowed them to develop restrictive migration policies that emphasize 'control' over 'internal free movement' (Ib., 267). In explaining the rationale behind these 'venue-shopping' processes Guiraudon draws strongly on the work of scholars who have documented the manner in which the 'juridicization of migration policy' has thwarted the discretionary powers of bureaucracies (e.g. Joppke, 1998; Hollifield, 1992; Ib. 258-259). As a result of more precise constitutional principles (e.g. fundamental rights), general legal principles (e.g. due process), and through the jurisprudence of national higher courts – governments have found themselves constrained in their restrictive 'urges', especially when it comes to the expulsion of certain categories of migrants such as for instance family members (protected by the right to family life) (Ib.).

Guiraudon's venue-shopping thesis - Boswell notes – shares a lot of premises with the securitization literature as regards the goals and strategies of those seeking to influence policy (Boswell, 2010, 282; 289). The three arguments in fact all share a common ground in the overarching argument that European cooperation in the area of migration policies has led – in various ways - to a prevalence of 'control-oriented' objectives that has topped commitments to migrants' rights protection.

In spite of this common ground however, the different theses tend to remain within the confines of their respective bodies of literature and rarely reference to one another (Boswell, 2010, 289). This lack of mutual engagement adds to Boswell's perceived 'compartmentalization' of research in this area (Ib.). One notable exception can however be found in the body of literature that critiques the 'Fortress Europe' idea.[4] In recent years, an increasing number of scholars have attacked the notion on the grounds that the conception of European migration policies solely focused on control (to the detriment of rights) is, at best, one-sided.

Thielemann and El-Enany for example continue their overview of the 'Fortress Europe' literature by outlining a number of important caveats within the theoretical assumptions of the three theses outlined above (Thielemann & El-Enany, 2009, 4-7). Most importantly, while acknowledging the existence of restrictive trends in many European destination countries – they challenge the argument that European cooperation has been responsible for, or has exacerbated, such developments (Ib., 1-2). On the contrary, they argue, European cooperation has curtailed regulatory competition amongst the Member States, and has in that way halted the 'downward spiral of restrictionism' discussed above (Ib.). Claiming that the 'empirical evidence' supporting the 'Fortress Europe thesis' is weak - they review four major recent legislative instruments in the area of EU asylum policies and assess the extent to which these have led to a strengthening of protection

[4] Arguably, the notion of an overarching 'fortress-idea' is more commonly found in the literature criticizing the concept, than in the works of the scholars said to contribute to it.

standards when compared to the domestic laws in place before (Ib.). Similarly, Boswell has criticized the 'securitization' thesis on the basis that only little evidence can be found for the claim that 9/11 provided an opportunity for the increased 'security framing' of migration policies, as the critical security literature would presume (Boswell, 2007).
It is interesting to note at this point that neither of the two studies outlined above dismisses of the idea that 'control' or 'restrictive measures' are part of EU migration policies. Rather, they differ from the 'Fortress Europe' strand of literature by arguing that the latter's perception of an exclusive preponderance of control-oriented policies inevitably leading to the erosion of foreigners' rights, simplifies a more complex reality, and fails to take on a necessary comparative perspective that weighs EU legislative instruments against domestic laws already in place. This brings us to the core of the 'Fortress Europe' debate: the discussion over whether or not European integration has – comparatively – led to more restrictive European migration policies at the expense of commitments to migrants' rights.
This is a highly interesting discussion, and reverberations of the arguments outlined above are – in one way or another – present in almost all studies accounting for the substances of EU migration policies. What is important to retain is that – in parallel with the literature examining the institutional dynamics of EU migration policies – it is again possible to observe a dichotomy between two 'opposites'. The literature accounting for the policy substances of European migration policies is characterized by a second 'bipolar tendency' as commentators adhere (or as a minimum refer) to the dialectics of 'rights versus control' (or 'securitizing versus liberalizing', Boswell, 2010, 290).

To conclude this first section, what can be inferred from the discussion above is that both strands of literature analyzing the Europeanisation of migration policies ('institutional dynamics' and 'policy substances') overlap in the idea that this Europeanisation has not been a straightforward, linear process – but rather is characterized by different sets of dialectics ('intergovernmentalism versus supranationalism' and 'rights versus control') that are – depending on the viewpoint of the author – either opposing each other or being balanced out against one another. In a bid to address Boswell's perception of research on the Europeanization of migration policies as fragmented and overly compartmentalized – this paper will elaborate upon the common ground between the two strands of literature (Boswell, 2010).

2. Theorizing the Connection between the Two Dialectics

2.1. Hypothesis

References to potential connections between the two dialectics are abundantly present in both strands of literature reviewed above. To exemplify, Thielemann and El-Enany state in the conclusion of their discussion of the rights vs. control dynamics in asylum policies: "We expect that the ongoing communitarisation of asylum policy will help to improve Member States' implementation records of EU asylum law and further strengthen refugee protection outcomes in Europe" (Thielemann & El-Enany, 2009, 24). Similarly, with regard to the literature discussing the institutional dynamics of EU migration policies, Lavenex contends: "A common assumption in this literature is that a greater empowerment of the Commission and the European Parliament would be preconditions for a comprehensive and balanced European approach to asylum" (Lavenex, 2007, 313). Geddes states in reference to a comparable postulation: "The solution to fortress Europe, from this perspective, is *more* not *less* Europe in response to 'fortress' like tendencies" (Geddes, 2003, 7).

Arguably, the most explicit connection between policy substance and institutional dynamics of cooperation on migration policies is to be found in Guiraudon's framework of venue-shopping (Guiraudon, 2000). Her argument clearly links the two dialectics as she contends that the institutional set-up of EU migration policy cooperation is at the same time resulting from – and leading to – restrictive migration control policy objectives (Ib.). Officials in Justice and Home Affairs are keen to cooperate at the European level, she argues, as this enables them to circumvent constraints faced at the domestic level and 'frees' them to devise the migration control policies that suit their policy interests (see above; Ib.).

Guiraudon's idea that different policy venues are either more or less amenable to different policy objectives[5], indirectly implies that changes within a given policy venue will result in changes in the amenability of that policy venue to certain policy objectives. She explicitly states that the logic of venue-shopping does not preclude change over time as "excluded actors become aware of international venues and/or seek to change the rules of the game" (Ib., 258). However, in analogy to the other studies outlined above, she does not elaborate on the potential implications of such changes.

It is the contention of this paper that these implications are worthy of further elaboration, as this could lead to a better link between the two subfields of literature on the Europeanization of migration policies discussed above. In what follows, the potential connection between the dialectics of 'intergovernmentalism vs. supranationalism' and 'rights vs. control' is examined.

Building on the various indications to be found in the literature – and particularly on Guiraudon's venue-shopping framework, the paper posits that the dialectics of 'intergovernmentalism vs. supranationalism' and 'rights vs. control' are causally connected. To this aim, the following hypothesis, derived from the above mentioned accounts, will be examined: Changes to the relative balance of one set of dialectics are likely to affect the relative balance within the other set. In other words, if the balance between 'intergovernmental' and 'supranational' elements within the institutional framework on EU migration policies shifts, alterations to the 'rights vs. control' dynamics observable within the policy substances are to be expected.

[5] As "different levels have different rules and players" (Guiraudon, 2000, 168).

2.2. Research Design

The hypothesis above possesses a high intuitive appeal. The various references to connections of this kind across the literature (see above), are testimony to this. Indeed, when institutional players such as the European Commission, known for its 'competence-maximizing' agenda, and the European Parliament, known for its 'integrationist and rights-protecting' agenda gain leverage in the decision-making processes, policy outcomes can be expected to alter in parallel (Uçarer, 2001, 1; 14; Guiraudon, 2000, 264).

Taking a very broad point of view it is possible to argue that, as competencies delegated to the supranational level increased - not only did the amount of EU legislation in the area of migration policies rise – the relative importance of control-oriented migration policies changed as well. One could for instance observe what Messina describes as "an immigration regime of which the central trust, virtually to the exclusion of all other possible objectives, is the reduction of non-EU migration" in the period from the mid-1980s up until the Amsterdam Treaty when 'intergovernmentalism' was clearly the dominant mode of cooperation (Messina, 2007, 167-168). Empirically such a claim is supported by the observation that major policy initiatives in this period, such as the Schengen and Dublin Conventions, can indeed *mutatis mutandis* be described as such. Arguably, from Amsterdam onwards when cooperation on migration policies was shifted into the 'community pillar', a more 'mixed record' regarding the substances of these policies can be observed as for instance issues concerning legal employment or migrant integration entered the policy debate at EU level. As such, at first sight an overarching approach which links important treaty changes (alterations to intergovernmental vs. supranational balances) to major legislative instruments adopted in the periods between such treaty changes seems to sustain the hypothesis. By and large, alterations to the relative importance of 'control versus rights' within the overall policy substances can be observed on a first cursory glance as subsequent treaty changes increasingly added supranational elements to the cooperation framework.

However, despite the ostensible attractiveness of such a 'grand overview', closer analysis of its merits and limits reveals a number of caveats which seem to suggest that a more narrowly defined, in-depth research design is better suited to explore the connection of our hypothesis. What can be inferred from the literature review above is that the balancing acts at play within the dialectics of 'intergovernmentalism vs. supranationalism' and 'rights vs. control' appear to be characterized by a high degree of complexity. If anything, the diverging opinions of scholars suggest that it would be difficult to adopt a linear perspective on how the dynamics within the two sets of dialectics have evolved over time. More specifically, although a consensus can be detected within the 'institutionalist' literature around the observation that supranational elements have increasingly been added to the cooperation framework – the question as to how this affects the 'relative importance' of intergovernmentalist elements in that same framework is an issue of contention. The complexity of the matter is for example illustrated in Lavenex' 2010 overview of cooperation in Justice and Home Affairs (Lavenex, 2010). After describing the 'uneasy communitarisation' detected in the changes brought forth by the Amsterdam and Nice Treaty, she continues her review by describing a renewed propensity of Member States to make recourse to intergovernmental frameworks outside the EU structures which she calls: 'The Reinvention of Intergovernmentalism' (Ib.). As such, assuming a clear-cut evolution within the dialectics of 'intergovernmentalism vs. supranationalism' as subsequent Treaty changes gradually add supranational elements to the cooperation framework – would not do justice to the complexity that appears to characterize the balancing acts at play.

Similar observations can also be inferred from the literature review on studies accounting for the substances of EU migration policies. As precisely the relative balance of 'rights vs. control' within these policies is the core point of contention within this body of literature; one can assume that a clear-cut evolution towards either one of the two sets of elements in the balance ('rights' or

'control') is either very difficult to construct, or would require a considerable simplification of the intricacies of the debate.
Last but not least, the assumption that seems to underlie the references in both sets of literature to connections between the two dialectics (see above) – namely: the idea that when 'supranational institutions' such as the European Parliament and European Commission are delegated greater authority, policy contents are likely to shift in parallel - is again potentially observable on a overarching, macro level, but can be empirically contested when zooming in to the level of decision-making processes of particular policy instruments. The idea is for instance touched upon by Uçarer as she describes the behaviour of the Commission in the field of Justice and Home Affairs as 'competence-maximizing' and advocating the 'deepening of European integration' (Uçarer, 2001). Referring to the rights-enhancing agenda of the European Parliament, Guiraudon states: 'The European Parliament had long been a friend of Third Country Nationals' (Guiraudon, 2000, 264). Conversely however, Geddes argues that policy communications from the Commission on labour and asylum-seeking migration from around the time of writing of his article (2003) could suggest "that the Commission is a follower rather than a leader and that it is reacting to member state policy preferences" (Geddes, 2003, 7). With regard to the European Parliament, Acosta - in an analysis of the institutions' behaviour during the negotiations on the first important immigration instrument to be adopted under co-decision (the 2008 Return Directive) - describes how this institution, contrary to what would be expected, did not take on a strong 'rights-enhancing' position (Acosta, 2009).

All in all therefore, a 'grand research design' that would link major treaty changes (alterations to 'intergovernmental vs supranational' balances) to important policy instruments adopted in periods demarcated by such treaty changes – with the intention of analysing the potential connections between the two, runs the risk of not adequately capturing the characteristics of such connections (if any exist). Accordingly, as I expect a connection between the dialectics of 'intergovernmentalism vs. supranationalism' and 'rights vs. control' (if any exists) to reflect the same degree of complexity that can be found within these dialectics (see above) – I will examine the hypothesis on the basis of an in-depth case study.
This is done in the third and final section of this paper which analyses the Lisbon Treaty's modifications to the competences of the European Court of Justice (ECJ), and the substantive impact these can be expected to have. The choice for this case study stems from the assumption that the changes, and their impact, will lead to an important 're-shuffling' in both the dialectics of 'intergovernmentalism vs. supranationalism' and 'rights vs. control' (see below) - thus possibly allowing us to observe potential connections between the two, and analyzing the character of any such connections. Empirically the analysis is supported by an overview of 'landmark' cases in the area of migration policies under the previous (restricted) Amsterdam arrangements[6], and strengthened by official policy documents, and interviews and e-mail correspondence with national and EU (Commission) officials.

[6] The judgments on a number of cases reviewed are dated after the entry into force of the Lisbon Treaty (1 December 2009). They are nevertheless considered 'prior to' because the timing of their referral to the ECJ precedes this date, and as such they were still subject to the restrictions set by the Amsterdam Treaty.

3. Case Study: The Enhanced Role of the European Court of Justice in the Area of Justice and Home Affairs

3.1. Changes to the Dialectics of 'Intergovernmentalism vs. Supranationalism' and 'Rights vs. Control'

The dialectics of 'intergovernmentalism vs. supranationalism' can be expected to experience an important 're-shuffling' as the changes brought forth by the Lisbon Treaty have generally been interpreted as significantly increasing the communitarisation of EU cooperation in the area of Justice and Home Affairs (JHA). Commentators point in this regard for instance to the abolishment of the previous 'pillar structure', and the extension of the 'ordinary legislative procedure' with a Commission right of initiative, QMV in the Council and co-decision with the European Parliament, to all JHA matters. With regard to migration policies, this implies an extension of these decision-making rules to the areas of legal migration, the integration of third country nationals, and some of the rules concerning visa requirements (Carrera & Geyer, 2007, 2). What is most relevant to our discussion however – and therefore the object of scrutiny – is the Lisbon Treaty's extension of full jurisdiction of the ECJ to all JHA matters.

Jurisdiction of the ECJ regarding migration policies had already been established in the provisions of the 1999 Amsterdam Treaty. Article 68 of that same Treaty however simultaneously imposed a number of important limitations to the ECJ's competencies in this area which – as Stetter notes – did not exist in any other policy field (ex Article 68 EC; Stetter, 2000, 95). ECJ's judgements regarding the interpretation of measures adopted under Title IV would for instance not apply to national judgments that had already become *res juridicata* (ex Article 68.3 EC). The ECJ was also excluded to rule on any national measures regarding controls on border crossings adopted with a view to safeguard internal security and related to the maintenance of law and order (ex Article 68.2 EC). The most significant limitation however concerned the restriction on requests for preliminary rulings to those questions raised by courts of last instance under national law (ex Article 68.1; Lenaerts, 2010, 263-264; Stetter, 2000, 95).[7]

Both Stetter and Guiraudon have interpreted the insertion of these restrictions in the Amsterdam Treaty in a similar way, as motivated by fears of national governments about the application of the ECJ's 'overly integrationist outlook' to the area of migration policies (Guiraudon, 2000, 262), or the potentially high 'agency losses' that could occur (Stetter, 2000, 95). Indeed, it can be assumed that the Lisbon Treaty's changes which abolish the above restrictions - and thus extend general jurisdiction of the ECJ to the area of migration policies - will significantly strengthen the 'supranational features' of the cooperation framework on these policies (and, consequently, alter the 'supranational vs. intergovernmental' balances of this framework). This assumption is not only to be inferred from references within the literature on EU migration policies such as the ones above, but can also be deduced from academic observations on ECJ's impact on inter-institutional and/or inter-level dynamics within other policy fields.

The history of European integration is fraught with examples of ECJ's jurisprudence having far-reaching consequences on Member States' competences, and the relationship between the ECJ on the one hand and Member States on the other has been the object of extensive scholarly debate. As Stone Sweet has argued, the large theoretical issues of these discussions can be connected to the debates within delegation theory (Stone Sweet, 2010, 20). He aptly summarizes the differing contentions as modelling the 'Principal-Agent' relationship between the Member States and Court in opposite ways (Ib.). The first type of modelling, he argues, is congruent with intergovernmentalist theory and regards the ECJ as a servile Agent of the Member States (Ib.). Garrett (1992, 1995) has for instance forcefully claimed that governments consciously allowed for

[7] Stetter stated in this regard that the restriction on preliminary references by lower national courts will result in "migration policies not having the same protection as other areas" (Stetter, 2000, 96). He highlights in this regard the works of scholars such as Alter (1998) and Mattli & Slaughter (1998) who have argued that higher national courts are traditionally more reluctant to ask for preliminary rulings from the ECJ as compared to lower national courts (Ib.).

the development of the ECJ's competences as this served their interests (e.g. by helping to overcome incomplete contracting problems) (Garret, 1992; Hix, 2005, 140-142; Stone Sweet, 2010, 16-20). As a result, Courts are restrained by the possibility of government's retributions (e.g. changes to the legal system) or by worries of non-compliance (Ib.). A second, opposite, type of modelling assumes that the ECJ in fact enjoys a large zone of discretion, and is able to generate pro-integrative outcomes that, as Stone Sweet puts it, "would not have been adopted by the Member States, given existing decision – rules" (Ib.).

Ultimately, as both Hix and Stone Sweet contend, the real test of these two models is an empirical one, and arguably there is "substantial evidence that the ECJ has often taken decisions that governments have opposed" (Ib., 18-20; Hix, 2005, 141). It is in replication of this argument that this paper positions itself within the second model, and as such contends that the Lisbon Treaty's application of full jurisprudence of the ECJ can be interpreted as adding an important 'supranational' factor to the cooperation framework on EU migration policies. The empirical evidence to support this choice can be found abundantly across the numerous rulings the ECJ has already pronounced in the field of migration policies under the Amsterdam arrangements. A broad grasp within these rulings reveals a number of 'landmark cases' in which, arguably, the Court's interpretations were 'far-reaching', not reconcilable with (perceived) Member States' interests and, importantly, 'rights-enhancing' from a substantive point of view.

This will be substantiated below (see 3.2.), but before proceeding it is worthwhile to touch upon this last element and look at the changes within the 'rights vs. control' dialectics that could be expected to occur. When referring back to Guiraudon's venue-shopping framework which was used to construct the hypothesis of this paper, it can indeed be expected that the Lisbon Treaty's empowerment of judicial authority will modify the dynamics at play within the 'rights vs. control' dialectics. Guiraudon's contention that the Europeanisation of migration policies has been driven by strategies of national officials to escape constraints on their 'restrictive' policy urges, draws heavily on the works of scholars such as Joppke (1998) and Hollifield (1992) who have argued that the diffusion of liberal norms and civil rights, and the role of independent national courts in enforcing these rights, have reduced the discretionary power of national bureaucracies to develop 'exclusionary' migration policies (see above, Guiraudon, 2000, 258-259; Joppke, 1998, 18-20). Arguably, a similar logic could be developed with regard to the role of the judiciary at the EU level. If officials have re-located their policy-making structures to the EU level in order to 'escape' the constraints imposed on them by independent judiciaries at the national level who enforce liberal rights - an empowerment of the judiciary at the EU level could, due to similar court behaviour, change their discretionary power to enact restrictive policies at this venue too. On a first cursory glance, such 'similar behaviour' seems to be confirmed by ECJ rulings in the area under the Amsterdam arrangements (see below).

In addition, the modifications of the Lisbon Treaty are expected to impact upon the 'rights vs. control' dynamics as, not only did the Treaty eliminate the previous procedural restrictions on the Court's jurisprudence (thus increasing 'supranationalisation' within the first set of dialectics), it also enhanced the scope for the ECJ's substantive competence by conferring legal status upon the 'Charter on Fundamental Rights of the EU'.[8] With reference to the changes brought forth by the Lisbon Treaty, Stone Sweet states in this regard:

"The change with the greatest potential to shape the future evolution of the system is the promulgation of the Charter of Rights. Lawyers and judges will be more comfortable working with a codified text than with the rights the Court incorporated into the Treaty, under pressure from national courts, as unwritten general principles. They will generate more rights-oriented litigation and preliminary references, and they will plead and decide cases differently. The ECJ, for its part, will be able to find rights issues implied in most any case it looks for them. Thus there is every reason to expect that rights preoccupations will gradually infuse the exercise of all of the Court's competences, much like it does that of other national constitutional courts in Europe." (Stone Sweet, 2010, 37).

[8] Albeit with a different protocol for Poland and the UK (see Barents, 2010, 720-721).

3.2. Substantiating the Argument: Previous ECJ Case Law in the Area of Migration Policies

The expectation that the ECJ's increased capacities for jurisprudence will affect the dynamics within both sets of dialects, cannot only be deduced from the theoretical arguments outlined above – but is also supported by case law in the area under the (restricted) Amsterdam arrangements. As can be inferred from the works of scholars that have examined the impact of national courts jurisprudence on domestic migration policies – case law typically tends to affect the substances of such policies through the enforcement of two universal human rights, namely: the right of asylum, and the right to family life (Joppke, 1998, 18-20). Scholars such as Hollifield and Joppke have documented how the right to seek asylum, and rights concerning family reunification have constrained domestic migration policies in the restriction of access and/or expulsion of certain categories of foreigners (Ib.; Hollifield, 1992, 11). It is not possible, within the scope limits of this paper, to review the full jurisprudence of the ECJ with regard to these two rights, but a short overview of a number of recent 'landmark' cases under the previous Amsterdam arrangements allows us to draw certain conclusions.

To begin with, in connection to the right of asylum, a number of preliminary references (under Article 267) have been brought before the ECJ regarding the interpretation of articles from the 'Return Directive', (2008/115/EC)[9], and the 'Qualification Directive' (2004/83/EC)[10]. As regards the Return Directive, in the *Kadzoev* Case (C-357/09) the Court had to interpret the regulations regarding the detention of asylum-seekers laid down in the highly contested Article 15 of that same Directive (Thielemann & El-Enany, 2009, 21; Lenaerts, 2010, 278-280). On the four questions which were referred to it, the ECJ ruled favourably from a 'rights-based' point of view providing, amongst others, a narrow interpretation of the 'maximum period of detention' (Ib.). Similarly, in *Elgafaji* (C-456/07) the Court provided a favourable (again, from a rights-based perspective) interpretation on the principles to be applied for the granting of 'subsidiary protection' under the Qualification Directive (Lenaerts, 2010, 292-298). Contrary to the interpretations of the Member States, the Court explained the connection between the two ostensibly contradictory concepts of 'serious and individual threat' and 'indiscriminate violence' in Article 15(c) in a way that broadened the scope for protection (Ib.).

These two cases, which attracted a lot of public attention, seem to confirm that the ECJ – when having the competence – takes on a rights-based approach in its rulings and, in the course of doing so, is not afraid to differ from more 'restrictive' interpretations applied by Member States. Interestingly, Lenaerts – himself a Judge at the ECJ – explicitly touches upon the dialectics of 'rights vs. control' and states in this regard:

"Arguably, EU policy on asylum is governed by two often conflicting dimensions. On the one hand, EU policy on asylum must contribute to strengthening the controls on the external borders of the Union (...) On the other hand, EU policy on asylum must also ensure that the Union is seriously committed to respecting the standards set out by international law. (...) [As analysed rulings confirm], the ECJ is seriously committed to respecting the 'fundamental rights dimension' of EU asylum policy" (Lenaerts, 2010, 288-289; 298)

When looking at the ECJ's 'landmark' cases concerning the second set of rights of which the enforcement is expected to impact upon migration policies, i.e. the 'right to family life', a relatively similar picture is encountered.[11] In the *Chakroun* Case (C-578/08) for instance, the Court countered Dutch policy practices regarding family reunification for legally resident third country nationals,

[9] *Kadzoev* (C357/09)

[10] *Elgafaji* (C-456/07), *Salahadin Abdulla and Others* (Joined Cases C-175, 176, 178 and 179/08), *Bolbol* (C-31/09), *Germany v B and D* (C-57/09 and C-101/09).

[11] It is important to note that this case law is not restricted to JHA legislation only. As will be documented below, a number of important cases on 'the right to family life' are also to be found within the ECJ's jurisprudence on EU citizenship provisions - possibly in connection with internal market legislation.

and ruled that they were not compatible with the regulations set out in the Family Reunification Directive (2003/86/EC). More specifically, the ECJ opposed the setting of a financial standard that amounted to 120% of the Dutch legal minimum income when considering the requirement of 'stable and regular resources' (Article 7(1)(c) of Directive 2003/86/EC), and ruled against the drawing of a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State (which was not in line with Article 2(d) of that same Directive).

Furthermore, a number of important cases have been brought before the ECJ concerning the status of EU citizenship (Article 20 TFEU) and the rights of EU citizens to be joined by their family members. This caseload can be divided into two categories, one concerning the rights of family reunification of Union citizens who have exercised their right to free movement (as laid out in Directive 2004/38/EC) – the other in which the Union citizens have not exercised their right to free movement, thus ruling on the interpretation of the legal concept of Union citizenship (and the rights to be derived from that citizenship). In both categories, ECJ case law seems - on a number of occasions - to have had an important substantive impact restricting the possibilities for Member States to exclude certain categories of Third Country Nationals.

With regard to the first category, important cases include amongst others *MRAX* (C-459/99), *Chen* (C-200/02), *Akrich* (C-109/01), *Jia* (C-1/05), and *Metock* (C-127/08). In *Chen* for instance the Court opposed the refusal of residence rights by the British Home Office to a Chinese family on the basis of Irish nationality of their eight months old daughter (Catherine). The British Authorities had reasoned that the eight month old child was not exercising rights stemming from the EC Treaty. The Court however argued that, as Catherine had sufficient resources (through her parents and health insurance) thus meeting the relevant requirements, she had – as a community national – the right to reside freely in the UK and denying residency to her parent(s) in a time when she was dependent on their care would counter that basic right. In *Metock* the ECJ opposed the requirement of 'prior lawful residence' which a number of Member States had linked to the right of 'Union citizens and their family members to reside and move freely' (Directive 2004/38/EC). The Court argued that the right of residence of third country family members in the Directive should be interpreted as applying to all non-EU national family members, and could not be made subject to the condition of prior lawful residence in another Member State.

As concerns the second category of case law in this area, relating to the right to family reunification derived from Union citizenship in cases where these citizens have not made use of their free movement rights - important ECJ judgments include, amongst others, *Carpenter* (C-60/00), *Eind* (C-291/05) and the recent *Zambrano* (C-34/09) and its follow-up *McCarthy* (C-434/09). It is important to note here that cases such as these have a dual significance. Not only do they rule on the right to family reunification for EU citizens – they equally define the extent of EU competencies (and ECJ jurisdiction) regarding the enforcement of this right as in the absence of a cross-border movement these cases concern 'internal situations'. As such, they are of particularly interest to our analysis. To illustrate, in the recent *Zambrano* Case, the ECJ pronounced a judgment against the Belgian authorities whom had refused residency rights for the Columbian parents of Belgian (and thus EU) citizens whom had never left Belgium. To begin with, the Court ruled (in line with the *Chen* case above) that not granting residency and employment rights to the parents of children that depend on their parents' care, would conflict with the basic right of these children (EU citizens) to 'move and reside freely within the territory of the Member States'. This rights-enhancing ruling was particularly far-reaching as the Court derived this 'right to family reunification' solely on the basis of 'EU citizenship' (Article 20 TFEU), thereby apparently withdrawing the requirement of a cross-border movement to be able to benefit from EU rights in this respect (as laid out in Directive 2004/38/EC).[12] As such, the ECJ seemed to extend the scope of its own jurisprudence (and EU competencies) to areas previously subject to national discretion and as a result could, in the future,

[12] See on these, and other implications of the Zambrano case (e.g. questions of reverse discrimination) for instance: Van Elsuwege, 2011.

be expected to possibly impose its 'rights-based' approach upon legal disputes in an increased number of situations.

Accordingly, it should not come as a surprise that the outcome of the case stirred a lot of reactions amongst observers (both academics and government officials). As reported by a commission official dealing with the reactions in the Council at the time: "The outcome of *Zambrano* triggered a lot of thinking and caution. A number of Member States reacted, and there were particular concerns as to what the outcome of the *McCarthy* case would be."[13] Indeed, in the *McCarthy* case that followed quickly after, the Court had to make a judgment on related questions. In this case, Mrs. McCarthy, a British and Irish national, opposed the rejection of a residence permit for her Jamaican husband by the British authorities. The application for this residence permit had been based of EU law provisions on the basis that Mrs. McCarthy possessed dual nationality. The ECJ ruled however that dual nationality did not call for the application of the rights to be derived from Directive 2004/38/EC, and that concerning Mrs. McCarthy's status as an EU citizen (Article 20 TFEU), she was not deprived of the rights to be derived from that status as the national measure (not granting residence rights to her husband), did not obstruct the exercise of her right to move and reside freely within the territory of the Member States. As such, the Court restricted the scope of its prior *Zambrano* judgment to those situations related to (EU citizen) minors who are dependent on their (third country national) parents, and not to 'static' EU citizens generally speaking. This 'limitation', arguably, tempered Member States' concerns regarding the further encroachment of ECJ rulings upon their national immigration regulations. An official at the Belgian Bureau of Foreigners Office (Home Affairs Ministry) states in this regard:

"We were not too concerned about the impact of the *Zambrano* case. After all, our nationality laws have already been tightened in this regard a few years ago, and therefore we do not expect a whole lot of new '*Zambrano* situations' to occur. (...) I think this is true for the other Member States as well as only very few still use the principle of *ius soli*. We have from the outset interpreted the *Zambrano* case as exclusively related to the status of dependent minors, hence our lesser concern – as such, we were relieved to see this confirmed by the *McCarthy* ruling."[14] It is with this last observation in mind that we turn to the final section of this paper.

3.3. Focusing on the Connection between the Dialectics of 'Intergovernmentalism vs. Supranationalism' and 'Rights vs. Control': Linearity?

Overall, the above analysis of the substantive impact of the Court's jurisprudence appears to support our hypothesis. The ECJ's rulings have introduced important rights-based elements into EU migration policies, and in the course of doing so, have often thwarted Member States' 'restrictive' approaches. However, the apparent 'anomaly' between the *Zambrano* and *McCarthy* rulings suggests that the connection between the two sets of dialectics under review may not be as *linear* as these first 'broad findings' suggest. Arguably, if the Court ruled in *Zambrano* that EU citizens can be impeded to exercise their right to 'move and reside freely within the territory of the Member States' in the event of being forced to separate from their family members should they to do so – it could have extended this logic to the *McCarthy* case as well. Instead, a defendable, though perhaps a bit arbitrary, distinction was made between EU citizens who would be forced to leave should their family members not be able to remain (as the Zambrano children), and those whom would be free to stay (Mrs. McCarthy). What is most important to our discussion here is the 'redressing' of the far-reaching 'rights-based' approach of *Zambrano* this distinction implies. It cannot empirically be demonstrated that Member States' strong reactions to the *Zambrano* outcome 'tempered' the Court's subsequent ruling, however such causality would not be illogical from the ECJ's point of view as will be elaborated below.

[13] Interview with Commission Official, Brussels, 17.08.2011

[14] Interview with official at the Belgian Bureau of Foreigners Office, Brussels, 17.08.2011.

The literature on 'Member State – ECJ relations' touched on above points to a number of mechanisms available to states in the case of far-reaching 'Court activism' which can help us build an understanding of the different substantive results of these two similar cases. Member States can for instance review the ECJ's powers. As this would require a Treaty change however – and hence, a unanimous vote - this 'mechanism' (or 'threat') is considered inefficient by most commentators (Pollack, 1997, 121; Alter, 2009; Stone Sweet, 2010, 9; 11). Member States can, nevertheless, resort to other – less invasive – mechanisms when they find their policy interests hindered by Court's jurisprudence. We learn from Stone Sweet, who comments on the Court's significant 'implicit' discretionary powers, for instance: "The Member States, or the EU's legislative organs, can try to limit these implicit grants of discretion, but only by paying the costs of adopting more detailed and precise law" (Ib., 13-14).

That such a mechanism of "adopting more detailed and precise law" could be set in motion can for instance be deduced from the comments of the Commission official quoted above, who stated: "In the Council, Member States certainly started thinking of how to avoid situations like *Zambrano* in the future."[15] In this regard it is for instance also interesting to note how major protests of Member States in the aftermath of the *Metock* ruling led to a number of discussions in the JHA Council, of which the conclusions read: "Concerned that the provisions of Directive 2004/38/EC should be fully and correctly implemented in order to improve the prevention and combating of misuses and abuses, while adhering to the principle of proportionality, the Council requests the Commission to publish guidelines for the interpretation of that Directive" (Council Justice and Home Affairs, 2008, 27). Similarly, in reaction to the censuring of Dutch regulations concerning family reunification in the *Chakroun* Case, the Dutch Minister for Immigration and Asylum, adopted a position paper in which he called for a tightening EU immigration policies (Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, 2011).[16] To exemplify, as regards the Family Reunification Directive (which was the subject of the *Chakroun* case), the Minister proposed to increase the age for partner reunification to 24, and called for a tightening of the income requirement (Ib., 5). At the national level, the Dutch Minister of Justice, proposed – in connection to the *Chakroun* ruling as well – a number of changes to the laws regulating the Dutch minimum income and social security benefits (Tweede Kamer der Staten-Generaal, 2010).[17]

This leads us to a second dynamic that can be expected to occur in the event of ECJ's jurisprudence being perceived as 'too damaging' for national migration control policy objectives, namely: the tightening of immigration regulations at the national level. This was again suggested by two commission officials who noted in relation to *Zambrano*, that the ruling could have a "'strictening' effect on national rules in relation to the acquisition of citizenship"[18]. Once more, it can also be inferred from earlier developments. An interesting example in this regard is the tightening of the Irish nationality legislation in the aftermath of the *Chen* arrest (see on this for instance: Mancini & Finlay, 2008, 582).

[15] Interview with Commission official, 17.08.2011.

[16] The connection of this position paper to the *Chakroun* ruling has been confirmed via e-mail correspondence with the Dutch Permanent Representation to the EU on 22.08.2011.

[17] Note here that the ECJ ruled in *Chakroun* that the Dutch government could not set a financial standard that topped the Dutch minimum income for the demonstration of 'stable and regular resources', and that the particular social assistance payment Mr. Chakroun could be eligible for under exceptional circumstances, was not be interpreted as 'recourse to the social assistance system' (Chakroun C-578/08; Directive 2003/86/EC).

[18] Email correspondence with Commission official, 23.08.2011; Interview with Commission official, 17.08.2011.

4. Conclusion: The Connection between the Two Dialectics: Linear or Circular? Implications for the Europeanisation of Migration Policies

What can be inferred from the above regarding the connection between the dialectics of 'intergovernmentalism vs. supranationalism' and 'rights vs. control'? At first glance, the hypothesis was confirmed as the workings of supranational features within the cooperation framework (ECJ's role), enhanced the 'rights-based' features of the policies developed through that cooperation framework (ECJ's case law). Referring back to Geddes' formulation, the solution to fortress Europe in this regard, indeed appears to be '*more* not *less* Europe in response to 'fortress' like tendencies' (Geddes, 2003, 7). More specifically, we deducted from the literature (ECJ as an important supranational actor) and the empirical material (ECJ's substantive impact on migration policies through case law), a *linear* causal connection between the dialectics of 'intergovernmentalism vs. supranationalism' and 'rights vs. control'. From this perspective, we can expect the increasing communitarisation of EU migration policies, which leads to changes within the first set of (institutional) dialectics - to impact upon the second set of dialectics and bring about substantive, rights-enhancing policy changes. As such, the Lisbon Treaty's enhancement of the ECJ's role is expected to result in the advancement of 'rights-based' elements within EU migration policies.

However, when zooming in upon the different dynamics at play, the image becomes – yet again (see 2.2.) – 'blurry'. Whilst the ECJ indeed significantly inserts 'rights-enhancing' elements into the substances of EU migration policies, such 'rights-based' policy modifications appear, in turn, to set in motion yet another connection. As the Court's case law ('supranational', 'rights-enhancing') frustrates Member States' 'restrictive' migration policy objectives ('intergovernmental', 'control-oriented'), these Member States appear to react anew via two different (albeit sometimes conflated) dynamics.

To begin with, Court 'rights-enhancing' activism has led at certain moments to 'tightened' policy positions at the EU Council level (e.g. Dutch position paper in response to *Chakroun*). This suggests that the connection between the two sets of dialectics is not *linear*, but instead *circular*. As changes to the dialectics of 'intergovernemtalism vs. suprantionalism' (e.g.: increase of ECJ's competences) lead to changes within the dialectics of 'control vs. rights' (e.g.: rights-enhancing case law) – these last changes appear in turn to impact anew upon the dialectics of 'intergovernmentalism vs. supranationalism' as Member States who see their control-oriented policy objectives thwarted flex their muscles at EU Council level. It is interesting, for instance, to corroborate this finding with Lavenex' notion of 'reinventing intergovernmentalism' (see above; Lavenex, 2010, 466).

Secondly, the ECJ's insertion of 'rights-enhancing elements' appears to stir reactions at the national level as well. Following a logic similar to the one above, Member States who are concerned about the impact of ECJ rulings upon their migration control capacities, appear to respond by altering policies at the national level that circumvent the potentially 'liberalizing' effects of ECJ rulings (e.g. tightening of Irish nationality law in the aftermath of the *Chen* case). Again, an enhancement of 'supranationalism' leading to an 'increase in rights-based elements', causes an inverse reaction and the strengthening of control-based policies at the level of national governments. This finding also confirms Guiraudon's venue-shopping these on which our hypothesis was based, albeit in a reversed direction. The dynamic described above can *mutatis mutandis* be interpreted as a renewed 'escape' from (judicial) constraints upon restrictive policy objectives to better suited policy-venues (in this case, a 'return' to the national level).

In conclusion, the analysis of the substantive impact of the European Court of Justice confirms the hypothesis. *Changes to the relative balance of one set of dialectics affect the relative balance within the other set*. In other words, as the balance between 'intergovernmental and supranational elements' within the institutional framework shifts, alterations to the 'rights vs. control' dynamics occur. However, in light of the feedback reactions of Member States to the ECJ's jurisprudence

observed, it is necessary to enlarge the hypothesis. As the connection between the two sets of dynamics appears to be *circular*, as opposed to *linear*, we confirm – but simultaneously add an extension to our postulation and state: 'Changes to the relative balance of one set of dialectics affect the relative balance within the others set, *and vice versa'*.

Where then does this leave us with regard to the substantive impact to be expected from the enhanced role of the European Court of Justice in the Lisbon Treaty? As can be inferred from the overview of the impact of previous ECJ case law, although rights-based elements were inserted into EU migration policies through ECJ jurisprudence, this did not necessarily in all instances lead to a 'rights-enhancement' of the contents of these policies overall. In a number of cases, far-reaching rights-based rulings of the ECJ stirred significant Member State reactions which led to the adoption of tightened positions either at the EU level or at the national level (and sometimes at both as in the Dutch reaction to the *Chakroun* ruling). Consequently, a margin seems to exist as to how far the ECJ's insertion of 'rights-based' elements into EU migration policies can go before the balances within the dialectics shift again, and policies become more restrictive as a result of a 'flexing of muscles' at the level of national governments' policy-making (either on EU or domestic level). As a result, the perceived dissimilar outcome of the *Zambrano* case on the one hand, and the *McCarthy* case on the other is not illogical.
In line with the postulation, I do assume the enhanced role of the ECJ to have a significant impact upon the Europeanisation processes of migration policies, and expect a 're-shuffling' within the balances of both sets of dialectics that characterize this Europeanisation. On a broad, overarching level this impact may over time lead to a gradual, *linear* insertion of rights-based elements into the substances of EU migration policies (in line with the 'large-scale' findings above). When taking on a more narrow approach however, I expect the connection to be *circular* and hence anticipate one out of two scenarios (or a mixture of the two depending on different policies/rulings). Either the Court - aware of the adverse 'effect' which could occur if its rights-based rulings are perceived as 'too damaging' to migration control objectives - acts in a 'self-restricting' way on certain occasions in order to avoid such effects. Or, in case of no such 'self-restraint', Member States - afraid of the impact of far-reaching ECJ jurisprudence upon their policy objectives - tighten their positions at the EU Council level and seek to adopt more 'detailed' and/or 'control-oriented' policies, or else resort to modifying related policies at the national level in order to increase the strength of control policies at the domestic level ('venue-shopping reversed'). As for now, the outcome (and discrepancy) of the *Zambrano* and *McCarthy* rulings seem to indicate that the former scenario is the more likely of the two. Just as to how this continuous 're-shuffling' within and between the two sets of dialectics at play within the Europeanisation of migration policies is to proceed in the future will perhaps become clear as the Court has been asked to rule upon three new preliminary references that are all related to the *Zambrano* and *McCarthy* cases.[19]

This paper ends by suggesting a number of avenues for further research. First and foremost, the findings above indicate that important connections are to be found between the institutional dynamics of cooperation in the area of EU migration policies, and the substances of these policies. We thus concur with Boswell's perspective touched on at the very beginning of this paper, and argue that a rigorous engagement across the different subfields of enquiry within the literature on the Europeanisation of migration policies is highly required (Boswell, 2010). Furthermore, the findings of this paper would greatly benefit from their application to a larger research design. Most evidently, such a research design could incorporate the full scope of ECJ competences vis-à-vis EU Member States, considering its jurisprudence under Article 258 TFEU[20] as well. Most importantly however, it would be interesting to analyze how the other EU players in the policy field (most

[19] Case C-256/11 referred by Austria in May 2011, and Cases C-356/11 and C-357/11 referred last month by Finland.
[20] Under which the Commission may initiate 'infringement proceedings' against a Member State for non-compliance with EC law.

notably European Commission and European Parliament) connect to, or counteract, the dynamics analyzed in this paper.[21]

[21] It would for instance be interesting to examine whether or not, under Article 258 TFEU, we can find strategic 'alliances' between the ECJ and the Commission along the lines of Schmidt's observations regarding the liberalization of telecommunications and airport services (Schmidt, 2000). Equally worthy of analysis would be to review the possible creation of 'partnerships' of the ECJ with the other (ostensibly) 'rights-based' institution, i.e. the EP (and vice versa).

References

Primary Sources

Council of the European Union (2008). *Press Release 2908th Meeting of the Council Justice and Home Affairs, Brussels, 27 and 28 November 2008.* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/104584.pdf

Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (2011). *Position Paper – Nederlandse Inzet EU Migratiebeleid*. B-8065.

Tweede Kamer der Staten-Generaal (2010). *Brief van de Minister van Justitie (nr. 11).* Kst-32175-11.

Interviews

Interview with Commission Official, Brussels, 17.08.2011

Interview with official at the Belgian Bureau of Foreigners Office, Brussels, 17.08.2011.

Case Law

Case C-60/00, *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

Case C-459/99, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v État Belge* [2002] ECR I - 6591.

Case C-109/01, *Secretary of State for the Home Department v Akrich* [2003] ECR I - 9607.

Case C–200/02, *Chen & Zhu v Secretary of State for the Home Department* [2004] ECR I - 9925.

Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind,* [2007] ECR I-10719.

Case C-1/05, *Yunying Jia v Migrationsverket* [2007] ECR I-1.

Case C-127/08, *Metock and others v Minister for Justice, Equality and Law Reform* [2008] ECR I - 06241.

Case C-357/09, *Said Shamilovich Kadzoev (Huchbarov)* [2009] ECR I-11189.

Case C-465/07, *Elgafaji v Staatssecretaris van Justitie* [2009] ECR I- 00921.

Cases C-175, 176, 178, 179/08, *Aydin Salahadin Abdulla and others v Germany* [2010] ECR I-01493.

Cases C-57/09 and C-101/09, *Germany v B and D* [2010].

Case C-57/08. *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I - 01839.

Case, C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal* [2010] All ER (D) 133 (Jun).

Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)* [2011] All ER (D) 199 (Mar).

Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department* [2011] All ER (D) 156 (May).

Legislation

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures for returning illegally staying third-country nationals.

Secondary Sources

Acosta, D. (2009): The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive), *European Journal of Migration and Law,* 11(1), 19-39.

Alter, K. (2009). *The European Court's Political Power: Selected Essays*. Oxford: Oxford University Press.

Barents, R. (2010). The Court of Justice after the Treaty of Lisbon. *Common Market Law Review,* 47, 709-728.

Bigo, D. (2002). Security and Immigration: Toward a Critique of the Governmentality of Unease. *Alternatives*, 27, 63-92.

Börzel, T.A. (2002). Pace-Setting, Foot-Dragging, and Fence-Sitting. Member State Responses to Europeanization. *Journal of Common Market Studies*, 40(2), pp. 193-214.

Boswell, C. (2007). Migration Control in Europe After 9/11: Explaining the Absence of Securitization. *Journal of Common Market Studies*, 45 (3), 589-610.

Boswell, C. (2010). Justice and Home Affairs. In M.P. Egan, N. Nugent & W.E. Paterson (eds.), *Research Agendas in EU Studies: Stalking the Elephant* (pp. 278-297). New York: Palgrave Macmillan.

Bulmer, S. (2007). Theorizing Europeanization. In M.P. Vink & P. Graziano (eds.), *Europeanization: New Research Agendas* (pp.46-58). New York: Palgrave Macmillan.

Carrera, S. & Geyer, F. (2007). The Reform Treaty & Justice and Home Affairs: Implications for the *common* Area of Freedom, Security & Justice , *Centre for European Policy Studies Policy Brief*, No.141.

Garrett, G. (1992). International Cooperation and Institutional Choice: The European Community's Internal Market. *International Organization*, 46(2), 533-560.

Geddes, A. (2003). Still Beyond Fortress Europe? Patterns and Pathways in EU Migration Policy. *Queen's Papers on Europeanisation*, No 4/2003.

Guiraudon, V. (2000). European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping. *Journal of Common Market Studies*, 38(2), 251-71.

Hathaway, J.C. (1993). Harmonizing for Whom: The Devaluation of Refugee Protection in the Era of European Economic Integration. *Cornell International Law Journal*, 26, 719-732.

Hix, S. (2005). *The Political System of the European Union*. London: Palgrave Macmillan.

Huysmans, J. (2000). The European Union and the Securitization of Migration. *Journal of Common Market Studies*, 38 (5), 751-777.

Huysmans, J. (2006). *The Politics of Insecurity: Fear, Migration and Asylum in the EU*. New York: Routledge.

Hollifield, J. (1992). *Immigrants, Markets, and States: The Political Economy of Postwar Europe*. Harvard University Press.

Joppke, C. (1998). *Challenge to the Nation-State. Immigration in Western Europe and the United States*. Oxford: Oxford University Press.

Lavenex, S. & Wallace, W. (2005). Justice and Home Affairs. In H. Wallace, W. Wallace & M.A. Pollack (eds.), *Policy-Making in the European Union* (pp. 457-80). Oxford: Oxford University Press.

Lavenex, S. (2007). Asylum Policy. In M.P. Vink & P. Graziano (eds.), *Europeanization: New Research Agendas* (pp. 309-320). New York: Palgrave Macmillan.

Lavenex, S. (2010). Justice and Home Affairs. In H. Wallace, W. Wallace & M.A. Pollack (eds.), *Policy-Making in the European Union* (pp. 457-82). Oxford: Oxford University Press.

Lenaerts, K. (2010). The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice. *International and Comparative Law Quarterly*, 59(2), 255-301.

Mancini, J.M. & Finlay, G. 'Citizenship Matters': Lessons From the Irish Citizenship Referendum. *American Quarterly*, 60 (3). 575-599.

Messina, A. (2007). *The Logics and Politics of Post-WWII Migration to Western Europe*. Cambridge: Cambridge University Press.

Niemann, A. (2008). Dynamics and Countervailing Pressures of Visa, Asylum and Immigration Policy Treaty Revision: Explaining Changes and Stagnation from the Amsterdam IGC to the IGC of 2003-04. *Journal of Common Market Studies*, 46(3), pp. 559-591.

Pollack, M.A. (1997). Delegation, Agency, and Agenda-Setting in the European Community. *International Organization*, 51(1), 99-134.

Schmidt, S. (2000). Only an Agenda-Setter? The European Commission's Political Power over the Council of Ministers. European Union Politics, 1(37), 37-61.

Stetter, S. (2000). Regulating Migration: Authority Delegation in Justice and Home Affairs. *Journal of European Public Policy*, 7(1), pp. 80-103.

Stone Sweet, A. (2010). The European Court of Justice and the Judicialization of EU Governance. *Living Reviews in European Governance*, 5(2).

Thielemann, E. & El-Enany, N. (2009). Beyond Fortress Europe? How European Cooperation Strengthens Refugee Protection. Paper prepared for the firfth General Conference of the European Consortium for Political Research (ECPR), Potsdam, 10-12 September 2009.

Uçarer, E. (2001). From the Sidelines to Center Stage: Sidekick No More? The European Commission in Justice and Home Affairs. *European Integration Online Papers*, 5 (5).

Van Elsuwege, P. (2011). Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law. Case No. C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi. *Legal Issues of Economic Integration*. 38 (3). 263-276.

Vink, M. P. & Graziano, P. (2007). Challenges of a New Research Agenda. In M.P. Vink & P. Graziano (eds.), *Europeanization: New Research Agendas* (pp.3-20). New York: Palgrave Macmillan.