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PhD in Law

The Role of the State in Migration Control

Aoife McMahon

Thesis submitted in fulfilment of the Doctor in Philosophy Degree

Trinity College Dublin

2015

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SUMMARY

The basic premise that states have an absolute discretion to control migration across their territorial borders has become ossified to such an extent as to render its questioning controversial. Yet the more one delves into the theory of the state and the relatively recent history of state migration control measures, the more the foundations of this premise seem to give way. This has been the primary exercise of this thesis. It takes a legal positivist approach to three core research questions: first, can early state measures of migration control support the legitimacy of current such measures of a more general and systematic nature on a traditional basis? Secondly, can current state migration control measures of a general and systematic nature be legitimised on a rational-legal basis? Thirdly, are there any steps states could take with a view to improving the legitimacy of migration control measures?

It commences with an analysis of the concept of migration itself, but soon encounters obstacles in arriving at a global understanding of same. Only in the past few years have attempts been made to form bridges between the various disciplines interested in migration, such as economics, sociology, history and demography. Furthermore, all disciplines require reliable empirical data to test their theories. It is demonstrated that in the absence of state cooperation in obtaining international migration data, our global appreciation of this concept remains distorted. In order to know precisely what it is they are controlling and so to have any legitimate role in the control of migration, it is argued that states will at a minimum have to take steps to remedy this situation.

The concept of the state is then examined. The modern state has been in a continuous state of flux, reacting to new theories and new social phenomena, and yet many regard the state as a rigid given and fail to even question its powers of control in areas such as migration. A theory which has recently gained in momentum is that of rationalisation – the idea that in order to take political action, there must be some minimum evidential basis to demonstrate that this in some way will advance the common good. It is contended that beyond the few core functions of the state legitimised on a traditional basis, no functions of the state can simply be taken as a given and must be demonstrated on each occasion to be justified on a rational basis.

An analysis of the development of state control of migration on an empirical level in Europe and America reveals that early control for the most part took as its point of departure 'freedom unless you pose a threat'. A significant turning point is then identified first in America and then generally across Europe on the advent of the First World War. Control measures took on a more general and systematic character and were clearly influenced by the racist ideologies that spurred on the war. The point of departure in this way became 'control unless we want you'. These measures were continued after the war period and both measures of direct and indirect control of migration have since been adopted at an increasing rate. It is widely presumed that the control of migration can be justified on a traditional basis, which fails to appreciate this significant turning point or the racist origins of such measures. Alongside this shaky foundation to the legitimacy of state control of

migration, increasing limits from external forces have been placed on states' ability to adopt and enforce measures of control. These include international protection law, fundamental rights regimes, regional free movement regimes and economic theory.

The analysis of the legitimacy of state control of migration in this thesis is based on Weber's theories of traditional and rational-legal legitimacy. Traditional legitimacy is approached from both an international and internal perspective and it is found that neither perspective leads to a sufficient foundation on which the legitimacy of general and systematic state control of the movement of people can be based. Considering rational-legal legitimacy, very little evidence is found of any attempts to justify such control on an evidential basis and evidence is found on the contrary of irrationality or incoherence between such measures of control and other state obligations. It is submitted that states must take further steps in order to ground the legitimacy of their control of this area. A possible approach to the tangential issues as to what rights immigrants should be entitled and in what circumstances they should be accepted as naturalised citizens is also briefly set out.

It is submitted that states nevertheless face considerable obstacles in attempting to legitimise general and systematic control of the movement of people. First, as evidenced in a number of examples, the state often lacks the technical capacity to achieve its immigration policy objectives. Second, competing political interests of the state are identified as it tries to satisfy the needs of both particular interest groups and the general public. The third obstacle in the competing economic interests of a state is evident in the difference in treatment by liberal states between international trade and international labour movement. This difference in treatment amounts to a fatal flaw in the logic of liberal ideology and furthermore artificially curtails and distorts the working of the global economy.

In the final analysis, possible steps that could be taken by states in order to overcome these obstacles are examined. At the national level, governments could work with either an independent advisory body or directly with private actors holding an interest in the decision to be made. National courts have an important role in delineating the powers of the state in the control of the movement of people and must insist that any measures that are taken in this regard are justified on an evidential basis. At the international level, the potential of existing candidates to stand as a new global migration body of an economic nature and three human rights based models are considered and evaluated. A supranational approach at the regional level is submitted as the most sustainable long-term option. In this regard, recent developments of the EU are considered, in addition to informal arrangements in other regions that can be used as a stepping stone to supranational regional control with the aim of ultimately leading to inter-regional cooperation on the basis of equality between regions.

ACKNOWLEDGMENTS

There are a number of people who have inspired and encouraged me along the road of this thesis.

Dr. Síofra O'Leary and Professor Norbert Foulquier gave me words of wisdom that only those who have been along this road before can know to share, as I tackled chapters during my time in Luxembourg and Paris.

Support from lecturers and staff in the Law School and the library staff never faltered and I would like to thank Alex Schuster and Dr. Neville Cox in particular here.

My interest in the subject matter was honed in my practice at the Bar, notably through the inspiring work of Anthony Lowry BL, Rosaria Boyle SC, Michael Lynn BL and Patrick McGrath SC. I thank James Buckley BL and John Noonan BL in particular for our talks over pints on related subjects and John for his most generous help in reading the final draft.

Patricia Brazil BL, the best supervisor you could hope for, although I'm biased, falls into all the above categories. I really cannot thank her enough for her patience, guidance, wisdom and good humour.

My wonderful parents, Eddie and Fidelma, have seen me through a lot over the years, but this has perhaps been the biggest ask. I hope they know how much I have appreciated their love and support along the way. I owe my sisters, Jennifer, Sinéad and Sally, a big thank you too. They have gracefully put up with a lot of moaning, tactfully given me a sense of perspective when needed and supported me in particular towards the end.

This thesis has taken as great a toll on David O'Leary as it has on me. I will forever be in his debt for his support, encouragement, reading of the final draft, contagious aura of calm and insistence that fun be had between writing.

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Introduction

Immigration has proven itself to be one of the most sensitive and divisive issues on the political agenda of the modern state. Discourse on this topic is striking in its ability to evoke staunch and emotive views on both sides of the stronger / weaker controls debate. In political circles, those who favour stronger controls rely on such rationales as the protection of state sovereignty, the maintenance of the integrity of the immigration system, crime control, the protection of the national labour market etc. Those on the opposite side of the continuum raise such arguments as the illegitimacy of national borders, the existence of a universal right to free movement and that on global justice grounds developed states have a duty to accept migrants from poorer countries. But is there an optimum middle ground and if so, how can this be determined?

Political debates in this area, due to their emotive nature, tend to be overly simplistic. The reliance on such pithy arguments as the protection of state sovereignty for the adoption of greater migration control[1] measures for example fails to appreciate the complex history of this concept and at a deeper level fails to adequately justify in an intelligent and rational manner the measures in fact adopted. More is required of states by way of justification of the measures they take; such simplistic arguments are insufficient and quite simply unacceptable in present times of greater rationalisation. States have at their disposal increasingly advanced methods of data gathering and processing and so should be required to use same in demonstrating why particular measures taken will promote the common good.

In recent times there has been a rise in right-wing politics across the globe, accompanied by ever increasing restrictive measures of migration control. The negative impact of such measures, most notably serious breaches of the human rights of many migrants, is well documented. News articles abound detailing events of migrants dying at sea, being held in lengthy detention pending removal from states and being exploited as undocumented workers. In such circumstances, an inquiry into the legitimacy of state measures of migration control is timely.

The theory that a state has a sovereign right to control migration has become so firmly entrenched as to render it controversial to even question such a given. In this respect, this thesis endeavours to break new ground in doing precisely that. Applying Weber's definition of legitimacy[2] on both a traditional and rational-legal basis, this thesis first seeks to determine whether the initial state measures of migration control can support the legitimacy of current such measures of a more

[1] I use the phrase 'migration control' throughout the thesis. This captures the restrictive nature of present state measures in the area of migration. Some academics urge the use of 'migration management', which to my mind would suggest a desirable more balanced approach. Until this is a reality however, I feel the phrase 'migration control' is apt.

[2] Weber, *Economy and Society: An Outline of Interpretive Sociology*, Roth and Wittich (ed.s), University of California Press, Los Angeles and London, 1978.

general and systematic nature on a traditional basis. It continues to consider the question of whether current state migration control measures of a general and systematic nature can be legitimised on a rational-legal basis. It finally assesses what steps might be taken by states with a view to improving the legitimacy of migration control measures.

It must be clarified that this thesis does not deny a state the traditionally legitimate function of protecting such interests as security, order and health within its territory. Passport controls and security checks may be used to gather evidence on individuals who pose a real threat to these interests and where such evidence exists, a state has a legitimate corollary power to restrict the entry and residence of such individuals into and within its territory. Similarly, where the volume of anticipated immigrants is demonstrated by clear evidence to exceed that which a state could realistically absorb, this could amount to a significant threat to these interests and for the same reason, a state could take measures to restrict such flows. An approach which would presume that individuals will not constitute such a threat would still allow for a rebuttal of this presumption on an evidential basis.

Neither does this thesis go so far as to claim that a human right to free movement should exist. It confines itself to contending that in order for states to legitimise their measures of migration control, they must take some action, whether at the national, international or regional level, towards improving their evidential base on the concept of migration or returning the point of departure to 'freedom unless you pose a threat'. It is acknowledged that there is little difference in practical terms between a right to free movement and a 'freedom unless you pose a threat' point of departure, yet there is a nuance on a symbolic level: what matters is not what international human rights document to which states might agree in the future, but what they must do at present to safeguard their own legitimacy. This thesis focuses on the perspective of the legitimacy of the state rather than the rights of migrants.

The phrase 'freedom unless you pose a threat' derives from the historical exploration of chapter 3 in which it is demonstrated that initial migration control measures were based on the premise of free movement unless a threat was posed to such essential state interests as public order, security or health. While arguments of global justice and ethics are also important, it is acknowledged that these are beyond the scope of this research, which takes a distinct legal positivist approach in inquiring as to the legitimacy of state laws on migration control. I use the term positivist rather than rationalist to insist upon the fact that even positivist law must be rational in the sense of being based on some arguments, whether or not these are considered to be good or bad on deeper levels of global justice or ethics. It furthermore only briefly addresses the tangential issues of the extent to which civil, social and economic rights should be afforded to immigrants by host states and in what circumstances they should be granted political membership of the state as naturalised citizens.

While approached from a legal perspective, the nature of the subject matter necessitated delving into other disciplines. Following the recommendations of chapter one for an inter-disciplinary approach to be taken in order for all relevant disciplines to gain a greater understanding of the concept of migration, the focus spans from sociological and economic perspectives at the outset to historical and political perspectives throughout the thesis. A positivist legal approach nevertheless grounds the analysis of the core research question. A further feature of the approach taken is its markedly broad nature. States and migration are spoken about at a general level, with the examples of America and more particularly Europe being given where it became necessary to dip into detail. This broad approach was intentional and one of the aspects of the research setting it aside from other research in this area. Most research in the sphere of migration takes a narrower view focusing on particular regions, categories of migrants or associated problems. What is absent from the existing research is a bird's eye view of the whole, a lacuna I have endeavoured to fill. Another author aptly captures my sentiments in taking this approach: "it does seem to me that there is a virtue in looking across time and space in a comparative fashion. Some of the broader patterns of political development are simply not visible to those who focus too narrowly on specific subjects"[3].

A number of academic works in the field of migration similarly take a broad approach. Portes and deWind[4] and Stalker[5] take a comprehensive approach to researching the causes and effects of migration essentially from a socio-political perspective. Their research is particularly valuable in contributing to a holistic understanding of this concept. Hatton and Williamson[6] have made significant contributions to the broad historical understanding of migration patterns. They demonstrate that a temporal comparative approach serves to place present migration patterns in context, particularly in affording an appreciation of the qualitative and quantitative characteristics of the great migration waves of the 19th and 20th centuries. Koser[7] and Moses[8] take similarly broad approaches but go further in criticising current migration policies and regimes. Koser sets out to debunk myths such as the claim that migrants take jobs away from local workers, or that they take advantage of health care systems in presenting a fundamentally human side to migration. At a deeper theoretical level, Moses makes moral, political and economic arguments in favour of the free mobility of human beings across national borders.

More recently, efforts have been made to approach the subject of migration from an

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[3] Francis Fukuyama, *The Origins of Political Order*, Profile Books Limited, London, 2011 at p. xvi.
[4] Portes and deWind (eds.), *Rethinking migration: new theoretical and empirical perspectives*, Bergahn Books, New York, 2008.
[5] Stalker, *The No-Nonsense Guide to International Migration*, New Internationalist Publications limited, Oxford, 2008.
[6] Hatton and Williamson, *Global migration and the world economy*, MIT press, London and Cambridge, 2005; Hatton and Williamson (ed.s), *Migration and the International Labor Market 1850-1939*, Routledge, London and New York, 1994.
[7] Koser, *International Migration: A Very Short Introduction*, Oxford University Press, 2007.
[8] Moses, *International Migration: Globalisation's last frontier*, Zed Books, London, 2006.

interdisciplinary perspective. Brettell and Hollifield[9] appreciated that in order to deepen our understanding of this concept a combined input was required across such disciplines as anthropology, political science, demography, geography and sociology. Their approach is descriptive and although valuable in drawing together such a spectrum of views, given differing theoretical models and methodologies, the views remain segmented. Maloney and Korinek[10] also take an interdisciplinary approach and furthermore examine immigrant patterns and policy questions at the global, national and local levels. Their purpose is to connect ethical, legal, and social science scholarship from a variety of disciplines in order to facilitate the design of useful policy.

Further works take a global approach to examining this concept from a legal perspective. Two works in particular explore how international law applies to various categories of migration. Although dispersed in many different legal texts, Cholewinski, Perruchoud and MacDonald[11] manage to draw together the principal strands of what is today accepted as international migration law. They identify two key pillars underlying this area of law: first, the principles and standards deriving from state sovereignty and secondly, the human rights of the persons involved in migration. Betts[12] asserts that unlike many other trans-boundary policy areas, international migration lacks coherent global governance. His work brings together a group of the world's leading experts on migration to consider the global governance of different aspects of migration, with a view to ultimately posing the normative question of how claims about the type of global governance that should exist in each area can be grounded. Dummett and Nicol[13] provide a valuable insight into the development of immigration law at the national level, using the example of Britain, while placing its experience in the European and International context. They note the turning point from transient and small-scale measures of migration control to those of a more general and systematic nature and identify its origins in racial theory. Their work culminates in a tentative argument, based on standards of international law, for a human right to freedom of movement across borders.

This thesis seeks to build on this existing research in taking a broad approach to the field of migration, while building on it in developing a normative legal argument regarding migration control measures at the national level. It commences with an interdisciplinary approach in

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[9] Brettell and Hollifield (eds.), *Migration Theory: Talking across disciplines* (2nd ed.), Routledge, New York, 2008; see also Arcarazo and Wiesbrock (eds.), *Global Migration: Old assumptions, new dynamics*, Praeger, Santa Barbara, 2015.

[10] Maloney and Korinek (eds.), *Migration in the 21st Century: Rights, Outcomes, and Policy*, Routledge, London and New York, 2011.

[11] Cholewinski, Perruchoud and MacDonald, *International Migration Law: Developing Paradigms and Key Changes*, T.M.C. Asser Press, the Hague, 2007.

[12] Betts (ed.), *Global Migration Governance*, Oxford University Press, Oxford, 2011.

[13] Dummett and Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, Weidenfeld and Nicolson, London, 1990.

endeavouring to gain an understanding of the concept of migration itself but soon acknowledges the limitations of this exercise. It then provides a detailed analysis of the concept of the state in an effort to identify the general role of this social construct. The thesis continues to take a legal positivist approach to the question of whether or not current general and systematic measures of migration control by states are legitimate or indeed can be legitimised.

In order to set the conceptual parameters of this research, **chapter one** endeavours to come to an understanding of the concept of migration itself. However, in this exercise, obstacles in arriving at a global understanding of this concept soon become apparent. Until quite recently, research was carried out in a segmented manner, by individual disciplines following their own theories and methodologies. Only in the past few years have attempts been made to form bridges between the disciplines. While these developments constitute a considerable advance in improving our global understanding of this concept, all disciplines require reliable empirical data to test their theories. Given that to a large extent, these studies focus on cross border migration, cross border empirical data is imperative. Thus, another significant obstacle lies in the problem of a lack of comparability in international migration data due to a marked lack of political will to establish similar definitions and methods of data collection. This chapter makes clear that in the absence of state cooperation in obtaining international migration data, our global appreciation of this concept remains distorted. In order to know precisely what it is they are controlling and so to have any legitimate role in the control of migration, states will at a minimum have to take steps to remedy this situation.

With a similar goal to the previous chapter, **chapter two** seeks to come to an understanding of the concept of the state. A brief historical account traces the transition from early forms of social organisation to political organisation. From the birth of the modern state, political theorists have formulated varying theories aimed at justifying the existence and functions of this political entity. In a piecemeal and gradual manner, these theories have influenced the addition of elements to the modern state in the name of greater legitimacy, from the constitution to an independent judiciary. Others theories have ossified concepts, such as the nation state and sovereignty, which have proven less helpful in the quest for legitimacy. The modern state has been in a continuous state of flux, reacting to new theories and new social phenomena, and yet many regard the state as a rigid given and fail to even question its powers of control in areas such as migration. A theory which has recently gained in momentum is that of rationalisation – the idea that in order to take political action, there must be some minimum evidential basis to demonstrate that this in some way will advance the common good. This chapter contends that, beyond the few core functions of the state which have been legitimised on a traditional basis, no functions of the state can simply be taken as a given and must be demonstrated on each occasion to be justified on a rational basis. The onus is thus on the state to demonstrate on an evidential basis that it has a legitimate role in taking measures to control migration.

Chapter three analyses the development of state control of migration on an empirical level, focusing on certain developed and mainly receiving countries in Europe and America. Early control measures for the most part took as their point of departure 'freedom unless you pose a threat'. A significant turning point is then identified first in America and then generally across Europe on the advent of the First World War. Control measures took on a more general and systematic character and were clearly influenced by the racist ideologies that spurred on the war. The point of departure in this way became 'control unless we want you'. These measures were continued after the war period and both measures of direct and indirect control of migration have since been adopted at an increasing rate. It is widely presumed that the control of migration can be justified on a traditional basis, which fails to appreciate this significant turning point or the racist origins of such measures. Where attempts are made to justify such measures, they are commonly based on generic phrases such as the protection of state sovereignty or security. Little effort has been made by states to identify on an evidential basis how migration affects either of these vague interests.

Alongside this shaky foundation to the legitimacy of state control of migration, increasing limits from external forces have been placed on states' ability to adopt and enforce measures of control. **Chapter four** examines these external limits in four general categories. First, international and regional law place obligations on contracting states to afford certain individuals international protection, notably in accordance with the refugee and subsidiary protection regimes. Second, various international and regional fundamental rights regimes limit contracting states' ability to adopt both direct and indirect measures of control. Relevant rights protected include the right to liberty and security of the person, the right to respect for private and family life, the right to fair procedures in criminal law and the right to privacy. Third, certain regions are developing areas of free movement of goods, capital, services and to an increasing extent people. The leading example of the European Union is focused on with a brief mention of other regional migration regimes which are following suit. Finally, economists and economic lobbying groups are putting increasing pressure on states to remove some of the restraints on labour migration. With such increasing external pressure, the time is apt to consider more closely whether or not the state has a legitimate role in pursuing its own unilateral migration control agenda in direct confrontation with these limits.

Chapter five delves into a deeper analysis of the legitimacy of state control of migration on a theoretical basis. It commences with a clarification of what it is that is being sought to legitimise as distinct from issues beyond the scope of this thesis. This research confines itself to considering the legitimacy of state controls on the physical movement of people. It is acknowledged however that this inevitably leads to such issues as to what rights immigrants should be entitled and in what circumstances they should be accepted as naturalised citizens. A possible approach to these tangential issues is very briefly set out. The rest of the chapter is based on Weber's theories of

traditional and rational-legal legitimacy[14]. Traditional legitimacy is approached from both an international and internal perspective and it is found that neither perspective leads to a sufficient foundation on which the legitimacy of general and systematic state control of the movement of people can be based. Moving on to consider rational-legal legitimacy, very little evidence is found of any attempts to justify such control on an evidential basis, while evidence is found on the contrary of irrationality or incoherence between such measures of control and other state obligations. Empirical evidence of such incoherence is traced up to the level of the EU as an example, where conflicts between the intergovernmental arms of the EU as proponents for greater control come into conflict with wider interests of human rights and the economy voiced by the supranational arms. Given the problems in obtaining reliable data on international migration as outlined in the first chapter and the conflict between policies of migration control and other state policies in the fields of human rights and economic policy as identified in the fourth, states face a formidable task in trying to justify measures of control of the movement of people on an evidential basis as required by the theory of rational legitimacy. States must take further steps in order to ground the legitimacy of their control of this area.

Chapter six uncovers considerable obstacles a state will face in attempting to legitimise its general and systematic control of the movement of people. First, the technical incapacity of the state to achieve its immigration policy objectives is evidenced in various examples of state policies in the field of immigration control which were adopted with a specific objective in mind but on implementation led to quite a different outcome. An examination of the tangential issue of the cost-benefit ratio of such policies is also undertaken. Second, competing political interests of the state are identified as it tries to satisfy the needs of both particular interest groups and the general public. Various tactics are used to sway between these two poles, such as the association of immigration with topical political problems to rouse public interest or the use of visible measures of control of symbolic importance purely as a tool to elevate the political party above the opposition by demonstrating that no matter what the issue, they can deal with it in a more effective manner than the opposing party. The third obstacle in the competing economic interests of a state is evident in the difference in treatment by liberal states between international trade and international labour movement. This difference in treatment amounts to a fatal flaw in the logic of their liberal ideology and furthermore artificially curtails and distorts the working of the global economy, favouring those with goods and capital resources and prejudicing those with labour resources. If a state seriously seeks to legitimise its role in the control of the movement of people, it must do so on a transparent basis, clear about its objectives and what political interests are being served, and in a manner coherent to its overall economic policy, whether liberal or protectionist.

Chapter seven looks at possible steps that could be taken by states in order to overcome the

[14] Weber, *Economy and Society: An Outline of Interpretive Sociology*, *op. cit.*

obstacles set out in the previous chapter to legitimising its role in the control of the movement of persons. This chapter commences with short-term options and leads to more sustainable long-term options. At the national level, in order to improve the transparency of the decision-making process in the field of migration and to stand back from the risks of populist decision-making, the government could work with either an independent advisory body or directly with private actors holding an interest in the decision to be made. National courts have an important role in delineating the powers of the state in the control of the movement of people and must insist that any measures that are taken in this regard are justified on an evidential basis. Steps that could be taken at the global level are preferable at the very least in order to be able to improve the reliability of international migration data. The potential of existing candidates to stand as a new global migration body of an economic nature are considered, namely the International Organisation for Migration (IOM), the World Trade Organisation (WTO) and the International Labour Organisation (ILO). Three human rights based models are then considered and evaluated.

International cooperation in the field of migration tends to suffer from the same political weaknesses as national control, which is why a supranational approach at the regional level is submitted as the most sustainable long-term step towards legitimate migration control. Supranationalism places an emphasis on a broader regional common good and so escapes the confines and squabbles of a collection of nationalist views of the common good, while being more manageable than a universalist approach. In this regard, recent developments of the EU are considered, in addition to informal arrangements in other regions that can be used as a stepping stone to supranational regional control across the globe with the aim of ultimately leading to inter-regional cooperation on the basis of equality between regions. While the issue of dispute resolution at this inter-regional level would remain to be addressed, it is conceivable that equality between regions would lend itself towards respectful cross-regional judicial dialogue. As a last port of call, an international dispute resolution body or jurisdiction could be envisaged.

To conclude, this thesis seeks to answer three principal questions: first, can early state measures of migration control support the legitimacy of current such measures of a more general and systematic nature on a traditional basis? Secondly, can current state migration control measures of a general and systematic nature be legitimised on a rational-legal basis? Thirdly, are there any steps states could take with a view to improving the legitimacy of migration control measures? It is hoped that in considering these questions, this thesis will serve to pry open for debate the seemingly closed question of the role of the state in migration control.

1. The Concept of Migration

Introduction

Migration is a notoriously complex phenomenon; the more one delves into its multiple facets, the more questions seem to emerge. It has become a subject of research for a number of distinct disciplines ranging from economics and demography to sociology and political science, each of which approach the subject with their own theories and methodology. This has given rise to in-depth yet compartmentalised research and studies of either mathematical precision on the one hand or qualitative richness on the other. Recent efforts have nonetheless been made to approach this subject in an interdisciplinary manner in order to combine the advantages of the various distinct disciplines. A first step in this vein is to simply get academics from each discipline communicating with each other. The next step, namely trying to achieve some form of shared theoretical basis or methodological framework, has proven more difficult. A further significant obstacle which has been faced is in the collection of reliable empirical data on international migration in order to test the various theories proposed. This chapter will trace the efforts to date at deepening our understanding of this complex phenomenon.

§1 Understanding migration

Migration essentially means movement of people from one place, country, or region to another, for a minimum duration. This research will focus on movement across international borders, considering only tangentially internal movements of people within territorial borders, as the latter tend by their nature not to be subject to state control. Even with such a reduction in scope, this concept is far-reaching and encapsulates many different categories of people, moving in widely diverse patterns and for a multitude of reasons. In order to examine the state's role in controlling migration, it is first necessary to determine what exactly it is the state would be controlling.

A myriad of questions arise in approaching this task: who moves across international borders? Why do they move? Where do they move? How do they move? What do they experience in moving? What obstacles exist to this movement? What is the economic, demographic and social effect of this movement? The complexity of the concept of migration is evident in its inherently interdisciplinary nature: scholars in all social sciences have turned their attention to its study. With the individual approach of each discipline, research questions, definitions and methodologies vary. A recent study coordinated by Brettel and Hollifield, aiming to encourage interdisciplinary

dialogue on the subject, brought together essays by two sociologists, an anthropologist, a historian, a geographer, a demographer, an economist, a political scientist and a legal scholar[15].

A brief overview of the approach taken by each discipline to undertaking the task of explaining this concept serves to illustrate why it is that migration remains quite so misunderstood. Sociologists[16] were among the first to undertake its examination. Schmitter Heisler explains that central to their research are the questions of why immigration occurs and how it is sustained over time[17]. Taking a structuralist approach, social relations are key to understanding processes of migration and immigrant incorporation. Although the analysis is based on both sending country and receiving country societies, the main focus is on the latter and for this reason emphasis is placed more on the effects than the causes of migration. Anthropology, formed as a distinct discipline at a later stage, is described as a study of "the other"[18]: the focus here, Brettel[19] contends, is placed on sending societies and on the experiences of individual migrants. Beyond examining the who, when and why, anthropologists[20] seek to capture the meaning to the migrants themselves of social and cultural changes that result from leaving one society and entering another. Both the causes of migration and its effects on both individuals and communities are studied and in this way, crucial insights have been provided into the phenomena of migrant networks and transnational communities.

Considering the historical approach, Diner[21] observes that this provides a narrative of how specific groups settled, shaped their communities and constructed their identities. This approach tends to be

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[15] Brettel and Hollfield (ed.s), *Migration Theory: Talking across disciplines*, second edition, Routledge, New York, 2008. For further calls for an interdisciplinary approach to migration research, see Massey, Arango, Hugo, Kouaouci, Pellegrino and Taylor, "Theories of International Migration: a review and appraisal", *Population and Development Review* (Sep, 1993), Vol. 19, No. 3, pp. 431-466; Korinek and Maloney, "Immigration in the early 21st century: lessons from a multidisciplinary perspective", in Maloney and Korinek (eds.), *Migration in the 21st Century: Rights, Outcomes, and Policy*, Routledge, London and New York, 2011, pp. 269-279.

[16] See for example Portes and Rumbaut, *Immigrant America: A Portrait, Berkley and Los Angeles*, University of California Press, California, 1990; Massey, *Worlds in Motion: Understanding international migration at the end of the millennium*, Clarendon Press, Oxford, 1998; Soysal, *Limits of Citizenship: migrants and postnational membership in Europe*, University of Chicago Press, Chicago, 1994; Schmitter Heisler, "The sociology of immigration", in Brettell and Hollifield (eds.), *Migration Theory: Talking across disciplines* (2nd ed.), Routledge, New York, 2008, pp. 83-112; Ivan Light, *Deflecting immigration: networks, markets and regulation in Los Angeles*, Russell Sage, New York, 2006.

[17] Schmitter Heisler, "The sociology of immigration", *op. cit.*

[18] Brettel and Hollfield (ed.s), *Migration Theory: Talking across disciplines*, *op. cit.* at p. 5.

[19] Brettell, "Theorising migration in anthropology", in Brettell and Hollifield (eds.), *Migration Theory: Talking across disciplines* (2nd ed.), Routledge, New York, 2008, pp. 113-160.

[20] See for example Lambelet Coleman, "Individualising justice through multiculturalism: the liberals' dilemma", *Columbia Law Review*, Vol. 96 (1996), pp. 1093-1167; Magnarella, "Justice in a culturally pluralistic society: the cultural defense on trial", *Journal of Ethnic Studies*, Vol. 19 (1991), pp. 65-84; Volpp, "(Mis)Identifying culture: Asian women and the 'cultural defense'", *Harvard Women's Law Journal*, Vol. 17 (1994), pp. 57-101; Sassen, *Losing Control? Sovereignty in an age of globalisation*, Columbia University Press, New York, 1996.

[21] Diner, "History and the Study of Immigration" in Brettell and Hollifield (eds.), *Migration Theory: Talking across disciplines* (2nd ed.), Routledge, New York, 2008, pp. 31-50. See also Gabaccia, "Is everywhere nowhere? Nomads, Nations and the immigrant paradigm of United States history", *The Journal of American*

quite individualist: the examination focuses more on individual migrants as agents rather than how social structures influence and constrain behaviour. History serves to advance understanding of the intentions and ambitions of migrants. Geographers such as Hardwick[22], on the other hand and taking a more structuralist approach, use the spatial dimensions of migration and settlement in developing theories on aspects of migration covering transnationalism, diasporas, migrant networks and the way in which race is constructed. They also consider such related issues as the relationship between employment and residential patterns.

Teitelbaum[23] explains that demographers[24] examine the nature of population change through empirical models. Of the three primary forces of demographic change – fertility, mortality and migration – twentieth century demographers focused often only peripherally on the third. This is simply because demographic explanations "have not succeeded in addressing the rather messy realities and complexities inherent in the patterns of international migration"[25]. Nevertheless, by the methodology used, demographers tend to have the best empirical knowledge of the movement of people across borders and how such movements affect population dynamics in both sending and receiving countries. Furthermore, analysis of empirical models enables demographic studies to look to the future in constructing predictive models of population change. Chiswick,[26] speaking for economists, states that they also use empirical models in their methodological approach to the study of migration. From the rationalist premise that individuals act rationally to maximise their utility, a key research question for this discipline is under what conditions will the most favourable (in human capital terms and for labour market success) individuals migrate? More focus tends to be placed on the causes of migration rather than on its economic effects.

History, Vol. 86 (1999), pp. 1115-1134; Mageean, "From Irish countryside to American city; the settlement and mobility of Ulster migrations in Philadelphia", in Pooley and Whyte (eds.), *Migrants, Emigrants and Immigrants: a social history of migration*, Routledge, London, 1991 at pp. 42-61; Green, "The Comparative method of poststructural structuralism: new perspectives for migration studies", in Lucassen (ed.), *Migration, migration history, history: old paradigms and new perspectives*, Lang, Bern, 1997, at pp. 57-72.

[22] Hardwick, "Place, space and pattern", in Brettell and Hollifield (eds.), *Migration Theory: Talking across disciplines* (2nd ed.), Routledge, New York, 2008, pp.161-182. See also Montello, "Scale in Geography", in N.J. Smelser and P.B. Baltes (eds.), *International Encyclopaedia of the social and behavioural sciences*, Pergamon Press, Oxford, 2001 at pp. 13501-13504.

[23] Teitelbaum, "Demographic analyses of international migration", in Brettell and Hollifield (eds.), *Migration Theory: Talking across disciplines* (2nd ed.), Routledge, New York, 2008, pp. 51-62.

[24] See for example Passel, *Immigrants and taxes: a reappraisal of Huddle's 'the costs of immigration'*, Urban Institute, Washington D.C., 1994; Hill, "'Truth lies in the eye of the beholder': the nature of evidence in demography and anthropology", in Kertzer and Fricke (eds.), *Anthropological Demography: toward a new synthesis*, University of Chicago Press, Chicago, 1997, at pp. 223-247.

[25] Brettel and Hollfield (ed.s), *Migration Theory: Talking across disciplines*, *op. cit.* at p. 54.

[26] Chiswick, "Are immigrants favourably self-selected?", in Brettell and Hollifield (eds.), *Migration Theory: Talking across disciplines* (2nd ed.), Routledge, New York, 2008, pp. 63-82. See also Sjaastad, "The costs and returns of human migration", *Journal of Political Economy*, Vol. 70 (Supplement) (1962), pp. 80-93; Borjas, "Assimilation, changes in cohort quality and the earnings of immigrants, *Journal of Labour Economics*, Vol. 3 (1985), at pp. 463-489; Simon, "Immigrants, taxes and welfare in the United States", *Population and Development Review*, March 1984, pp. 55-69; Duleep and Regets, "Measuring Immigrant wage growth using matched CPS files", *Demography*, Vol. 34 (1997), pp. 239-249; Rothman and Espenshade, "Fiscal impacts of immigration to the United States", *Population Index*, Vol. 58 (1992), pp. 381-415.

The main concern for political scientists according to Hollifield[27] is to seek to understand how state and public policy affect migration flows and conversely how nations are designed and shaped by migration policy. A structuralist approach is taken and the focus is mainly on the experiences of receiving countries. Finally legal scholars such as Schuck[28], for their part, examine similar issues, but focus on legislative texts and their implementation. This discipline also takes a critical approach in examining the difficulties that exist in establishing a coherent regulatory regime to control migration and in attempting to explain why such large gaps exist between existing laws relating to migration and their implementation. The institution of fundamental rights and how it affects migration policy outcomes is also of interest.

The perspectives of economists, political scientists and legal scholars in particular will be examined in greater detail throughout this thesis. For now however this brief overview of the approach of the above disciplines simply serves to emphasise quite how different they are, which will assist in appreciating the difficulties encountered by scholars of all disciplines in attempting to work together on migration theories, difficulties that will be identified throughout this chapter.

It can nevertheless be said that two underlying theories of migration thread the studies undertaken of this concept in all disciplines. The first theory adopts an *individualist* or *rationalist approach* – that each migrant is a rational human being who carefully weighs up all his or her options, considers which place, country or region has the most advantages and least disadvantages and makes a decision on this basis[29]. Taking the *structuralist approach*, each migrant is more "like a ball in a pinball machine, knocked around by forces beyond his or her control. These forces could be economic, social or political – pushing people out of one country and pulling them towards another"[30]. A third theory – the *world systems theory* – considers not just individual decision-making and migration-specific external factors, but also flows of capital and goods; it examines

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[27] Hollifield, "The Politics of international migration", in Brettell and Hollifield (eds.), *Migration Theory: Talking across disciplines* (2nd ed.), Routledge, New York, 2008, pp. 183-238. See also Weiner, *The Global Migration Crisis*, HarperCollins, New York, 1995; Gary Freeman, "Modes of Immigration Politics in Liberal Democratic States", *International Migration Review*, Vol. 19 (1995), pp. 881-902; Zolberg, "International migration in political perspective", in Kritz, Keely and Tomasi (eds.), *Global Trends in Migration: Theory and Research in International Population Movements*, Centre for Migration Studies, New York, 1981.

[28] Schuck, "Law and the study of migration", in Brettell and Hollifield (eds.), *Migration Theory: Talking across disciplines* (2nd ed.), Routledge, New York, 2008, pp. 239-258. See also Legomsky, *Immigration and the Judiciary: Law and politics in Britain and America*, Oxford University Press, Oxford, 1987; Kagan, *Adversarial Legalism: the American way of law*, Harvard University Press, Cambridge, 2001.

[29] This theory is evident in such writing as Lee, "A Theory of Migration", *Demography*, Vol. 3, No. 1 (1966) pp. 47-57 and the collection of articles in Dejong and Gardner (ed.s), *Migration Decision Making: Multidisciplinary Approaches to Microlevel Studies in Developed and Developing Countries*, Pergamon Press, New York, 1981.

[30] Stalker, *The No-Nonsense Guide to International Migration*, New Internationalist Publications limited, Oxford, 2008, p. 21. See such writing as Portes and Walton, Labor, *Class, and the International System*, Academic Press, New York, 1981 and Morawska, "The Sociology and Historiography of Immigration" in Yans-McLaughlin (ed.), *Immigration Reconsidered: History, Sociology, and Politics*, Oxford University Press, New York, 1990, pp. 187-240.

how these all interconnect to form one seamless whole[31]. This theory aims to transcend the structures of knowledge inherited from the 19th century and notably the divisions between the above disciplines. The aim is to seek a comprehensive knowledge going beyond the illusions of the "three supposedly distinctive arenas" of society, economy and politics[32].

Each of these theories has its weaknesses however. Stalker observes that it is difficult to keep the initial two theories distinct: choices of individual migrants may be influenced by external forces, but different individuals respond in different ways to the same forces. He gives as an example of the overlap between these two theories the development of migrant networks. A common sequence is that initially a pioneer makes an individual decision to migrate to a new country; later migrants tend to go to places in which they already have contacts (a phenomenon termed *chain migration*). The initial individual decision develops into an external force influencing the migratory movements of others. As regards the world systems theory, this is most useful when examining migration within a limited geographic region e.g. between Mexico and the United States. However, when extended to larger areas, this theory becomes much too complex to be manageable. "Everything in the world is in some way connected to everything else, but accepting this does not get you very far"[33]. It seems as such that these theories individually are either too simplistic or too complex to be of use.

Having briefly considered the approaches of various disciplines to understanding the concept of migration and the underlying theories common to many, we will now look in greater detail at economic studies and explain how it gradually became evident that an interdisciplinary approach was warranted.

§2 An economic approach

Economists depart from the rational choice premise – that in the decision to migrate an individual will act rationally in order to maximise his utility. This of course does not include any forms of forced migration[34]. Initially, such theories were confined to solely economic determinants – the key goal was presumed to be to find a higher economic position in life. Migration research in

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[31] This theory originated with the following work: Wallerstein, *The Modern World System: capitalist agriculture and the origins of the European world-economy in the sixteenth century*, Academic Press, New York, 1974.

[32] Wallerstein, "Beyond Annales", *Radical History Review*, Duke University Press, Durham North Carolina (1991) no. 49, p. 14.

[33] Stalker, *The No-Nonsense Guide to International Migration*, *op. cit.*, p.24.

[34] Defined in the International Organisation for Migration *Glossary on Migration*, at p. 25, as a "general term used to describe a migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes (e.g. movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects)".

economics has tended to remain distanced from the other social sciences in this way[35]. In relation to the mass migration from Europe to the United States of America in the century following 1820, Hatton and Williamson make the following observations:

> This evidence suggests that those who emigrated had the most to gain from the move, and were likely, therefore, to be the most responsive to labour market conditions. By emigrating when young they were able to reap the gains over most of their working lives. By moving as single individuals they were able to minimise the costs of the move, including earnings foregone in passage and job search. Costs were reduced even further by the assistance of friends and relatives in the destination countries. Since the emigrants were typically unskilled, they also had little technology or country specific human capital invested and hence stood to lose few of the rents from such acquired skills (except for language).
>
> This picture reinforces the notion that economic forces were uppermost in migration decisions and that most migrants moved in the expectation of a more prosperous and secure life for themselves and their descendants ... As the technology of transport and communication improved, the costs and uncertainty of migration fell, and overseas migration came within reach of an increasing portion of the European population for whom the move offered the most gain. These forces accompanied by European famine and revolution gave rise to the first great surge of mass emigration in the 1840s[36].

The dominance or at the very least perceived dominance of this economic motivation is also reflected in the fact that since the subject of migration has entered the political arena, debate on labour migration has proven the most sensitive.

(i) The assumed three principal economic determinants

Predictive theoretical studies of economic migration have proposed three principal economic determinants: disparities in wages between rich and poor countries, employment rate differentials between same and the effects of economic globalisation[37]. The first determinant operates on the

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[35] See Boswell and Mueser, "Economics and interdisciplinary approaches in migration research", *Journal of Ethnic and Migration Studies*, Vol. 34, No. 4, (May 2008), pp. 519-529; Radu, "Social Interactions in Economic Models of Migration: a review and appraisal", *Journal of Ethnic and Migration Studies*, Vol. 34, No. 4, (May 2008), pp. 531-548; Brettel and Hollifield (eds.), *Migration Theory, talking across disciplines*, *op. cit.*, see introduction at pp. 1-30.

[36] Hatton and Williamson (ed.s), *Migration and the International Labor Market 1850-1939*, Routledge, London and New York, 1994, p.8.

[37] Stalker, *The No-Nonsense Guide to International Migration*, *op. cit.*, pp. 27-39. See also Borjas, "Economic theory and international migration", *International Migration Review*, Vo. 23, No. 3 (1989), pp. 457-485; Yap, "The attraction of cities: A review of the migration literature", *Journal of Development Economics*, Vol. 4, Issue 3, September 1977, pp. 239–264; Hatton and Williamson (ed.s), *Migration and the*

assumption that workers will move to a country in which they can expect to earn the highest level of wages for the same work carried out. Koser stresses that it is not underdevelopment *per se* that causes migration, "but rather differentials between different parts of the world. Per capita gross domestic product, which is the most commonly used economic indicator for what people earn, is 66 times higher in the developed world than in the developing world"[38].

In addition to the expected level of wages, the prospect of actually finding work is considered the second significant determinant. Here, individuals are assumed to migrate to locations in which they believe they are most likely to find work. Most academic writing on this topic simply points to the generalised differentials between developed and developing countries. Koser, for example, observes that "the highest incidence of unemployment in the world's major regions is in the Middle East and North Africa at over 12%, compared with about 6% across the industrialised economies"[39]. Such bare statistics on employment rates fail to take into account the complex and fluctuating nature of these differentials, which are to some extent a question of economic cycles: "when an economy starts to expand, employment opportunities increase and eventually there are more jobs than workers"[40].

The temporary nature of economic cycles can be appreciated in Stalker's outline of the wave of worldwide booming economies since the end of World War II[41]. Departing from the post-World War II context of a booming Europe, it was then evident that France and West Germany needed more workers than Spain and Italy could provide; as such, workers from North Africa, Turkey and elsewhere were recruited. In the same period, the United Kingdom actively attracted workers from India. He observes that the 1973 oil crisis shifted the focus to the countries of the Gulf. With the rise of the price of oil, the demand for workers slackened throughout Europe, but then simultaneously increased in the Gulf. Even when the price of oil fell in the 1980s and the Gulf countries needed fewer construction workers, the demand for workers remained high in the hotel and catering industry due to the rise in the standard of living in this region. By the late 1980s, the focus of intense economic development had moved on to South East Asia. "The tiger economies of

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International Labor Market 1850-1939, Routledge, London and New York, 1994; Graves, "A Reexamination of Migration, Economic Opportunity and the Quality of Life", *Journal of Regional Science*, 1976, Issue 16, pp. 107–112; Rothenberg Pack, Determinants of Migration to Central Cities, *Journal of Regional Science*, Vol. 13, Issue 2, (1973), pp. 249–260.

[38] Koser, *International Migration: A Very Short Introduction*, Oxford University Press, 2007. See also Stark and Yitzhaki, "Labour migration as a response to relative deprivation", Journal of Population Economics, June 1988, Vol. 1, Issue 1, pp 57-70.

[39] Koser, *International Migration: A Very Short Introduction*, *op. cit.*, at p.31.

[40] Stalker, *The No-Nonsense Guide to International Migration*, *op. cit.*, at p. 28.

[41] *Ibid.*, pp. 28-30. See also Hollifield, *Immigrants, Markets, and States: The Political Economy of Postwar Europe*, Harvard University Press, Cambridge, 1992; Zanoyan, "After the Oil Boom - The Holiday Ends in the Gulf", *Foreign Affairs*, Vol. 74, No. 6 (1995), pp. 2-7; Furman, Stiglitz, Bosworth and Radelet, "Economic Crises: Evidence and Insights from East Asia", *Brookings Papers on Economic Activity*, Vol. 1998, No. 2 (1998), pp. 1-135.

Singapore, Taiwan, South Korea and Hong Kong were rearing ahead and they too soon found themselves short of workers"[42]. This financial bubble in turn burst in 1997.

This wave of economic booms highlights the inherently unpredictable nature of economic cycles and places a question mark over the theoretical assumption that migrants will travel towards the country in which they are most likely to find work. In this fluctuating framework, an individual is highly unlikely to be able to make such a prediction. In the examples above, it was the receiving countries themselves that made positive efforts to attract foreign labour.

Such regional economic bubbles are becoming increasingly rare, however, with the development of a global economy, the effects of which constitute the third economic determinant influencing migration. Indeed the global financial crisis of 2008 might be seen as evidence of this. National economies of the world's developed states are becoming to such an extent interdependent as to give rise to the gradual formation of a global economic entity. This process has however the corollary effect of placing less developed economies under considerable pressure to develop at a speed sufficient to facilitate membership of this global entity. For many developing countries today, this is proving an impossible task. The effects of this third economic factor on international migration have been identified by Stalker:

> Developing countries today face an altogether more complex situation [than that of 19th century Europe following the industrial revolution], primarily because their process of modernisation has largely been shaped by technologies and ideas imported from – or imposed by – the industrial countries ... Nevertheless, the underlying principle is similar: economic and social development disrupts settled societies and creates the conditions for mass migration...[43].

Although these economic phenomena offer logical reasons in theory for the movements of people and do in fact explain some migration statistics in this area, they do not adequately explain all the statistics. The next section will identify the problems faced by economists in reconciling their theories with corresponding migration data and the increasing adaptations of the theories as a result.

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[42] Stalker, *The No-Nonsense Guide to International Migration*, *op. cit.*, at p. 29.
[43] *Ibid.*, pp.37-38. For a detailed account on the effect of globalisation on migration, see Stalker, *Workers without frontiers: the impact of globalisation on international migration*, International Labour Office, Geneva, 1999.

(ii) The principal assumptions don't add up

Several plain realities, evident from available migration statistics, cast a shadow on the assumption that individuals will migrate in order to better their economic position. Hatton and Williamson state that "one of the main challenges facing scholars has been to explain why emigration rates were not always highest from the poorest countries, whose populations would have gained most from the move, and why emigration rates often rose from low levels as successful economic development took place at home"[44]. Stalker also sets out some puzzling examples:

> Many people certainly want to escape poverty, but not all poor people migrate. Cote d'Ivoire, for example, with a capita GDP of $1,600, is by global standards a poor country yet relatively few of its people leave. The Netherlands on the other hand is one of the world's richest countries, with a GDP per capita of $31,789, yet in 2005 more people were leaving than arriving.
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> ...
>
> Perhaps the presence or absence of border controls will shape people's decisions. If so, why do Greek citizens, who are free to live and work anywhere within the EU, not all flock to Luxembourg where the average per capita income is three times as high?[45]

A number of empirical studies have demonstrated that the available migration data does not sit with the three principal economic determinants set out above[46]. Consideration of factors beyond those of a purely economic nature has therefore been required to address remaining discrepancies.

In endeavouring to explain the migratory statistics of their particular study, Hatton and Williamson found that economic variables alone were insufficient and so additional non-economic variables were considered. First, the "rate-of-natural-increase-lagged-twenty-years had a powerful effect on emigration rates... This demographic effect stimulated emigration directly by raising the share of the population in the prime emigration group, or by reducing the ability to acquire land, rather than simply indirectly by lowering the domestic wage"[47]. Another variable identified was that of the rate of industrialisation: emigration rates were seen to increase as the proportion of the labour force in the agricultural sector of the country of origin fell.

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[44] Hatton and Williamson (ed.s), *Migration and the International Labor Market 1850-1939*, *op. cit.*, p. 10.
[45] Stalker, *The No-Nonsense Guide to International Migration*, *op cit.*, pp. 20-21.
[46] Mayda, *International Migration: A Panel Data Analysis of Economic and non-Economic Determinants*, Institute for the Study of Labour, Bonn, 2005; Geis, Uebelmesser and Werding, *How do Migrants choose their destination country? An analysis of institutional determinants*, CESifo Working paper No. 2506, Munich, December 2008; Boswell and Mueser, "Economics and interdisciplinary approaches in migration research", *Journal of Ethnic and Migration Studies*, Vol. 34, No. 4 (May 2008), at p. 520; Greenwood, "Human Migration: Theory, models and empirical studies", *Journal of Regional Science*, Vol. 25, Issue 4, (1985) pp. 521–544.
[47] Hatton and Williamson (ed.s), *Migration and the International Labor Market 1850-1939*, *op. cit.*, p.9.

These economic-demographic-industrialisation variables fit into the statistics obtained from their study in the following manner:

> Some observers have argued that the typical pattern in Northwest Europe was that emigration started from low levels, rose to a peak and then declined... A long-run inverse "U" shape can be identified in the emigration histories of a number of countries in northwest Europe. The upswing of the emigration cycle usually coincided with industrialization and rising wages at home. Since this successful development often reduced the gap between real wages at home and abroad... we argue that [all the economic-demographic-industrialisation variables taken together] served to drive up the emigration rate in early stages of industrialisation. As these forces weakened, the narrowing gap between home and foreign wages began to dominate and emigration receded"[48].

A study carried out by the OECD in 2010 found that, similar to the findings of Hatton and Williamson above, "the relationship between the total emigration rate [to OECD countries] and the income level of origin countries follows an inverted U-shape"[49]. Although the former study based this finding on the average development of European countries over a certain time frame and the latter on the stage of development of all countries of origin at one point in time, both conclusions demonstrate that total emigration rates are very low for the poorest countries, higher for lower-middle and upper-middle income countries and decrease again for high income countries, a notable deviation from the initial three principal economic determinants.

In the initial stage of this inverted U-shape cycle, the poverty trap has a considerable effect:

> emigration was constrained in its early stages by the poverty of potential emigrants and their inability to save (or borrow) enough to finance a passage to the new world despite the strong economic incentive to do so... As industrialisation took place in the home country, real wage rates rose and the constraint on migration was gradually released. More and more migrants were able to finance the move and, in contrast with conventional theory, the home wage and the emigration rate rose together[50].

Once the poverty trap is overcome and in the presence of significant wage differentials between rich and poor countries, migratory movements are stimulated. Historical accounts demonstrate

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[48] *Ibid.*, p.10.

[49] Dumont, Spielvogel and Widmaier, "International Migrants in Developed, Emerging and Developing Countries: An Extended Profile", *OECD Social, Employment and Migration Working Papers, No.113*, 2010, at p. 9,
www.oecd.org/els/workingpapers

[50] Hatton and Williamson (ed.s), *Migration and the International Labor Market 1850-1939*, *op. cit.*, p.10.

however that these movements decrease long before the wage ratio is equalised. For example, "in Europe during the 1960s and 1970s, millions of workers went from Spain and Italy to France and Germany. But as incomes rose in the poorer countries, fewer people chose to leave, even though significant wage gaps remained ... When the home country starts to do better and local prospects brighten, people become more optimistic and prefer to stay at home[51]. This suggests, contrary to Koser's view as set out above[52], that underdevelopment is of greater importance than wage or employment rate differentials: once a country reaches a minimum threshold of development, its population will prefer to remain rather than migrate, even if other countries are more developed and offer better economic opportunities. Economic factors are not the sole consideration of any human being and non-economic factors are often underestimated.

Another finding that economic determinants fail to fully account for the statistics on migration was made by the Institute for the Study of Labor. A study it conducted in 2005 concludes that its "empirical analysis both delivers estimates broadly consistent with the theoretical predictions of a standard international-migration model and generates empirical puzzles"[53]. In comparing the influence of push and pull factors[54] on migration rates, one puzzling finding was that the effect of push factors in themselves was "seldom consistent with the theoretical predictions of the model, and, when it is, the size of the effect is smaller than for pull factors and is almost always insignificant"[55]. Given the wide variations in the data obtained on migration patterns in the countries considered, it is not surprising that all the findings could not be explained:

> Cross-country migration patterns vary considerably over time, and across destination and origin countries. Some OECD countries have experienced a decrease in the size of the annual immigrant inflow between 1980 and 1995[56]. Over the same years, the number of immigrants per year has increased in several other OECD countries[57]. The percentage change of the yearly immigrant inflow in this period ranges between negative 42% (in Japan) and positive 48% (in Canada). For all destinations, such changes are anything but monotonic. The variation in terms of origin countries is remarkable as well[58].

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[51] Stalker, *The No-Nonsense Guide to International Migration*, *op. cit.*, p. 27.
[52] *Supra* at p. 16.
[53] Mayda, *International Migration: A Panel Data Analysis of Economic and non-Economic Determinants*, *op. cit.*, p. 3.
[54] In this study pull factors are defined as "improvements in the mean income opportunities in the destination country" (p. 3) and push factors as "declining levels of per worker GDP in the origin country" (p. 4).
[55] Mayda, *International Migration: A Panel Data Analysis of Economic and non-Economic Determinants*, *op. cit.*, p. 19.
[56] For example, Australia, France, Japan, Netherlands and the United Kingdom.
[57] For example, in Belgium, Canada, Denmark, Germany, Luxembourg, Norway, Sweden, Switzerland and the United States.

From the above it is clear that economic determinants do not suffice in themselves to explain the available migration statistics using the theoretical predictive model. Indeed, Boswell and Mueser confirm that "economists recognise that there is often a substantial gap between the idealised models they have developed and the empirical phenomena they seek to explain"[59]. It must be remembered that although most individuals seek the best economic opportunities on offer, they do not exist in a vacuum and are members of families and social networks. These social factors play a significant role in any person's decision to uproot and leave their country of origin. This explains the significant contribution of sociology in the addition of sociological determinants to the existing economic theories.

§3 The contribution of sociology

The previous section traced how economists have developed their approach on the realisation that the initial assumed three principal determinants were insufficient to explain available data on migratory movements. Various non-economic determinants were added to the economic predictive models in an attempt to further explain the data. It has become increasingly apparent that in choosing such non-economic determinants, the more qualitative work of sociologists in particular is of great assistance.

Haug comments that while the study of Brettel and Hollifield was a good starting point, interdisciplinary research needs to take the next step of establishing links and common ground between disciplines. In particular relation to the fields of economics and sociology she observes that:

> In some areas, the economics and the sociology of migration are converging and overlapping. Economics can incorporate social networks and non-economic decision factors in order to be more realistic. Sociological research can draw on economic models in rational choice theory and the social embeddedness of migration decisions to enhance theoretical clarity and concreteness[60].

In this vein, it is noteworthy that Hatton and Williamson identified two further non-economic determinants in their study of international migration from 1850-1939 as the emigration rate in the previous decade and the stock of previous emigrants living abroad:

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[58] Mayda, *International Migration: A Panel Data Analysis of Economic and non-Economic Determinants*, *op. cit.*, p. 2.
[59] Boswell and Mueser, "Economics and interdisciplinary approaches in migration research", *Journal of Ethnic and Migration Studies*, Vol. 34, No. 4 (May 2008), at p. 520.
[60] Haug, "Migration networks and migration decision-making", *Journal of Ethnic and Migration Studies*, Vol. 34, No. 4, (May 2008), pp. 585-605, at p. 599.

> These variables reflect the important pull of earlier migrants – the 'friends and relatives' or 'chain migration' effect stressed by many historians... both proved to be very important and significant: for example, every additional thousand of past emigrants induced an additional twenty emigrants to leave each year. There is independent evidence supporting this powerful influence. Among all European immigrants arriving in the United States in 1908-9, 94.7 percent said they were joining friends or relatives[61].

They also considered that access to information was a crucial catalyst in the early stages of emigration. As the information on emigration possibilities dispersed, emigration rates rose; but as this information became old news, the rate of emigration stagnated. This latter argument was to some degree supported by the fact that "there were vast differences in emigration intensity within any given country, and that these tended to narrow over time, presumably as knowledge of opportunities diffused"[62].

More recent studies suggest that such factors remain of considerable importance today. "Most migrants move to countries where they have friends or family already established, forming what are often referred to as transnational migration networks"[63]. Koser contends that one of the main reasons for rising rates of migration lies in these migration networks and their self-perpetuating nature. They also seem to be highly robust to changes in the level of economic prosperity in destination countries[64]. Through a qualitative study of Mexican migrant communities in various regions of the United States, Bacon gives an insightful account of this phenomenon of transnationalism. He explains that "their ties to each other are so strong, and the movement of people so great, that in many ways they belong to a single community that exists in different locations, on both sides of the borders that formally divide their countries"[65]. The self perpetuating nature of these migrant flows is evident in the names that have been coined for certain places of destination: for example, Oaxacan migrants have clustered together in a region of California now known as 'Oaxacalifornia'; the same effect of migrants from the Mexican State of Puebla in New York founded the area of 'Pueblayork'.

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[61] Hatton and Williamson (ed.s), *Migration and the International Labor Market 1850-1939*, *op. cit.*, p. 9.
[62] *Ibid.*, p.10.
[63] Koser, *International Migration: A Very Short Introduction*, *op. cit.*, p. 36. See also Gurak and Caces, "Migration networks and the shaping of migration systems", in Kritz, Lim and Zlotnik (eds.), *International migration systems: a global approach*, Clarendon Press, Oxford, 1992, pp. 150-76; Woodruff and Zenteno, "Migration networks and microenterprises in Mexico", *Journal of Development Economics*, Vol. 82, Issue 2, (2007), pp. 509–528; Light, Bhachu and Karageorgis, "Migration Networks and Immigrant Entrepreneurship" in Light and Bhachu (eds.), *Immigration and Entrepreneurship: Culture, Capital, and Ethnic Networks*, Transaction Publishers, Somerset, 2004, pp. 25-50.
[64] Koser, *International Migration: A Very Short Introduction, op. cit., at* p. 37.
[65] Bacon, *Communities without Borders – Images and Voices from the World of Migration*, Cornell University Press, Ithaca, New York, 2006, p. xv. For a further study on transnationalism in the African context from a geographical perspective, see Mercer, Page and Evans, "Unsettling connections: transnational networks, development and African home associations", *Global Networks*, Vo. 9, No.2 (2009), pp. 141–161.

Another recent study found evidence of this phenomenon among migrants in Spain and Italy who had travelled from five countries of origin: Turkey, Morocco, Egypt, Ghana and Senegal[66]. Besides the finding that the primary source of information on migration possibilities was received from family members already present in the destination country, it also interestingly found that "surprisingly few migrants knew anything about admission regulations"[67]. Not only is evidence of chain migration widespread, Massey observes furthermore that the effects of this phenomenon evolve over time, something he describes as the "cumulative causation over time" of migration[68].

Stalker offers examples of how migrants' movements have been influenced by historical and particularly colonial links[69]: French recruitment of Africans from its colonies after the First World War, recruitment of labour from the Caribbean and the West Indies by the UK following the Second World War and in a similar vein though not based on colonial ties, recruitment of Mexicans in the US at the beginning of the twentieth century and of Turkish workers in Germany in the early 1960s and 1970s. He highlights that "in all these cases, the labour-receiving countries took the initiative. Indeed the industrialised countries deliberately started almost all the major international flows of the past century. Once they had established the routes and links, however, the migration flows took on a life of their own"[70]. Another concept he considers is a 'culture of emigration' in certain communities:

> This has long been the case in the Caribbean where a history of slavery and indentured labour has left fractured societies in which emigration is seen as one of the most natural options. Young men who have few opportunities at home have come to regard emigration, even if only temporary, as a rite of passage. A similar phenomenon seems to have emerged in Mexico where a whole generation of young people in many communities now directs its aspirations towards El Norte[71].

The 2010 OECD study found that there was an important difference between emigration to OECD and non-OECD countries: in the latter case emigration rates steadily decrease as the level of income of the origin country increases (as opposed to the inverse-U cycle in the former). Non-economic variables considered were found to explain this difference: "distance more strongly

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[66] Schoorl, Heering, Esveldt, Groenewold, van der Erf, Bosch, de Valk and de Bruijn, *Push and pull factors of international migration: a comparative report*, Eurostat, Luxembourg, 2000.
[67] *Ibid.*, at p. 103.
[68] Massey, "Social Structure, Household strategies, and the Cumulative Causation of Migration", *Population Index*, Vol. 56, No. 1 (Spring, 1990), pp. 3-26.
[69] Stalker, *The No-Nonsense Guide to International Migration*, *op. cit.*, p. 41. See also Robinson and Carey, Peopling Skilled International Migration: Indian Doctors in the UK, International Migration, Vol. 38, Issue 1, (2000) pp. 89–108; Darby, African Football Labour Migration to Portugal: Colonial and Neo-Colonial Resource, Soccer & Society, Vol. 8, Issue 4, 2007, pp. 495-509.
[70] Stalker, *The No-Nonsense Guide to International Migration*, *op. cit.*, p. 41.
[71] *Ibid.*, p. 114. For more information on the culture of migration in Mexico see Cohen, *The Culture of Migration in Southern Mexico*, University of Texas Press, Texas, 2004.

affects migration between South-South pairs of countries ... [and] dyad-specific variables such as common language or a past colonial relationship retain a strong explanatory power"[72]. This finding is noteworthy when considered in conjunction with another of its findings that: "Most destination countries receive mainly migrants born in the same region (about 85% in Africa, 75% in Asia, 62% in Latin America and 60% in Europe)"[73].

Adding all these sociological factors, and indeed spill over historical and geographical factors, to the pot makes it clear that what is simply termed economic migration is largely more complex than predictive theoretical models would have us believe. Furthermore, although an interdisciplinary approach is to be encouraged, Radu[74] warns that there are theoretical limits to this endeavour. For example, the economic approach is based on rational-choice theory – that individuals will weigh up the costs and benefits of the decision to migrate and act in such a way as to maximise their own utility. This is fundamentally an individualist perspective and even attempts to take into account social interactions and family decision-making in order to determine behaviour at the group level "is itself an aggregation of individual behaviours"[75] when calculated according to economic models. He notes two further problems related to determining what precisely are the determinants at play to be tested and to the difficulty of identifying social interactions in the migration data commonly available[76].

The following section will demonstrate that while the above highlights the difficulties in establishing a theoretical model of determinants for migration decisions, whether economic or sociological[77], it is equally difficult to collect reliable empirical data on migration to test same.

§4 The contribution of demography: empirical data

Obtaining data on international migration is not an easy task. Carrying out empirical studies on cross-border migration is necessarily an international endeavour and requires cooperation and coordination between states. Where this is not the case, and as will be demonstrated below, considerable problems of lack of comparability and reliability arise.

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[72] Dumont, Spielvogel and Widmaier, "International Migrants in Developed, Emerging and Developing Countries: An Extended Profile", *op. cit.*, at p. 34.
[73] *Ibid.*, p. 8.
[74] Radu, "Social interactions in economic models of migration: a review and appraisal", *Journal of Ethnic and Migration Studies*, Vol. 34, No. 4 (May 2008), pp. 531-548. See also Boswell, "Combining economics and sociology in migration theory", in the same special edition, at pp. 549-566.
[75] Radu, "Social interactions in economic models of migration: a review and appraisal", *op. cit.*, at p. 542.
[76] *Ibid.*, at p. 541.
[77] Political and legal determinants for migration flows will be discussed in more depth in later chapters. This section serves to simply highlight the conceptual and methodological difficulties that can arise even confining the analysis to a socio-economic approach.

(i) Problems inherent in collecting migration data

Early empirical migration studies collected data in an *ad hoc* manner from such sources as national censuses, national immigration / emigration records and surveys and studies carried out by individuals. Several problems arise with these sources in themselves: official government sources are unreliable to the extent that they cannot measure irregular migration statistics (beyond recorded apprehension rates of illegal migrants)[78]; individual studies tend to be of a more qualitative than quantitative value, providing an insight into the experiences of individuals and limited sectors of a migrant population, but failing to provide a comprehensive picture of the whole. A stoic attempt to overcome these problems is Massey's ethnosurvey. This is a research design that comprises five specific design features: multimethod data collection, representative multisite sampling, multilevel data collection, life history collection and parallel sampling. However, given the substantial investment of finance and professional time required, Massey concludes that "the ethnosurvey is best seen as a supplement to other sources of immigration data, providing specialised information on the social processes that underlie the aggregate patterns revealed in national statistics"[79].

However, using national statistics to carry out cross-border studies is simply not feasible due to differing definitions, uncorrelated data and selectivity. King explains that:

> the validity of statistics on any form of migration is restricted by country-specific methods of data collection and complicated by definitions of migration. Generally speaking, in order for migration to be recorded, a statistical boundary must be crossed and some threshold of time spent in the destination place must be exceeded.[80].

The collection of migration data becomes problematic on incorporating the finer details. Diverse national legislative provisions defining such terms as citizenship, short and long term residency and setting out the necessary requirements for visas and work permits etc. render the collection of cross-border data on such topics very difficult. The effect of this difficulty in stalling the collection of international migration data was noted in a recent study on economic migration: "while clearly it is important to understand the driving forces behind recent international migration patterns, a limited amount of empirical research has been devoted to this topic, perhaps due to past

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[78] For an analysis of the considerable problems relating to efforts to collect data on irregular migration, see Koser, "Dimensions and dynamics of irregular migration", *Population, Space and Place*, Vol. 16 (2010), pp. 181-193.

[79] Massey, "The Ethnosurvey in theory and practice", *International Migration Review*, Vol. 21, No. 4 (Winter 1987), at p. 1515. See also, Massey and Zenteno, "A Validation of the ethnosurvey: the case of Mexico-US Migration", *International Migration Review*, Vol. 34, No. 3 (Autumn 2000), pp. 766-793.

[80] King (ed.), *The History of Human Migration*, New Holland, 2007, p.9. See for a possible, if limited, response to this problem: de Beer, Raymer, van der Erf, van Wissen, "Overcoming the Problems of Inconsistent International Migration data: A New Method Applied to Flows in Europe", *European Journal of Population*, 2010, Vol. 26, Issue 4, pp 459-481.

unavailability of cross-country data on migration"[81]. Other analysts comment that "our understanding of the mechanisms and patterns of international migration over time are impeded both by the lack of data and by inconsistencies in the measurement and collection of the data that are available"[82].

Beyond definitional divergences, national migration statistics from different countries may in fact be quantifying different things. For example, some sources of data measure migrant "flow", others migrant "stock". These terms can be defined as follows: "migrant flow is the number of migrants counted as moving or being authorized to move, to or from a country to access employment or to establish themselves over a defined period of time. Migrant stock is the number of migrants residing in a country at a particular point in time"[83]. In their recent research published in March 2014, Abel and Sander maintain that "the discrepancies between the demand for flow data and the availability of migrant stock data have hindered theoretical development and have led to conjectures concerning increases in the overall volume of global migration and shifts in spatial patterns"[84]

A further problem is when migrant flow data solely measures immigration rates (gross immigration rates), failing to account for return migration (net immigration rates). Hatton and Williamson observed that the US immigration statistics, among the sources of data they relied on, "typically refer to gross rather than net flows. The distinction becomes increasingly important as the upward trend in gross emigration is partially offset by an even steeper rise in return migration later in the century. United States authorities estimated that between 1890 and 1914 return migration was 30 percent of the gross inflow"[85]. To overcome this problem they found that "for most purposes, the migrant flow relative to country population is a more relevant statistic than absolutes"[86].

This links in to the problem of the selectivity of migration statistics – often highly relevant data is simply not considered. King emphasises the relative importance of this often unconsidered element of return migration in the overall context of international migration:

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[81] Mayda, *International Migration: A Panel Data Analysis of Economic and non-Economic Determinants*, Institute for the Study of Labour, Bonn, 2005, p. 2.
[82] de Beer, Raymer, van der Erf and van Wissen, "Overcoming the problems of inconsistent international migration data: a new method applied to flows in Europe", *European Journal of Population*, (2010), Vol. 26, pp. 459-481 at p. 460. Massey previously highlighted this problematic lack of data – see Massey, Arango, Hugo, Kouaouci, Pellegrino and Taylor, "An Evaluation of International Migration Theory: the North American Case", *Population and Development Review* (Dec., 1994), Vol. 20, No. 4, pp. 699-751, at p. 700.
[83] IOM, *Glossary on Migration*, p. 41.
[84] Abel and Sander, "Quantifying global international migration flows", *Science*, Vol. 343 (March 2014), pp. 1520-1522, at p. 1520.
[85] Hatton and Williamson (ed.s), *Migration and the International Labor Market 1850-1939*, *op. cit.*, p. 5.
[86] *Ibid.*, p. 6.

> Return is the great unwritten chapter in the history of migration. From the available evidence, decisions to return-migrate are more complex and ambivalent than the often economically driven motives for emigration. Some returns take place because it was always the migrant's intention to do so; it is the natural corollary of temporary migration. Others are triggered by nostalgia or family responsibilities, such as the need to care for aged parents or the wish to educate young children in the language and culture of the home country. Yet other returns are economically motivated, when a migrant comes home to invest foreign-earned income and savings in a new business or some other project. Finally, return migration can be driven by negative factors operating within the host country: racism, unemployment or poor health[87].

The need for reliable and comprehensive international migration data is becoming increasingly evident. Theoretical assumptions, popular belief and media exaggeration tend to overshadow the underlying facts. Abowd and Freeman analysed the data compiled by the National Bureau of Economic Research on immigration into the US from 1950-1980 and found that the relevant media reports had grossly exaggerated the numbers of immigrants involved: "The flow of illegal immigrants to the United States, while sizeable, falls far short of the huge numbers often reported in the media. NBER estimates of Mexican-born illegal immigrants [calculate that] the number of illegal Mexican immigrants in 1980 was on the order of two million rather than ten to twelve million"[88].

The value of reliable international data on migration is succinctly demonstrated by a few statistics set out by King:

> The global data on international migration are revealing, since they show many misconceptions to be false. According to the United Nations, there were 191 million international migrants in 2005 – people officially recorded as residing in a country other than that of their birth. This figure represents only 3 % of the world's population, a proportion that has changed little in recent decades (it was 2.3% in 1965). In other words international migration is increasing only fractionally faster than global population growth[89].

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[87] King (ed.), *The History of Human Migration*, *op. cit.*, p. 9. For studies demonstrating the significance of return migration see: Zhao, "Causes and Consequences of Return Migration: Recent Evidence from China", *Journal of Comparative Economics*, 2002, Vol. 30, Issue 2, pp. 376–394; Gmelch, "Return Migration", *Annual Review of Anthropology*, Vol. 9, (1980), pp. 135-159; Dustmann, "Return migration, uncertainty and precautionary savings", *Journal of Development Economics*, 1997, Vol. 52, Issue 2, pp. 295–316.

[88] Abowd and Freeman, *Immigration, Trade and the Labour Market*, University of Chicago Press, 1991, p. 21.

[89] King (ed.), *The History of Human Migration*, *op. cit.*, p. 10. For similar observations on world migration statistics, see Abel and Sander, "Quantifying global international migration flows", *op. cit.*, at p. 1521; Castles, "The factors that make and unmake migration policies", and Hollifield, "The emerging migration

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> Taking the broad categories of the global North and the global South, and based again on the stock of migrants in 2005, 33% are South-North, 32% are South-South, 28% are North-North and 7% are North-South. Therefore, only one in three global migrants move from the poorer South to the richer North[90].

The international community is gradually creating the tools necessary to address this information gap. More recent research studies in this area have been able to obtain increasingly reliable international data from such sources as the world population statistics of the UN Statistics Division, the ILO database on international labour migration statistics, the world development indicators of the World Bank and the SOPEMI reporting system and DIOC database of the OECD[91].

(ii) International sources of migration data

The quality of sources of international migration data has improved over the years. The first demographic yearbook of the UN Statistics Division of 1948 highlighted the numerous problems relating to the collection of international migration data at that time:

> Statistical tables of international migration are subject to many more difficulties than are tables on population, vital statistics and most other demographic subjects. These difficulties are due to the absence of a uniform and practical definition of the term migrant in the statistical returns of the various countries. Also the practical problems to be solved in collecting adequate statistics of migrants are many. Fundamentally, migrants must be distinguished from all other travellers crossing international borders; and in most cases, the distinction can only be made on the basis of declared intention regarding length of stay, exercise of an occupation, etc. ...
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> The principal [conditions necessary in order to have correspondence of data] are: equivalence in all countries of methods of collection and of the definitions of immigrant and emigrant; identity of time references of the data; compatibility of the respective lists of countries of intended residence and of countries of last residence. Less fundamental conditions would also have to be satisfied, such as recording of

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state", both in Portes and deWind (eds.), *Rethinking migration: new theoretical and empirical perspectives*, Bergahn Books, New York, 2008 at p. 38 and 69 respectively.

[90] King (ed.), *The History of Human Migration*, *op. cit.*, p. 12. In terms of flows, Cornelius and Rosenblum observe that "a substantial majority of overall international migratory flows are within the global South", Cornelius and Rosenblum, "Immigration and politics", *Annual Review of Political Science*, 2005, Vol. 8, at p. 111. See also the 2014 study of Abel and Sander, "Quantifying global international migration flows", *op. cit.*, at p. 1522.

[91] See such studies as Dumont, Spielvogel and Widmaier, "International Migrants in Developed, Emerging and Developing Countries: An Extended Profile", *op. cit.* and Mayda, *International Migration: A Panel Data Analysis of Economic and non-Economic Determinants*, *op. cit.*

persons changing their destination *en route* and of births and deaths during the period of travel; adjustment of the data for differences in the time references of the questions put to the migrants at the places where the data are collected, so as to deal with journeys extending beyond the end of a calendar year[92].

The UN has continuously endeavoured to improve the reliability of its statistics through encouraging the use of common definitions and common data collection methods. In 1998, it published a detailed report "Recommendations on Statistics of International Migration, Revision 1"[93], revising a 1979 report and addressing contemporary developments, such as the greater variety of migrant subcategories subsumed within the generally accepted broad definition of a migrant and the recognition that countries were continuing to a large degree to use their own definitions in collecting data. A glaring admission of this report is that: "it is beyond the scope of these recommendations to provide guidance about the estimation methods or special data-collection procedures that may be used to obtain acceptable measures of irregular migration"[94].

Its technical report of 2004 "United Nations Demographic Yearbook Review"[95] evaluates the effectiveness with which Demographic Yearbook data on international migration are collected, compiled and disseminated and assesses the level of reporting of international migration statistics from countries to the UN Statistics Division. The fact that during the previous three decades there had been a general decline in the level of reporting of international migration data was a notable cause for concern[96]. This evaluation makes clear that although the reliability of international migration statistics has greatly improved, certain difficulties in its collection, compilation and dissemination remain.

The International Labour Organisation has developed a database on the particular aspect of international labour migration (ILM) statistics. This contains data for over 200 countries or territories dating back in some cases to 1986. Data collection is by means of a common questionnaire[97] jointly developed and used by the UN Statistics Division, the ILO, the European regional bodies of the Statistical Office of the European Communities (EUROSTAT) and the Council of Europe. From 1st January 2008, the ILM database has been integrated with the ILO

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[92] United Nations, *Demographic Year Book 1948*, pp.31 and 33.
[93] United Nations, Department of Economic and Social Affairs, Statistics Division, *Recommendations on Statistics of International Migration, Rev. 1*, 1998,
[http://unstats.un.org/unsd/publication/SeriesM/SeriesM_58rev1E.pdf].
[94] *Ibid.* p.10, para. 11.
[95] United Nations, Department of Economic and Social Affairs, Statistics Division, *Demographic Yearbook Review*, April 2004,
[http://unstats.un.org/unsd/demographic/products/dyb/techreport/migration.pdf].
[96] *Ibid.* p. 1.
[97] ILO, Labour migration statistics questionnaire,
[http://ilo-mirror.library.cornell.edu/public/english/protection/migrant/download/ilmdbqs.pdf].

database on Labour Statistics (LABORSTA)[98] operated by the ILO Bureau of Statistics. With these data, several volumes on "Sources and Methods" are published in order to provide basic methodological information on the different sources and methods used in each participating country and to set out the limits of the comparability of the data obtained. In order to enhance the latter, key descriptions are standardised as far as possible, but for the most part, broad headings are used and the participating countries required to set out the precise national definitions used. Such transparency in the limits of the comparability of international data goes to some extent towards improving its reliability.

The world development indicators of the World Bank include data from 209 countries dating from 1960. Of the 298 indicators for which data is collected, only four indicators relate directly to international migration: net migration, emigration rate of tertiary educated (% of total tertiary educated population), International migrant stock (% of population) and international migrant stock (total). Statistics on such are available from 1981. The World Bank is also very much conscious of the need for reliable data in the compilation of international statistics and has collaborated with the International Monetary Fund in developing the "Data Quality Assessment Framework (DQAF)" as a methodology for assessing data quality[99]. In its 2013 report on World Development Indicators, however, comparability of data is stated to remain a problem in many sections of the report: "comparability of population indicators is limited by differences in the concepts, definitions, collection procedures, and estimation methods used by national statistical agencies and other organizations that collect the data"[100].

The OECD has also, since the early 1970s, collected migration data by means of individual contributions of national correspondents appointed by the OECD Secretariat. This network of correspondents, constituting the Continuous Reporting System on Migration (SOPEMI), covers most OECD member countries as well as the Baltic States, Bulgaria and Romania. The OECD is quite frank as to the limits of the quality of these data. The statistical annex to its 2013 annual "International Migration Outlook" report states that:

> ... these data are not necessarily based on common definitions ... The continuous reporting system on migration has no authority to impose changes in data collection procedures. It is an observatory which, by its very nature, has to use existing statistics. However, it does play an active role in suggesting what it considers to be

[98] International Labour Migration statistics database of the ILO, [http://laborsta.ilo.org/STP/guest].
[99] The World Bank website: "Data quality and effectiveness", http://data.worldbank.org/about/data-overview/data-quality-and-effectiveness; IMF, DQAF factsheet, http://dsbb.imf.org/images/pdfs/dqrs_factsheet.pdf.
[100] World Bank, World Development Indicators 2013, at p. 25,

> essential improvements in data collection and makes every effort to present consistent and well-documented statistics ... These data have not been standardised and are therefore not fully comparable across countries. In particular, the criteria for registering persons in population registers and the conditions for granting residence permits, for example, vary across countries, which means that measurements may differ greatly even if the same type of source is being used. In addition to the problem of the comparability of statistics, there is the difficulty of the very partial coverage of unauthorised migrants[101].

In addition, the OECD has established a database on Immigrants in OECD countries (DIOC) which provides a more comprehensive selection of information on a broad range of demographic and labour market characteristics of such immigrants, but is limited to data gleaned from censuses carried out by the participating countries around the year 2000. With the increasing importance of South-South flows of migrants, this database has since been extended (DIOC-E) to include data from a number of key destination countries outside the OECD, again from around the year 2000[102]. While this database provides much more detail than the above sources of international migration data, temporal comparisons cannot be made and its quality is subject to the same difficulties of relying on a collection of national census results.

While these advances in the comparability of international migration data have to some extent improved the reliability of statistics in this field, reliance is still placed on the efforts and cooperation of individual states. A recent paper drawn up for the 2005 Report of the Global Commission on International Migration suggests that a lack of national political will continues to curb progress towards truly reliable international migration statistics:

> 18. Countries collecting data do so to support their own national legislative, policy and administrative imperatives. For this reason most of the countries surveyed indicated that it would not be possible for them to adopt a standard or universal list of defined terminology. Even if there was a will to adapt to such a list, other possible reasons cited for making this impractical were listed, to wit, inconsistency with current data collection systems; expense associated with altering data collection systems; possible legislative difficulties for change to be facilitated; insufficient relevance for own data collection needs. The adoption of a standard list of defined

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http://databank.worldbank.org/data/download/WDI-2013-ebook.pdf.

[101] OECD, *International Migration Outlook 2013*, at p. 312, [http://www.oecd.org/dataoecd/59/38/43180015.pdf].

[102] The database on immigrants in OECD countries (DIOC), released in 2008 by the OECD incorporates detailed information on immigrant populations in 28 OECD countries around the year 2000; DIOC-E has since expanded this database to cover 61 non-OECD destination countries, [http://www.oecd.org/document/56/0,3343,en_2649_33931_40644339_1_1_1_37415,00.html].

> terms appears therefore to be of academic interest only although the existence of lists such as that found in the Glossary to the UN Recommendations and other lexicons of terminology permits a general understanding of those terms[103].

Furthermore, in their research published in 2014, Abel and Sanders produced a comparable set of global migration flows by simultaneously replicating migration stock and place-of-birth data for 196 countries and accounting for changes in populations from births and deaths. They notably demonstrated considerable differences between snapshots of their flow estimates as compared with the U.N. sequential migrant stocks recorded at the same time[104], a proven marked weakness in currently available international migration data.

§5 From an interdisciplinary to a post-disciplinary approach

The concept of migration has proven a difficult one to grasp both for reasons of the segmented approach that had been taken by individual disciplines until relatively recently and the lack of comparability of international migration data. Facing such limits, Massey makes a forceful argument for a move towards interdisciplinary awareness and research:

> In the end, what is needed most is not better methods, better data, or different theories, but a simple realization that the fragmented way social scientists have pursued the study of human migration in the past is not likely to bear much additional fruit. What is needed now is for migration researchers in all fields to read more of one another's work and to spend more time thinking about how to integrate their theories and findings[105].

Although Brettel and Hollifield made significant efforts to initiate such interdisciplinary awareness, further efforts, notably in the fields of economics and sociology, suggest that a more far-reaching approach may be called for. Favell proposes what he calls a "post-disciplinary" approach; in his view, "the political mode of carving up the world into nation-states is utterly pervasive and ever present in *all* the existing disciplines and their debates"[106]. He suggests that the approach of existing disciplines, and equally any process of interdisciplinary dialogue, is of no assistance in furthering our knowledge of migration. He instead advocates:

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[103] Parker, *International migration data collection: A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration*, September 2005, [http://www.gcim.org/attachements/TP11.pdf].
[104] Abel and Sander, "Quantifying global international migration flows", *op. cit.*, at p. 1521.
[105] Massey, "Social Structure, Household strategies, and the Cumulative Causation of Migration", *op. cit.*, at p. 19.
[106] Brettel and Hollfield (ed.s), *Migration Theory: Talking across disciplines*, *op. cit.* p. 271.

> preserving the focus, uppermost to migration studies, on real people moving in real space – not virtual and nonhuman forms of mobility… What is it that makes the "illegal" migrant crossing a given border different than the "legal" immigrant, the foreigner on a holiday visa, the lorry driver, or the shopper over for the day? The mobility of goods and services, and even sometimes capital, also involves the physical movement of persons across borders. Minus the nation-state, we might very easily see the fruit pickers on the other side of the sea, who pick the bananas we enjoy at breakfast, as part of our society; they are certainly an essential part of our economy, that is, our market for fruit. Similarly, there is a deep truth for the Mexicans in California who complain, when accused of illegality, that they did not cross the border, the border crossed them. What makes the "illegal migrant" different is that a nation-state has decided to name the movement that way – as a way of asserting its own sovereign existence[107].

This is to suggest that a move away from the political convention of existing disciplines is key to advancing our understanding of migration and echoes the propositions of Wallerstein's world systems theory set out at the beginning of this chapter. The post-disciplinary approach is based on the premise that boundaries and definitions associated with the concept of the state act as significant obstacles to our ability to deepen our knowledge of the concept of migration.

Conclusion

From the above it is clear that the presumed principal economic determinants of disparities in wages between rich and poor countries, employment rate differentials between same and the effects of economic globalisation do not account for all movements that have been placed in the category of economic migration. Sociology has been able to assist in suggesting possible non-economic determinants that can be included in predictive theoretical models, such as cultural links, transnational migrant networks and chain migration. Significant problems have arisen however in placing the fundamentally individualist approach of economics and the structuralist approach of sociology on the same theoretical footing, particularly in relation to taking into account group decision-making and contextual utility frameworks. Such behaviour does not lend well to neat determinants that can be placed into precise economic predictive theoretical models. Even where a predictive theoretical model can be built, a further difficulty must be faced when it comes to testing it against empirical data on international migration. The position is that given the lack of international cooperation on definitions and methodological approaches to migration data

[107] *Ibid.* p. 272. See also Wimmer and Glick Schiller, "Methodological nationalism and beyond: nation-state building, migration and the social sciences", *Global Networks*, Vol. 2, No. 4 (2002), pp. 301-334.

collection, even where international data exist, their reliability is significantly tainted due to problems of comparability.

Great strides have been taken to improve the accuracy of theoretical studies on migration through the formation of interdisciplinary approaches, even if significant obstacles remain. Later chapters will go into more depth in considering migration concerns from the perspectives of economics and political science. As regards the collection of empirical data on international migration, far greater cooperation between states is required if the reliability of same is to be improved. Favell's proposed post-disciplinary approach plants the seed for the development of this thesis in suggesting that boundaries and definitions associated with the concept of the state are perhaps more of a hindrance than an aid to our ability to understand and respond to the multiple facets of migration. In the short term, and on the basis of the status quo, if states appreciate the inherent limits to their ability to deepen their knowledge of the concept of migration, steps taken to control or manage same must be extra vigilant in the knowledge that reliance is placed on imperfect studies and data. Later chapters emphasise the need for states to have some minimum evidential knowledge of any social problem not only in order to determine the appropriate political response but also to base the legitimacy of any political action taken on a rational basis. Thus how this conflict between the need for evidence and difficulties in obtaining reliable evidence should be addressed will be teased out throughout the thesis.

2. The Concept of the State and its Justification

Introduction

Before examining the state's role in controlling migration, in addition to the concept of migration, it is also necessary to determine what the concept of the state signifies. The state, as a political entity, has by no means always existed. In order to elucidate the meaning of this concept, an examination of its origins and how it developed will prove a useful exercise in demonstrating the haphazard manner in which it has come to be. Indeed even today, the state exists in many different forms. This chapter will then consider the various theories which aim to justify the existence of the state. This is a huge undertaking, a task considerably beyond the scope of this thesis; however, a clarification of the theories of the state on which reliance is placed is necessary for an understanding of the thesis as a whole. A chronological approach is taken as the theories have tended to build on each other and the chapter ends with a discussion of hypothetical consent theories – it is here that Max Weber's theories of traditional and rational-legal legitimacy, the basic theories relied upon, are set out.

Although reliance is placed on Weber's theories of legitimacy, setting out their predecessors serves to reinforce the haphazard way in which the state has developed. The interplay between reality and theory has continued for centuries and remains ongoing. The various theories discussed have influenced the development of the modern state in efforts to improve its legitimacy, but have also resulted in the ossification of such concepts as the nation state and sovereignty, which has come to place an epistemological wall in front of efforts to think beyond these concepts. Alongside traditional legitimacy, Weber's theory of rational-legal legitimacy calls for the justification of state action on an evidential basis, which in itself will not stand for the bare use of loaded terms for the justification of state action. This is of particular relevance in the field of migration control, in which such bare assertions as 'the exercise of sovereign power' or 'the protection of the nation state' are often used to justify measures of migration control adopted by states.

§1 From social organisation to political organisation

Paul traces the very rough origins of the state back to the structure of social organisation of the gens or clan in ancient times. Small in scale, this structure was based on personal relations and common ownership. Organisation was assured through kinship and discipline rather than coercion. Interpersonal ties within each clan were so strong that banishment from its safehold was considered the worst form of punishment; all individuals outside the clan were perceived as enemies[108].

[108] Paul, *The State: Its Origin and Function*, Proletarian Publishing, Edinburgh, 1974, see in general chapters I and IV.

This structure evolved very gradually as individuals developed new skills and increasingly productive systems were put in place. Craftsmen began to keep for themselves their own creations, and huntsmen, their animals as pets, in this way introducing the concept of private property. Individuals began to produce more than they could consume, leading to trade between clans and bartering, and the creation of the mechanism of money brought with it the notion of profit. A key transition thus occurred in the early Middle Ages, at which point politics consisted of "nothing but the struggle between clan and state. The rise of the feudal state is evidence of the defeat of the clan system and the triumph of private property"[109]. Efficient societal order nevertheless underpinned both structures.

Paul's theory is based on earlier work of Marx and Engels[110]. While describing these works as "the most famous development theory of modern times"[111], Fukuyama criticises same as oversimplified. He himself takes on the daunting task of tracing back the early origins of political order and devising reasons as to why states have formed in some countries in a variety of different forms, while tribal communities continue to thrive in other regions. On his analysis, between the clan and state stages of development came tribal communities. Whereas the transition from band / clan level societies to tribal societies was made possible by the development of agriculture, thus sedentary and "segmentary" (self-sufficient segments) societies[112], the transition to the state was far from the linear and rigid social progression as suggested by Marx and Engels.

Fukuyama asks the interesting anthropological question of whether or not the metaphorical concept of the social contract[113] could have actually happened in reality to bring about a transition through agreement between tribal communities to the centralised organisation of the state. He observes that given that "tribal societies are egalitarian and, within the context of close-knit kinship groups, very free [and] states, by contrast, are coercive, domineering and hierarchical … we could imagine a free tribal society delegating authority to a single dictator only under the most extreme duress"[114]. He concludes that while technological, geographic and demographic factors come into play in state

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[109] *Ibid.*, p.91.

[110] Marx and Engels, "Manifesto of the Communist Party" (1848), in *Marx/Engels Selected Works*, Vol. 1, Progress Publishers, Moscow, 1969, pp. 98-137,
[http://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf];
Engels, *The Origin of the Family, Private Property and the State*, Hottingen, Zurich, 1884 (English translation by Alick West, 1942),
[https://www.marxists.org/archive/marx/works/download/pdf/origin_family.pdf].
Both Paul and Engels are influenced by Marxist theory, however, Wolf urges anthropologists "to focus on [Marx's] ideas rather than on the polemics surrounding them" and to consult such books in their research on early social organisation (Eric Wolf, *Europe and the People without History*, University of California Press, California, 1982, at p. 394).

[111] Fukuyama, *The Origins of Political Order*, Profile Books Limited, London, 2011 at p. 49.

[112] *Ibid.*, pp. 55-58.

[113] Social contract theory will be further discussed in the following section.

[114] Fukuyama, The Origins of Political Order, *op. cit.*, at p. 82.

formation, "tribal groups have to be motivated to give up their freedom to the authority of a state [which] can come about through the threat of physical extinction ... or it can result from the charismatic authority of a religious leader"[115]. From a Weberian perspective and as will be discussed at the end of this chapter, although charismatic authority can be a form of legitimate authority, violent overthrow is not, and if there are any doubts as to the legitimacy of the initial formation of the state, this places all the more pressure on the state now in being to justify the measures it takes, including those of migration control, in order to demonstrate that it serves a continuing legitimate purpose. This gives added weight to the exercise of this chapter in examining the various theories of state justification.

Once the state was established, social organisation based on personal relationships was forced to yield to political organisation based on territory. Although his theory of the initial formation of the state has been subject to the criticisms above, Paul's description of the chief functions of the feudal state, once formed, remain pertinent: first, the defence of the kingdom against the external enemy; second, the preservation of law and order within the kingdom – the King's peace; and third, the dispensing of Justice and the administration of Law[116]. The first function reflects the increased size of this new form of organisation: the peripheral border line dividing friend and foe mushroomed out to cover a greater territory. Harder to manage, the centralised state became the means of protecting this territory. The second two functions, in essence the preservation of security and order within this territory, were a consequence of this increased size as personal relationships were no longer a sufficient basis for order. Obedience within such an organisation of anonymous individuals required a form of centralised coercion the state could provide. Efficient societal order is again the underlying theme[117].

§2 Justifying political power

While efficient societal order is the objective, why do we have the state rather than the clan or the tribe or other imaginable forms of social organisation? Having briefly traced the origins and the broad reasoning behind the development of the modern state, this section will consider the various theories that aim in different ways to justify the continuing existence of this structure. This will in turn facilitate an examination of how the state justifies its actions in the particular field of migration control.

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[115] *Ibid.*, at p. 89.

[116] Paul, *The State: Its Origin and Function*, *op. cit.*, p. 95.

[117] Efficiency is a prominent element of the function of state among such theorists as Weber, *Economy and Society: An Outline of Interpretive Sociology*, Roth and Wittich (ed.s), University of California Press, Los Angeles and London, 1978, at pp. 956-1005, and at the international level, Hume, *A Treatise of Human Nature* (1739) Book III, Part II, § XI, "Of the laws of nations," (2nd ed.) Oxford University Press, New York, 1978, at pp. 567-569.

i) Constitutionalism

Constitutionalism is one theory which aims to justify the state as being subject to a higher law; it has been described as:

> a complicated concept, deeply imbedded in historical experience, which subjects the officials who exercise governmental powers to the limitations of a higher law. Constitutionalism proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment or mere fiat of public officials ... they are bound to observe both the limitations on power and the procedures which are set out in the supreme, constitutional law of the community. It may therefore be said that the touchstone of constitutionalism is the concept of limited government under a higher law[118].

The central elements of this higher law, which essentially comprise individual rights protections and provisions for the separation of powers[119], took some time to consolidate. At the transition from social to political organisations, the concept of private property was beginning to give rise to class division. Assuring obedience to the state through purely coercive means worked while the lower classes were weak, but this gradually changed as each class began to act collectively to further its own interests and the state found itself forced to adapt accordingly. England in the Middle Ages is a notable example: here "the play and interplay of the clash of interests that took place between the Crown, Church, barons, and burghers"[120] led to the idea of a written document which would bind the crown and serve to limit its powers and protect certain baronial liberties. What is now known as the Magna Carta was intended for this purpose in its initial drafts in the twelfth century. While the content of these various drafts and amendments was essentially confined to rights of succession, the payment of duties and taxes, with the important exception of the right to due process, the idea of constitutional control of the arbitrary power of the state it represents has been of greater importance[121].

In addition to the mechanism of individual rights as a control on state power, some of the drafts of this Charter contained the seeds of institutional control of this power by means of the separation of government and parliament. Clause 12 of the Runnymede version of the Magna Carta of 1215 provided that the king would accept the "common counsel of our realm" when levying and assessing an aid or a scutage (taxes). Clause 14 set out procedural details relating to how the

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[118] Fellman, "Constitutionalism", in Wiener (ed.), Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas, Vol. I (1973-1974), pp. 491-92.
[119] Bellamy, "The political form of the constitution: the separation of powers, rights and representative democracy", Political Studies (1996) 44, pp. 436-456.
[120] Paul, *The State: Its Origin and Function*, *op.cit.*, p. 107.
[121] Holt, *Magna Carta*, Cambridge University Press, 2nd Edition, 1992, see in general chapter 1.

archbishops, bishops, abbots, earls and greater barons were to be consulted. Clause 61 of the Runnymede version stated that "the barons shall choose any twenty-five barons of the realm they wish, who with all their might are to observe, maintain and cause to be observed the peace and liberties which we have granted and confirmed to them by this our present charter"[122]. If the king failed to respect the provisions of the charter, the twenty five barons were given the power to seize "castles, lands and possessions... until, in their judgment, amends have been made"[123]. This was considered far too great a restriction on the power of the King, essentially a dethroning, and so was quickly removed. However, in 1258 after another confrontation between the King and the barons, another version of the charter known as the 'Provisions of Oxford' forced Henry III to accept a new form of government in which power was placed in the hands of a council of twenty-four members, twelve selected by the crown, twelve by the barons. This council was to supervise ministerial appointments, local administration and the custody of royal castles. Parliament, meanwhile, which was to meet three times a year, would monitor the performance of this council[124].

This seemed an advanced step in theory, but initial practice proved it a hollow measure indeed:

> Parliament was the desire of the Crown to strengthen its power against the barons by granting representation to the burghers. The State, which was mostly influenced by the King, seldom called Parliament unless to demand money ... When the King approached the commoners and sought their advice, they refused because they foresaw a demand for money as a consequence of any 'advising of theirs'. It was only when the King desired special help against the barons that he appealed to the burghers. Thus when the ruling class was not divided against itself the nation was ruled directly through the state without Parliament being summoned for years[125].

Far from including the lower classes in a meaningful way in the decision-making apparatus of the state in order to justify or limit the centralised coercive power of the state, these measures served in reality to simply placate this segment of the population. Paul conveys a similarly bleak image of the individual rights aspect of the charter commenting that "the much vaunted Magna Carta was simply a charter to guarantee the freedom of the propertied members of the community"[126].

This void between theory and practice was gradually improved upon in the centuries to follow, leading to the many European revolutions of the eighteenth and nineteenth centuries inspired by

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[122] See Holt, *Magna Carta*, *op. cit.*, 6th appendix, pp. 441-473 for the Latin text and English translation of the 1215 version of the Magna Carta.
[123] *Ibid.*
[124] Treharne, *Simon de Montfort and Baronial Reform*, (ed. E.B. fryde) London, Hambeldon Press, 1986, p. 223.
[125] Paul, *The State: Its Origin and Function*, *op.cit.*, p. 124.
[126] *Ibid.*, p. 124.

this idea of constitutional control of the state. The content of the individual rights aspect had by this time been pushed beyond the protection of aristocratic privileges[127]. Factors giving rise to the French revolution, as a notable example, included resentment of royal absolutism, resentment by peasants, labourers and the bourgeoisie toward the traditional seigneurial privileges possessed by the nobility, resentment of the Church's influence over public policy and institutions and resentment of aristocratic bishops by the poorer rural clergy[128].

The writing of Charles-Louis de Secondat (le Baron de Montesquieu) was of great influence in the prelude to the French revolution of 1789. He submits that political liberty is to be found only in moderate governments; and even in these it is not always found:

> It is there only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go … To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits[129].

He proceeded to offer an internal mechanism within the state that could allow power be a check to power, which now goes under the appellation of the separation of powers[130]:

> In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law … When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty … Again, there is no liberty, if the judiciary power be not separated from the legislative and executive … There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three

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[127] For a detailed account of the various ideologies underpinning the French Revolution, see Sewell, "Ideologies and Social Revolutions: reflections on the French case", *The Journal of Modern History*, Vol. 57, No. 1 (March 1985), pp. 57-85.

[128] Doyle, *The Oxford History of the French Revolution* (2nd ed.), Oxford University Press, 2003, pp.73–74.

[129] de Secondat, Baron de Montesquieu, *The Spirit of Laws*, 1752, translated by Thomas Nugent, Bell & Sons ltd., London, 1914, Book XI, section 4.
[www.constitution.org/cm/sol.htm].

[130] For more detailed analysis of the doctrine of the separation of powers see, Ackerman, "The new separation of powers", *Harvard Law Review*, Vol. 113, No. 3 (2000), pp. 633-729; Segal, "Separation of Powers games in the positive theory of congress and courts", *The American Political Science Review*, Vol. 91, No. 1 (1997), pp. 28-44; Persson, Roland and Tabellini, "Separation of powers and political accountability", *The Quarterly Journal of Economics*, November 1997, pp. 1163-1202.

powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals[131].

Some clauses of the Magna Carta make reference to a tentative judicial branch of the state[132], which was at this time slowly developing into a distinct branch. Originating from the *Curia Regis*, the immediate entourage of the monarch – chosen counselors from whom advice was sought on dispute settlement, the seeds of an independent justice system were sown by Henry II. Under his reign, a system of itinerant justices was set up to alleviate the work load of the *Curia Regis*, "the direct precursors of the judges of assize and the beginning of a separate judiciary"[133]. In 1178, Henry II proceeded to establish an alternative fixed body for dispute settlement, comprising five members of his own household – two clergy and three laymen – "to hear all the suits of the realm, and adjudicate upon them"[134]. This, supervised by the King, was the origin of the Court of Common Pleas. The Court of the King's Bench gradually divided from the *Curia Regis* and by the end of the fourteenth century, judicial proceedings before this court came to be seen as separate from proceedings before the King's Council (which continued in its own right as a court of equity, leading to the Court of Chancery)[135].

Montesquieu based his model of the separation of powers of the state on this evolving British constitutional system, in which he perceived a separation of powers between the monarch, parliament, and the courts of law. His theory has since had a considerable impact on the development of states throughout the world. From the above it is clear that, standing alongside the individual rights aspect, the theory is that a state is bound to respect specific individual rights and the mechanism of the separation of powers aims to ensure that it does so. Precisely whose rights the state is bound to respect will be further discussed in chapter five. At this juncture it is simply highlighted that constitutionalism goes some way towards justifying the power of the state by ensuring that this power does not go beyond that necessary to achieve societal order. This section has gone into some historical detail, with the aim of highlighting just how gradual the development of both theories on state justification and indeed the implementation of such theories in reality has been. The state and its functions have at no point been taken as a given and have rather been in a constant state of evolution.

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[131] de Secondat, Baron de Montesquieu, *The Spirit of Laws*, *op. cit.*, book XI, section 6.

[132] Clause 17 stated that "common pleas shall not follow our court but shall be held in some certain place"; clauses 18 and 19 defined the scope and frequency of county assizes; clause 45 provided that the King should only appoint as "justices, constables, sheriffs, or bailiffs" those who knew the law and would keep it well. See Holt, Magna Carta, *op. cit.*, 6th appendix, pp. 441-473 for the Latin text and English translation of the 1215 version of the Magna Carta.

[133] Lederman, "The Independence of the Judiciary", *Canadian Bar Review*, Vol. 34, No. 7, pp. 769-809, at p. 772.

[134] *Ibid.*, p.773.

[135] See Adams, "The Origin of English Equity", *Columbia Law Review*, Vol. 16, No. 2 (1916), pp. 87-98.

(ii) The Social Contract

Further to the theories of Montesquieu on constitutionalism, the enlightenment period also saw the growth of theories steering the legitimacy of the state away from the "divine right" of the monarch or the charismatic authority of a religious leader:

> The Enlightenment contradicted the ideology of the monarchical state in both of its essentials. First, where the monarchical ideology saw divine spirit as the ultimate source of the social order, the Enlightenment insisted on a purely naturalistic account of the world. Social order was derived from natural phenomena, and was to be understood in terms of the operation of natural laws...[136]

The French revolutionaries were inspired by Rousseau's writings, which at that time were expanding upon[137] the notion of the social contract[138]. The essence of this intellectual mechanism is that the only legitimate political authority is the authority consented to by all the people, who have agreed to such government by entering into a social contract for the sake of their mutual preservation. Again, the objective is efficient societal order. To achieve this, each person's individual capacity is insufficient, and so all must act in concert according to a single motive power. The problem he felt was to find a form of association which "will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before. This is the fundamental problem of which the Social Contract provides the solution"[139].

A key condition of this social contract is that each member of the association must commit to it fully, for only in this way is equality preserved. Rousseau reduces his notion of the social contract to the following terms: each of us puts his person and all his power in common under the supreme direction of the general will, and, as a collective, we receive each member as an indivisible part of the whole. "This public person, so formed by the union of all other persons formerly took the name of city, and now takes that of Republic or body politic"[140].

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[136] Sewell, "Ideologies and social revolutions: reflections on the French case", *The Journal of Modern History*, Vol. 57, No. 1 (March 1985), pp. 57-85, at p. 65.

[137] Following on from the writings on this subject of Hobbes (Leviathan, 1651) and Locke (Second Treatise of Government, 1689).

[138] Rousseau, *The Social Contract or Principles of Political Right*, 1762, translated by G.H.D. Cole, [www.constitution.org/jjr/socon.htm].

[139] *Ibid.*, book I, section 6. For an analysis of the social contract theory in a modern context see, Keeley, "Continuing the social contract tradition", *Business Ethics Quarterly*, Vol. 5, Issue 2 (1995), pp. 241-255 and Waldron, "John Locke: Social Contract versus Political Anthropology", *The Review of Politics*, Vol. 51, No. 1 (1989), pp. 3-28.

[140] Rousseau, *The Social Contract or Principles of Political Right*, *op. cit.*, book I, section 6.

The social contract justifies some form of state as a means to achieve efficient societal order and so something that each individual member would want, but could not achieve alone. This theory highlights an axiom of particular relevance to this thesis – that the state is a social construction, constructed by people to achieve this purpose; individual freedom remains primary and the powers of the state can only encroach upon these to the extent necessary to achieve its purpose. What powers it might require to achieve this purpose in the particular area of migration is the central research question of this thesis.

The previous section set out one means of ensuring the state did not usurp its powers: a Constitution is the higher law by which a preexisting state becomes bound. Another means of controlling the use of power by a preexisting state is through the mechanism of democracy. Thus, while the metaphor of the social contract is used to justify the initial formation of a state, constitutionalism and democracy see that it remains in check and so support arguments justifying its continuance in being.

The social contract theory has nevertheless had its criticisms. Fukuyama argues that at a theoretical level there is a fundamental fallacy in all liberal social contract theories because "such a state of primordial individualism never existed; human beings are social by nature and do not have to make a self-interested decision to organise themselves into groups[141]. A further criticism of this theory is that it can never be empirically tested: the fact is that there was no initial social contract; on the contrary, the historical evidence suggests that the state initially came about as a result of violence or religious domination[142], the antithesis of a voluntary agreement. The concepts of both originating and joining consent[143] are criticised for this reason by theorists who propose in their stead various forms of hypothetical consent theories. These will be examined at the end of this chapter.

iii) Democracy

Constitutionalism is a useful tool at the level of abstract rights and institutional structures. It gives no detail on the content of laws or on who exactly is to occupy positions in the various branches of government in order to apply such. At this more dynamic level, the consent of the people is vital in order to justify political power and the concept of democracy developed for this reason.

While there is no universally accepted definition of democracy, equality and freedom have both been identified as its most fundamental characteristics since the political theories of Aristotle[144].

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[141] Fukuyama, *The Origins of Political Order*, *op. cit.*, at pp. 89-90.
[142] *Ibid.*, at p. 89.
[143] A distinction coined by Rawls, see note 210 *infra*.
[144] Aristotle, *Politics*, 350 B.C., translated by Rackham, Harvard University Press, Cambridge, 1944, book VI, section 1317b,

Direct democracy was possible in Aristotle's time due to the small size of the many Greek cities and the concept of representative democracy gradually developed throughout the Middle Ages. Until the Enlightenment however the participatory process was often restricted to a minority upper class, and so more appropriately labeled an oligarchy[145]. Indeed, the right to an equal vote for all capable members of a population did not become a reality until relatively recently – by the turn of the twentieth century, only New Zealand and Australia had extended their suffrage to some women in national elections[146].

Rousseau was critical of the representative capacity of the English Parliament and advocated direct democracy as the optimum means of ensuring respect for the general will[147]. However, and as observed by Montesquieu, "since this is impossible in large states, and in small ones is subject to many inconveniences, it is fit the people should transact by their representatives what they cannot transact by themselves"[148]. Indeed Montesquieu went further in submitting that "the great advantage of representatives is their capacity of discussing public affairs. For this the people collectively are extremely unfit, which is one of the chief inconveniences of a democracy"[149].

Representative democracy has been the basic form taken up by a large number of states since this time. Dahl is pessimistic on the question of whether or not modern attempts at establishing this process of government serve in reality to control and legitimate the political power of the state. He submits that there are five standards of such a process for governing an association, which if respected, would "satisfy the requirement that all the members are equally entitled to participate in the association's decisions about its policies"[150]:

> 1) Effective participation: before a policy is adopted by the association, all the members must have equal and effective opportunities for making their views known to the other members as to what the policy should be.
> 2) Voting equality: when the moment arrives at which the decision about policy will finally be made, every member must have an equal and effective opportunity to vote, and all votes must be counted as equal.
> 3) Enlightened understanding: within reasonable limits as to time, each member must have equal and effective opportunities for learning about the relevant alternative policies and their likely consequences.

[http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0058%3Abook%3D6%3Asection%3D1317b].

[145] History World, "History of Democracy", [http://www.historyworld.net/wrldhis/PlainTextHistories.asp?ParagraphID=fwe].

[146] Dahl, *Democracy and its Critics*, Yale University Press, New Haven, 1989, p. 235.

[147] *Ibid.*, book III, section 15.

[148] de Secondat, Baron de Montesquieu, *The Spirit of Laws*, *op. cit.*, book XI, section 6.

[149] *Ibid.*

[150] Dahl, *On Democracy*, Yale University Press, New Haven, 1998, p. 37.

> 4) Control of the agenda: the members must have the exclusive opportunity to decide how and, if they choose, what matters are to be placed on the agenda ... The policies of the association are always open to change by the members, if they so choose.
> 5) Inclusion of adults: all, or at any rate most, adult permanent residents should have the full rights of citizens that are implied by the first four criteria. Before the twentieth century this criterion was unacceptable to most advocates of democracy[151].

Three of these standards merit particular comment: 'enlightened understanding' lays the seed for evidence based decision making, which will be discussed further at the end of this chapter and will remain a central theme throughout the thesis. 'Control of the agenda' ties in to Benhabib's submissions relating in particular to the "conditions for the acquisition of membership" which will be further discussed in chapter 5. Dahl's specification that 'inclusion of adults' includes "adult permanent residents", and so non-national immigrants once a certain period of residency can be demonstrated, is a key notion which will be further considered in chapters 5 and 7.

Arendt conceptualises democracy as permeating public life to a much greater extent than Dahl. It is only through public expression and action that human beings can experience freedom and discover their own individuality[152]. She uses the example of the ancient Greek *polis* to demonstrate that in this way man "is able to perform what is infinitely improbable ... to call something into being which did not exist before, which was not given, not even as an object of cognition or imagination, and which therefore, strictly speaking, could not be known"[153]. Thus, democracy does not simply require enlightened understanding under Dahl's criteria, but in fact creates such. This is a key idea when democracy is considered as a means of justifying political power as the state, much like any individual alone, cannot conceive of all new possible ways of life. In order for society to develop to its full potential, all voices, laden with their individuality and unique ideas, must be heard and be in a position to influence state policy. She describes the disturbing consequences of allowing democratic control on a pluralistic platform cede to the rise of a homogenous and inert mass society in her book 'The Origins of Totalitarianism'[154], a warning that pre-empts the discussion to come in the next section on the nation state.

The most recent development in political theory among democracy theorists is the concept of deliberative democracy, which draws to some degree from Arendt's logic. Theorists in this field accept that there remain and will always be differences in opinion on the substantive ideal, unsolvable problems, which "include the dialectical relationships of sacred/secular, centralization/

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[151] *Ibid.*
[152] Arendt, *The Human Condition*, University of Chicago Press, Chicago, 1958, p. 197.
[153] Arendt, "What is Freedom?" in Arendt, *Between Past and Future*, Meridian Books, New York, 1963, p. 151.
[154] Arendt, *The Origins of Totalitarianism*, Schocken Books, New York, 2004 (first ed. 1951).

decentralization, uniform justice/discretionary justice, public interest/private interest. These antinomies will produce oscillations and unstable compromises rather than unidirectional change. In short, we view the struggles as without a final solution"[155]. Habermas, in developing his discourse theory[156], highlighted in particular the duality of modern law between liberalism based on individual rights and civic republicanism based on the common good. "Broadly defined, deliberative democracy refers to the idea that legitimate lawmaking issues from the public deliberation of citizens"[157]. The types of arguments that will hold sway in this deliberation on the substantive ideal at any given time and in any given context links this theoretical field to the hypothetical consent theories which will be discussed at the end of this chapter.

Democracy is often understood as majority rule. However, this, if unchecked, could lead to the oppression of minority groups. The symbiotic relationship between constitutionalism and democracy serves to ensure that the government respects the will of the majority, but also the individual rights of all, including the minority. The independence of the judicial branch of the state acts as an important safeguard to this end. Gordon observes that a political organization is constitutional to the extent that it "contain[s] institutionalized mechanisms of power control for the protection of the interests and liberties of the citizenry, including those that may be in the minority"[158]. The extent to which minority rights should be protected as against the will of the majority is a recurring dilemma faced by courts and the addition of non-nationals to the minorities' pot has further complicated issues. This dilemma, in the particular context of immigrants will be further discussed in chapter 5.

iv) The nation state

Another means of justifying the political power of the state over its population which gained in influence at the time of the enlightenment was that of the nation state. To make clear from the outset, in my view, and for the reasons to follow, the use of the compound 'nation state' is unhelpful due to its common association with a state and homogenous *ethnos*, as opposed to a state with a *demos* valuing pluralism, as will be considered below[159]. Given that one of the elements of

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[155] Sterling and Moore, "Weber's Analysis of Legal Rationalisation: a critique of constructive modification", *Sociological Forum*, Vol. 2, No. 1 (Winter, 1987), pp. 67-89, at p. 82.

[156] Habermas, *Facts and Norms: contributions to a discourse theory of law and democracy* (translated by William Rehg), The MIT Press, Cambridge, 1996.

[157] Bohman and Rehg (eds.), *Essays on Reason and Politics: deliberative democracy*, The MIT Press, Cambridge, London, 1997, p. ix.

[158] Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today*, Harvard University Press, 1999, p. 4.

[159] See in particular Habermas, "The European nation state: on the past and future of sovereignty and citizenship" (translated by Ciaran Cronin), *Public Culture*, Vo. 10, No. 2 (1998), pp. 397-416; Delbruck, "Global migration – immigration – multiethnicity: challenges to the concept of the nation state", *Indiana Journal of Global Legal Studies*, Vol. 2 (1994-95), pp. 45-64.

the definition of a state is the possession of a permanent population[160], the use of this compound is unnecessary. Habermas has gone so far as to contend that in order to prevent a regression of the state back to nationalism or the nation state, a move towards cosmopolitanism in the form of supranational governance is necessary[161]. This will be further considered in chapters 5 and 7. For now, I simply want to clarify that beyond this section and for these reasons, I use the term 'state' *simpliciter* throughout the thesis.

Broadly, the nation state is the idea that the legitimacy of the state derives not from some religious source but from the fact that the population itself adopts a sense of obedience or loyalty to those it perceives as in the same "imagined community" [162]. The state, representing this community, will be obeyed in order to advance the interests of the latter. In Anderson's view, the nation is an imagined political community – and imagined as both inherently limited and sovereign:

> It is imagined because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion ... In fact, all communities larger than primordial villages of face-to-face contact (and perhaps even these) are imagined ... The nation is imagined as limited because even the largest of them encompassing perhaps a billion living human beings, has finite, if elastic boundaries, beyond which lie other nations. No nation imagines itself coterminous with mankind ... It is imagined as sovereign because the concept was born in an age in which Enlightenment and Revolution were destroying the legitimacy of the divinely-ordained, hierarchical dynastic realm ... Finally, it is imagined as a community, because, regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship[163].

Views diverge as to the origins of this concept. Whereas Anderson focuses on the post-industrialisation period, Greenfeld sees nations as beginning with Henry VIII's nationalisation of the church during the early sixteenth century when the word "nation," which had referred to the "elite" was transformed to mean "the people"[164]. Some theorists trace the origins of nations even further back to ancient times drawing parallels with city states, such as those in ancient Greece and

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[160] Article 1 of the Convention on Rights and Duties of States (inter-American), signed at Montevideo on 26th December 1933, which will be further discussed in chapter 3.
[161] Habermas, *The Postnational Constellation: Political Essays*, Polity, Cambridge, 2001; Fine and Smith, "Jürgen Habermas's Theory of Cosmopolitanism", *Constellations*, Vol. 1o, No. 4, 2003, pp. 469-487; Jürgen Habermas, "The European Nation-State: On the Past and Future of Sovereignty and Citizenship", *op. cit.*
[162] A term coined by Anderson: Anderson, *Imagined communities: reflections on the origin and spread of nationalism* (revised and extended ed.), London: Verso, 1991.
[163] *Ibid.*, pp. 5-7.
[164] Greenfeld, *Nationalism: Five Roads to Modernity*, Cambridge and London, Harvard University Press, 1992.

Rome[165]. The difference between these schools of thought however may simply derive from the characteristic of all concepts to develop in reality before being recognised in language, as "to understand a concept, to grasp the meaning of the words which express it, is always ... to grasp the role of the concept in language and social life ... Different forms of social life will provide different roles for concepts to play"[166]. Davidson elaborates on this idea by explaining that "in other words, just because people used the term "nation" in, say, the 14th century, it does not follow that they meant by it what we mean by it"[167].

Beyond such epistemological difficulties, there are also differing views of the forces which bring a nation into being. Davidson criticises Anderson's theory for failing to take into consideration the symbiotic relationship between society and the economy. He notes that, as distinct from previous entities classified as nations, "it is only with modernity that a sense of national identity comes to pervade all classes, or emerges as the overriding identity"[168]. Anderson's own description of a nation as "imagined as a community, because, regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship" supports Davidson's claim that alongside horizontal solidarities existed vertical segregations of class. He submits that Anderson fails to appreciate the extent to which the transition to capitalism facilitated the creation and subsistence of nationalism:

> The capitalist system generates nationalism as a necessary everyday condition of its continued existence ... Industrialisation and urbanisation together produced the changes in human consciousness that made nationalism *possible* (for the subordinate classes), as well as creating societies that made nationalism *necessary* (for the dominant class). They developed new structural capacities, new modes of experience and new psychological needs in the people who had to work in the factories and live in the cities. It is the need for some collective sense of belonging with which to overcome the effects of alienation, the need for psychic compensation for the injuries sustained at the hands of capitalist society, that nationalism provides ... States need conscripts for their armies, citizens to pay taxes, workers to accept that they have more in common with those who exploit them at home than they do with their fellow-exploited abroad. This made it imperative that loyalty to a state be secured, and the nation was the means[169].

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[165] Boll, *Multiple nationality and international law*, The Netherlands, Martinus Nijhoff Publishers, 2007, p.62-67; Radan, *The break-up of Yugoslavia and international law*, London, Psychology Press, 2002, p. 14.
[166] MacIntyre, A Short History of Ethics, London, Routledge and Paul Kegan, 1967, pp. 2 and 8.
[167] Davidson, "Reimagined Communities", *International Socialism*, Issue 117, Winter 2008, [http://www.isj.org.uk/index.php4?id=401&issue=117].
[168] *Ibid.*, citing Spencer and Wollman, *Nationalism: A Critical Introduction*, London, Sage, 2002, p. 33.
[169] Davidson, "Reimagined Communities", *op. cit.*

Gellner[170] and Hobsbawm[171] also place particular importance on the role of capitalism and the development of class consciousness in the creation of nations. This role is relevant to the extent that it can impact upon the voluntariness of the creation of a nation: did a group of people choose to form a collective identity out of comradeship or were they essentially forced to do so by economic circumstances or political measures?

This gives rise to the question as to whether the nation or the nation state came first. That is whether nationalist movements rose to create a nation state or whether the state created the conditions necessary for the formation of a nation state. The distinction is not without significance for the function of this mechanism as a justification for the political power of the state: in the former case, the population of a certain territory came together and agreed to be bound by certain rules to be enforced by the centralised structure of the state; in the latter case, the state itself is justifying its own political power from above.

Anderson's theory tends to support the latter view of the nation state as a creation of the state. He argues that the main factors giving rise to such an entity are the reduction of privileged access to particular script languages because of mass vernacular literacy, the movement to abolish the ideas of divine rule and monarchy and 'print-capitalism'. Capitalist entrepreneurs printed their books and media in the vernacular (instead of exclusive script languages, such as Latin) in order to maximize circulation. In this way, readers speaking various local dialects became able to understand each other, and a common discourse emerged. Anderson argues that the first European nation-states were thus formed around their national 'print-languages'[172]. Hobsbawm also takes this approach submitting that the French state preceded the formation of the French people. He observes that at the time of the 1789 French Revolution, only half of the people within the territory of France spoke some French. The French state promoted the unification of various dialects and languages into the French language, introduced conscription and enacted laws on public instruction, which, in his view, facilitated the creation of a national identity[173].

Both Anderson and Hobsbawm suggest that although states created nation states, the population henceforth embraced its collective identity and comradeship. This proposition is related to Renan's thesis that a nation exists through the will of the population – its desire to be united under a collective identity. He highlights the reality that no country has an ethnically pure population, many countries have the same official language without feeling the need to join together as one nation

[170] Gellner, *Nations and Nationalism*, Ithaca, Cornell University Press, 1983.
[171] Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* (2nd ed.), Cambridge University Press, 1992.
[172] Anderson, *Imagined communities: reflections on the origin and spread of nationalism*, *op. cit.*, at pp. 44-45.
[173] Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality*, *op. cit.*

and some countries have several different official languages – the uniting force of the nation must come from elsewhere:

> La vérité est qu'il n'y a pas de race pure et que faire reposer la politique sur l'analyse ethnographique, c'est la faire porter sur une chimère. Les plus nobles pays, l'Angleterre, la France, l'Italie, sont ceux où le sang est le plus mêlé. L'Allemagne fait-elle à cet égard une exception ? Est-elle un pays germanique pur ? Quelle illusion ! … Nous touchons ici à un des problèmes sur lesquels il importe le plus de se faire des idées claires et de prévenir les malentendus … La langue invite à se réunir ; elle n'y force pas … Il y a dans l'homme quelque chose de supérieur à la langue : c'est la volonté. La volonté de la Suisse d'être unie, malgré la variété de ses idiomes, est un fait bien plus important qu'une similitude souvent obtenue par des vexations[174].

This muddies the waters somewhat as regards the question of whether or not a nation is a voluntary formation: it suggests that whereas the state certainly influenced its creation, such influence could not have been sufficient to create the powerful binding forces inherent in the nation. "There is something in man that is superior to language: that is will"[175]. Davidson, on the other hand, submits that there is no such will inherent in a nation. States created nation states for their own purposes; the population followed blindly, powerless to do otherwise or "unwilling to challenge the nationalism within which political discourse is conducted, for fear of being labelled unpatriotic"[176]. His argument leads to the proposition that the nature of a particular nation state, whether heterogeneous or homogenous, inclusionist or exclusionist, essentially depends upon state policy.

Another school of thought is that nations developed prior to the nation state and rose as a collective identity to instate their own government. White and Greenfeld take this view, drawing a picture of Germany and Italy as states in which cultural unification preceded state unification and classifying such states as ethnic nations or ethnic nationalities[177]. White feels that state-driven national unifications, such as France, England or China, are more likely to flourish in multiethnic societies, producing a traditional national heritage of civic nations, or territory-based nationalities. This is noteworthy, as it suggests that on the contrary, nation states that have arisen from the apparently more legitimate bottom-up source of a pre-existing nation, give rise to inherently homogenous societies, which tend to be highly exclusionist.

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[174] Renan, *Qu'est-ce qu'une nation?*, Conférence faite en Sorbonne, le 11 mars 1882, Calmann Lévy, 1882, p. 16.
[175] *Ibid.*, translation of second last sentence.
[176] Davidson, "Reimagined Communities", *op. cit.*
[177] White, "Globalization and the Mythology of the Nation State," In Hopkins (ed.) *Global History: Interactions Between the Universal and the Local*, Palgrave Macmillan, 2006, pp. 257-284; Greenfeld, *Nationalism: Five Roads to Modernity*, *op. cit.*

Despite the uncertain origins of the nation state, its imagined character and its potential to give rise to either the embodiment of state pursuits or highly exclusionist homogenous societies, the nation state has been ossified and is still used as a mechanism to justify the modern state[178]. This is sometimes due to a failure to distinguish between the state and the nation state. A large amount of academic writing on the subject paints the nation state in a negative light and urges movement beyond its conceptual confines[179]. The role of nationalism in generating racist ideologies leading up to World War I, something that will be considered in more detail in chapter 3, is the most persuasive argument in itself for an abandonment of this concept. This thesis will proceed giving preference to a conception of the state based on territory rather than identity, a dichotomy to be further considered in the following section, which will examine the contours of another problematic concept – that of sovereignty. Given that both of these concepts tend to be used frequently and as bare loaded terms for the justification of state measures in the field of migration control, they serve to stifle deeper debate on the legitimacy of such measures.

v) Sovereignty

a) The origins of the concept of sovereignty

Philpott traces the history of the concept of sovereignty through two broad movements, manifested in both practical institutions and political thought:

> The first is the development of a system of sovereign states, culminating at the Peace of Westphalia in 1648. Contemporaneously, sovereignty became prominent in political thought through the writings of Machiavelli, Luther, Bodin, and Hobbes. The second movement is the circumscription of the sovereign state, which began in practice after World War II and has since continued through European integration and the growth and strengthening of laws and practices to protect human rights. The most prominent

[178] See for example Meilaender, *Toward a theory of immigration*, Palgrave, New York, 2001; Marcussen, Risse, Daniela Engelmann-Martin, Knopf & Roscher, "Constructing Europe? The evolution of French, British and German nation state identities", *Journal of European Public Policy*, Vol. 6, No. 4 (1999), pp. 614-633; Olins, "Branding the nation – the historical context", *Brand Management*, Vol. 9, No. 4-5 (2002), pp. 241-248.

[179] Hoffmann, "Obstinate or obsolete? The fate of the nation state and the case of Western Europe", *Daedalus*, Vo. 95, No. 3 (1966), pp. 862-915; Held, "Democracy, the nation state and the global system", *Economy and Society*, Vol. 20, Issue 2 (1991), pp. 138-172; Tololyan, "The nation state and its others", *Diaspora*, Vol. 1, No. 1 (1991), pp. 3-7; Delbruck, "Global migration – immigration – multiethnicity: challenges to the concept of the nation state", *op. cit.*; Mann, "Has globalisation ended the rise and rise of the nation state?", *Review of international political economy*, Vol. 4, No. 3 (1997), pp. 472-496; Habermas, "The European nation state: on the past and future of sovereignty and citizenship, *op. cit.*; Wimmer and Glick Schiller, "Methodological nationalism and beyond: nation state building, migration and the social sciences", *Global Networks*, Vol. 2 No. 4 (2002), pp. 301-334.

corresponding political thought occurs in the writings of critics of sovereignty like Bertrand de Jouvenel and Jacques Maritain[180].

The signing of the Treaty of Westphalia in 1648 not only brought long awaited peace, but also marked the inception of the sovereign state system, notably due to a break from religious control[181].

He describes sovereignty as a "modern notion of political authority [which], though its meanings have varied across history, also has a core meaning, *supreme authority within a territory*"[182], thus breaking down the definition into its three constitutive elements. The two elements of supremacy and territoriality demonstrate an inherent link to the contextual factors leading to its creation: supremacy initially translated as freedom of the state from religious powers and clear territorial borders served to bring an end to territorial conflicts. The first element dictates that a holder of sovereignty possesses authority:

> That is to say, the person or entity does not merely wield coercive power, defined as A's ability to cause B to do what he would otherwise not do. Authority is rather what philosopher R.P. Wolff proposed: 'the right to command and correlatively the right to be obeyed' … What is most important here is the term 'right', connoting legitimacy. A holder of sovereignty derives authority from some mutually acknowledged source of legitimacy — natural law, a divine mandate, hereditary law, a constitution, even international law. In the contemporary era, some body of law is ubiquitously the source of sovereignty.

It follows from this analysis of his three-pronged definition that sovereignty does not legitimise political authority, but rather is simply a descriptive term for same. A state, having overcome religious governance, did not in this way become legitimate, but did become supreme and territoriality was simply a practical tool serving to cumulate the land within each state and divide the available land between states. Furthermore, the authority of a state is not legitimised by its sovereignty but by some other source. Among sovereignty theorists, legitimacy was felt to stem from such sources as natural law[183] or the general will of the people[184]. Constitutionalism dictates that the legitimacy of the state is derived from the fact that it is limited to the higher law as set out

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[180] *Ibid.* Not all theorists agree that the Treaty of Westphalia of 1648 marked the inception of the sovereign state system – see for example Krasner, *Sovereignty: Organized Hypocrisy*, Princeton University Press, New Jersey, 1999.

[181] Philpott, "Sovereignty", in Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Summer 2010. [http://plato.stanford.edu/archives/sum2010/entries/sovereignty/].

[182] Philpott, "Sovereignty", in Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, *op. cit.*

[183] Bodin, *On Sovereignty: Four Chapters From Six Books of the Commonwealth*, Cambridge University Press, Cambridge, 1992; Hobbes, *Leviathan* (1651), Penguin, Harmondsworth, 1968.

[184] Rousseau, *The Social Contract or Principles of Political Right*, *op. cit.*

in the Constitution. Thus, although the state had the last word and was in this way sovereign, it was bound by certain higher laws and so did not possess unlimited powers.

Other sovereignty theorists muddy the waters somewhat between these two concepts of *sovereignty* and *legitimacy*. Machiavelli believed that in order to fulfil its purpose, a state required absolute supremacy:

> Manifestly he was not to be bound by natural law, canon law, Gospel precepts, or any of the norms or authorities that obligated members of Christendom. Rather, he would have to be prepared 'not to be good', and to be ready to perform evil, not because evil was no longer evil, but because it was sometimes necessary [to achieve its purpose]: the strength and well-ordering of the state[185].

Bodin also viewed the problem of order as central and felt that far from outdated medieval notions of a segmented society, only a supreme authority within a territory could strengthen a fractured community[186]. The German philosopher Carl Schmitt proposed that only a pragmatic approach could ensure the efficiency of the state. For Schmitt, "what matters for the reality of legal life is who decides. Alongside the question of substantive correctness stands the question of competence"[187]. He therefore defined the sovereign as "he who decides the exceptions"[188]. He submitted that the sovereign was above any constitutional law and required to be able to make a decision on behalf of the good of the state in order to ensure societal order in times of crisis. However, the value of his theory of sovereignty as absolute supreme authority has since been the subject of controversy, mainly due to its intellectual support for national socialism[189].

Both the nation state and sovereignty represent the state breaking away from previously prominent religious control. Anderson describes the nation as sovereign, as free from the divinely-ordained, but that the "gage and emblem of this freedom is the sovereign state"[190]. A comparison of the definitions of the two concepts however reveals a fundamental difference between them. For the sovereign state, territoriality is key and so membership derives from residence within its borders:

> It is a powerful principle, for it defines membership in a way that may not correspond with identity. The borders of a sovereign state may not at all circumscribe a "people"

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[185] *Ibid.*, referring to Machiavelli, *The Prince and the Discourses* (translated from Italian by Luigi Ricci and Christian E. Detmold) Random House, New York, 1950.
[186] Bodin, *De la république* (1576), cited in Philpott, "Sovereignty", *op. cit.*
[187] Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, 1922, translation by Schwab, University of Chicago Press, Chicago, 2005, p.34.
[188] *Ibid.*, p. 5.
[189] Vinx, "Carl Schmitt", *The Stanford Encyclopedia of Philosophy* (Fall 2010 Edition), Zalta (ed.), [http://plato.stanford.edu/archives/fall2010/entries/schmitt/].
[190] Anderson, *Imagined communities: reflections on the origin and spread of nationalism, op. cit.* at p. 7.

> or a "nation," and may in fact encompass several of these identities, as national self-determination and irredentist movements make evident. It is rather by simple virtue of their location within geographic borders that people belong to a state and fall under the authority of its ruler[191].

On the other hand, for the nation state, a sense of community or comradeship – a common identity – is of the essence; this concept does not depend on territory at a definitional level. Both the nation state and sovereign state are exclusionist, but on the different bases of identity and territory. As I have advocated for the discontinuance of the compound nation state and as I will suggest the continuing use of a limited conception of sovereignty, I thus base my thesis on a conception of the state based on territory.

b) The circumscription of the sovereign state

Returning to Philpott's general analysis of the concept of sovereignty, he also noted a second broad movement, namely the circumscription of the sovereign state. This period marks the introduction of external limitations on the authority of the sovereign state and criticism of the concept itself. In Philpott's observations, it was "after the Holocaust that meaningful legal and institutional circumscriptions of sovereignty in fact arose, many of which have come to abridge the rights of sovereign states quite significantly. The two most prominent curtailments are conventions on human rights and European integration"[192].

He also draws attention to the modern critical theories of Bertrand de Jouvenel and Jacques Maritain. Jouvenel is of the opinion that since the writings of Hobbes, theories on sovereignty are tainted with a certain path dependency. Although their theories differ in respect of the locus and form of sovereignty, post-Hobbesian thinkers like Locke, Pufendorf, and Rousseau "were to feel the lure of this mechanically perfect construction"[193]. This was "the hour of sovereignty in itself, [the existence of which] hardly anyone would thenceforward have the hardihood to deny"[194]. Maritain's criticism of sovereignty goes a step further in contending that:

> Political philosophy must get rid of the word, as well as the concept, of sovereignty: not because it is an antiquated concept, or by virtue of a sociological-juridical theory of "objective law"; and not only because the concept of sovereignty creates insuperable

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[191] Philpott, "Sovereignty", *op. cit.*

[192] Philpott, "Sovereignty", *op. cit.*; for a more detailed discussion on the modern restrictions on the internal sovereignty of the state, see Habermas, "The European Nation-State: On the Past and Future of Sovereignty and Citizenship" *op. cit.*, at pp. 410-413.

[193] de Jouvenel, *Sovereignty: An Inquiry Into the Political Good*, Cambridge University Press, Cambridge and New York, 1957, p. 198.

[194] *Ibid.*, p. 198

> difficulties and theoretical entanglements in the field of international law; but because, considered in its genuine meaning, and in the perspective of the proper scientific realm to which it belongs — political philosophy — this concept is intrinsically wrong and bound to mislead us if we keep on using it — assuming that it has been too long and too largely accepted to be permissibly rejected, and unaware of the false connotations that are inherent in it[195].

In his view, the mistake Bodin and Hobbes made was in conceiving of sovereignty as authority that the people permanently transferred and alienated to an external entity, holding the supreme and inalienable right to rule over the people, independently of them, rather than representing the people, accountable to them. Furthermore, supreme authority of the state over the body politic results in centralism, impeding the development of a pluralist society[196]. Similar to Bodin and Hobbes, he locates the legitimacy of the state in its relationship to natural law; however, he deduces from this that any such transfer of authority is illegitimate[197]. This again highlights the problem of the conflation of the two concepts of legitimacy and sovereignty.

Further to the two examples of human rights and European integration proffered by Philpott, developments in numerous other areas have placed a strain on the ability of states to retain rights and powers claimed under the head of sovereignty. These areas include international justice[198], national[199] and international[200] security, international protection[201], development[202], health[203] and

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[195] Maritain, *Man and the State*, University of Chicago Press, Chicago, Illinois, 1951, pp. 29-30. A similar view has been expressed in legal practice by Justice Evatt of the High Court of Australia: "sovereignty is neither a question of fact, nor a question of law, but a question that does not arise at all", see "Sovereignty in cases of Mandated Territories", in Akweenda, *International law and the protection of Namibia's territorial integrity*, Martinus Nijhoff, The Hague, Netherlands, 1997, p.40.

[196] Maritain, *Man and the State*, *op. cit.*, pp. 51-53.

[197] *Ibid.*, pp. 80-97.

[198] Aalberts and Werner, "Sovereignty beyond Borders: Sovereignty, Self-Defense, and the Disciplining of States" in Adler-Nissen and Gammeltoft-Hansen (ed.s) *Sovereignty Games: Instrumentalising State Sovereignty in Europe and Beyond*, Palgrave Macmillan, Hampshire, 2008; Nyamuya Maogoto, "Westphalian Sovereignty in the Shadow of International Justice? A fresh coat of paint for a tainted concept", in Jacobsen, Sampford and Thakur, *Re-envisioning sovereignty: the end of Westphalia?*, Aldershot, Ashgate, 2008.

[199] Leander, "Securing Sovereignty by Governing Security through Markets", in Adler-Nissen and Gammeltoft-Hansen (ed.s) *Sovereignty Games: Instrumentalising State Sovereignty in Europe and Beyond*, *op. cit.*

[200] Adelman, "Sovereignty in the Twenty-First Century: Security, Immigration and Refugees", in Jacobsen, Sampford and Thakur, *Re-envisioning sovereignty: the end of Westphalia?*, *op. cit.*

[201] Gammeltoft-Hansen, "The refugee, the Sovereign, and the Sea: European Union Interdiction Policies", in Adler-Nissen and Gammeltoft-Hansen (ed.s) *Sovereignty Games: Instrumentalising State Sovereignty in Europe and Beyond*, *op. cit.*; Lui, "State Sovereignty and International Refugee Protection", in Jacobsen, Sampford and Thakur, *Re-envisioning sovereignty: the end of Westphalia?*, *op. cit.*

[202] Jacobsen, Sampford and Thakur, *Re-envisioning sovereignty: the end of Westphalia?*, *op. cit.*, see Part 5 Sovereignty and Development.

[203] Arya, "Do No Harm: Towards a Hippocratic Standard for International Civilisation", in Jacobsen, Sampford and Thakur, *Re-envisioning sovereignty: the end of Westphalia?*, *op. cit.*

the environment[204]. Authors discussing these modern trends highlight how other actors are coming to act with and in place of the state at the international level (private firms, international organisations, non-governmental organisations etc.) and how states are increasingly obliged to cooperate with each other. Chapter 4 will consider the external limits that have been placed on the particular power of the state claimed under the head of sovereignty to control the cross border movement of people.

c) Clarification of the limited role of sovereignty as a descriptive term

The above authors each come to one of two conclusions. For some, sovereignty is no longer pertinent as a distinct concept and its use in both theoretical and political spheres should be discontinued; alternatively, sovereignty remains pertinent but requires recalibration in line with the modern trends outlined above. Kurtulus argues that the former sceptical position is based on confused, incoherent, or simplistic notions of sovereignty and that it is therefore untenable[205]. He suggests that instead of considering the concept from a historical perspective, endeavouring to achieve its recalibration, a synchronic approach is more useful. He clarifies the concept on a theoretical level in order to establish an operational definition and justifies his position using empirical evidence. The conclusion he draws is that the referent for this concept is widespread which supports the argument for its continued use as a descriptive term. Other analysts insist on the need for a diachronic approach as in their view "neither state nor sovereignty should be assumed or taken as given, fixed or immutable"[206]. Kurtulus nevertheless stresses the importance of clarifying a working definition due to "the ubiquitous necessity of drawing a line between political rhetoric on the one hand and scientific terminology on the other"[207]. He thus submits the following working definitions:

> 'Juridical state sovereignty' refers to a condition in which an agent – a state or similar entity – according to law is supreme within a certain territory and independent of agents outside of it; 'factual state sovereignty', in turn, accounts for a condition in which an agent – a state or a similar entity – is, as a matter of material circumstances, actually supreme within a certain territory and independent of agents outside of it[208].

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[204] Elliott, "Sovereignty and the Global Politics of the Environment: Beyond Westphalia?", in Jacobsen, Sampford and Thakur, *Re-envisioning sovereignty: the end of Westphalia?*, *op. cit.*

[205] Kurtulus, *State Sovereignty: Concept, Phenomenon and Ramifications*, Palgrave Macmillan, New York and Hampshire, 2005.

[206] Biersteker and Weber (eds.), *State sovereignty as social construct*, Cambridge University Press, Cambridge, 1996 at p. 11; see also Morgenthau, *Politics among nations*, McGraw Hill, New York, 1993; Waltz, *Theory of international politics*, McGraw Hill, New York, 1979; F.H. Hinsley, *Sovereignty* (2nd ed.), Cambridge University Press, Cambridge, 1986; James, *Sovereign Statehood*, Harper Collins, Hammersmith, 1986.

[207] Kurtulus, *State Sovereignty: Concept, Phenomenon and Ramifications*, *op. cit.*, p. 6.

[208] *Ibid.*, p. 84. Kurtulus' limited conception of sovereignty has since been adopted by other academics in this field: Berg, "Examining power-sharing in persistent conflicts: de facto pseudo-statehood versus de jure

Kurtulus confines his analysis to sovereignty at the state level. However, it can be deduced from his contension that possessing particular powers of control over a territory gives rise to factual sovereignty that the inverse cannot be the case: the status of sovereignty does not give rise to particular intrastate sovereign powers. To hold otherwise would be circular. The effects of sovereignty thus only extend to the external sphere. Possessing factual sovereignty is of assistance in acquiring juridical sovereignty, a pass to becoming a player in the international community. Thus, at the internal level, his working definition is broadly analogous to that of Philpott set out above, in particular as regards the distinction between *sovereignty* and *authority*, between descriptive and prescriptive.

It follows that sovereignty is the descriptive term of a certain status, to be distinguished from the powers of states that are sovereign. The status itself is absolute but the powers of sovereign states may be limited. The importance of this distinction is captured in Kurtulus' contention that "the notion of 'limited' or 'loss of sovereignty', frequently referred to in contemporary international relations literature, is incompatible with international responsibility, which is one of the necessary conditions for the existence of international public law as a positive legal system"[209], in itself an important reason for the retention of this limited conception of sovereignty and connected to the external limits on the powers of sovereign states to be discussed in chapter four.

The concept of sovereignty, alongside the concept of the nation state, has been ossified to such an extent as to stunt further thought both on its meaning and the role of the state in various areas, but notably migration control. Hence Kurtulus' warning of the ubiquitous necessity of drawing a line between political rhetoric on the one hand and scientific terminology on the other. The importance of his working definition lies in this very service.

vi) Hypothetical consent theories

From the above sections relating to the various means by which political authority has been justified, it is clear that consent of the people is a prominent factor, whether originating consent to the social contract initially creating a state or joining consent to the continuing functioning of the state by means of democracy or nationalism[210]. Once consent has been assured, constitutionalism

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quasi-federalism, *Global Society*, Vol. 21, No. 2 (2007), pp. 199-217; Berg, Reexamining sovereignty claims in changing territorialities: reflections from 'Kosovo syndrome', *Geopolitics*, Vol. 14 (2009), pp. 219-234; Toomla and Berg, "Forms of normalisation in the quest for de facto statehood", *The International Spectator: Italian Journal of International Affairs*, Vo. 44, No. 4 (2009), pp. 27-45; Kuusk and Berg, "What makes sovereignty a relative concept? Empirical approaches to international society", *Political Geography*, Vol. 29 (2010), pp. 40-49.

[209] *Ibid.*, p. 189.

[210] The distinction between originating and joining consent was coined by Rawls: Rawls, *Lectures on the History of Political Philosophy*, Harvard University Press, Cambridge, 2007, p. 124.

acts as a safeguard preventing the state from surpassing the limits of this consent. Sovereignty is a mere descriptive term for the status of a state legitimised by such means as consent, which in turn gives rise to certain limited powers.

This may sit well in theory, however, short of direct democracy or a pure homogenous nation, the difficulty lies in the question of how the consent of all the people governed by a state can be obtained. For Kant, actual consent is unobtainable. In order to be legitimate, the state is under an obligation to obey public reason and to enact only laws to which all individuals would consent[211]. Rawls' concept of 'public reason'[212] continues along this hypothetical consent line and refers to the justification of a particular position by way of reasons that people of different moral or political backgrounds would accept. Public reason attracts all who are reasonable, yet there is deep pluralism in the set of "reasonable comprehensive doctrines, religious, philosophical and moral"[213]. He submits that under certain conditions, a hypothetical overlapping consensus can be reached on this political concept of public reason – those with comprehensive moral views must seek some common ground for reaching consensus about principles of justice in order to achieve political stability[214]. Among the necessary conditions important for Rawls are "a certain level of material and social well-being, and of training and education [to the extent that] is required to give due weight to the idea of society as a fair system of co-operation between free and equal citizens [and] the trust and confidence [of the people in the political system]"[215], as only then will individuals have reasonable assurance that others will also comply.

Habermas places his discourse theory, discussed above in the section on deliberative democracy, against the backdrop of such an overlapping consensus to be found in the constitution[216]. Only certain types of arguments can then be considered in the determination of the substantive ideal in a particular concrete situation: "specifically, competent speakers know how to base their interactions on validity claims that their hearers will accept or that could, if necessary, be redeemed with good reasons"[217]. Thus competency and good reasons are key in the formulation of arguments that

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[211] Kant, "On the Proverb: That may be true in theory, but is of no practical use", 1793, in Humphrey, *Perpetual Peace and Other Essays*, Hackett, Indianapolis, 1983, pp. 61-92.

[212] John Rawls, *The Law of Peoples: with the Idea of Public Reasoning Revisited*, Harvard University Press, Cambridge, 2001, see pp. 132-148.

[213] *Ibid.* p. 131.

[214] Rawls, *Political Liberalism*, Columbia University Press, New York, 1993, p. 15.

[215] *Ibid.*, p. 167. For a related discussion of what conditions would be necessary at the international level, see Teson, "International Obligation and the Theory of Hypothetical Consent" (1990), *Yale Journal of International Law*, Vol. 15, pp. 84-120.

[216] Habermas, *Facts and Norms: contributions to a discourse theory of law and democracy*, op. cit., see Appendix I. Popular Sovereignty as Procedure (1988), at pp. 465-466 and Appendix II. Citizenship and National Identity (1990) at pp. 499-500.

[217] *Ibid.*, at p. xiv of the translator's introduction discussing a theme that recurs throughout the book. For another article that links discourse theory to hypothetical consent theory, see Felts and Jos, "The contemporary challenge to the administrative state: a Weberian analysis", *Journal of Management History* (1996), Vol. 2, No. 1, pp. 21-36.

rational people would accept. The fact that the onus of proof falls on the state to offer such good reasons is clarified in his submission that:

> Democratic citizenship can only realize its integrative potential—that is, it can only found solidarity among strangers—if it proves itself as a mechanism that actually realizes the material conditions of preferred forms of life[218].

Rawls' required condition of trust and confidence ties in with Pitkin's understanding of 'hypothetical consent' – a label she herself coined:

> your obligation to obey depends not on any special relationship (consent) between you and your government, but on the nature of that government itself ... Legitimate government acts within the limits of authority rational men would, abstractly and hypothetically, have to give to a government they are founding. Legitimate government is government which *deserves* consent[219].

Lewis suggests that the focus should be steered away from the *consent of the people*, for it is clear that this consent is not actually given and it is equally unclear under what subjective circumstances any particular individual would consent. His focus is instead on the *behaviour of the state*. A state must treat its people as if they had consented, even though they had not consented: "By treating citizens as if they had consented, the authority acknowledges the citizens' right to consent and the right to dissent, and it accepts the task of persuading the citizen to *choose* to obey without relying on the citizen's *obligation* to obey"[220].

Stark elaborates on this, in her view, important distinction between choosing to obey and being obliged to obey in her defence of hypothetical consent theories against their main criticism[221] – the claim that hypothetical consent cannot give rise to obligation. She urges us to:

> think of a theory of legitimacy as giving a justification of political principles or arrangements. A legitimate principle or institution is one that is justified. Think of a theory of obligation as giving an account of why and under what circumstances

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[218] Habermas, "The European nation state: on the past and future of sovereignty and citizenship", *op. cit.*, at p. 409.
[219] Pitkin, "Obligation and consent – I", *American Political Science Review*, Vol. 59 (1965), pp. 990-999 at p. 999 (emphasis in the original).
[220] Lewis, "On using the concept of hypothetical consent", *Canadian Journal of Political Science*, Vol. 22, No. 4 (1989), pp. 793-807, at p. 794 (emphasis in the original).
[221] See such critics as Schmidtz, "Justifying the State" (1990), *Ethics*, Vol. 101, No. 1, pp. 89-102; Brudney, "Hypothetical Consent and Moral Force", *Law and Philosophy* (1991), Vol. 10, No. 3, pp. 235-270; Harris, "From Social Contract to Hypothetical Agreement: consent and the obligation to obey the law" (1992), *Columbia Law Review*, Vol. 92, pp. 651-683.

> citizens are required to obey justified rules or arrangements. On this account, first, legitimacy is a necessary, but not a sufficient, condition for obligation ...[222]

As an aside to hypothetical consent theories as a source of *legitimacy* of the state, she considers possible sources of *obligation* and suggests that:

> People may desire to disobey or be unwilling to obey because, for whatever reason, they do not lend credence to the reason they have to obey. (Perhaps they are moved by self-interest or desire or greed.) But, upon full reflection, they have reason willingly to obey. The sense in which the principles are self-imposed, then, is straightforwardly Kantian: the source of their authority is in the agent's own rational willing[223].

Max Weber proposes a form of the hypothetical consent theory[224]. He submits that a political regime is legitimate if its participants have certain beliefs or faith in regard to it: "the basis of every system of authority, and correspondingly of every kind of willingness to obey, is a belief, a belief by virtue of which persons exercising authority are lent prestige"[225]. Although this focuses on the consent of the people, his theory provides more detail on the behaviour the hypothetical consent theory requires of states. Weber distinguishes among three main sources of legitimacy. The first is traditional - people may have faith in a political entity because it has been there for a long time. Secondly, charismatic legitimacy is derived from the faith the people have in the particular ruler in question. Finally rational-legal legitimacy is based on the trust of the people in the rationality of the rule of law[226]. These three categories are merely ideal types in order to facilitate theoretical analysis and are of a self-professed purely descriptive nature. However, they are still based on the underlying idea that in certain conditions the people would hypothetically consent to a particular political authority. Due to the inherent instability of the first two categories, Weber considers the move towards a rational-legal structure of authority inevitable in the end.

Weber observes an empirical movement towards rationalisation at three levels: that of the individual, organisations and society as a whole. First, at the level of the individual, he observes that modern structures of society are marked by the differentiation of the two functionally symbiotic systems of calculating capitalism and the bureaucratic state, the private and public

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[222] Stark, "Hypothetical Consent and Justification" (2000), *The Journal of Philosophy*, Vol. 97, No. 6, pp. 313-334, at pp. 325-326.
[223] *Ibid.*, at p. 333.
[224] Weber, "Politics as a vocation", in Heinrich Gerth and Wright Mills (eds.), *From Max Weber: Essays in Sociology*, Routledge and Kegan Paul ltd., London, 1948, pp. 77-128, at p. 114.
[225] Weber, *Economy and Society: An Outline of Interpretive Sociology*, Roth and Wittich (ed.s), University of California Press, Los Angeles and London, 1978, p. 261.
[226] *Ibid.*, p. 215.

spheres[227]. Second, bureaucratisation[228] has developed as the most efficient and rational way of organising and the third aspect of rationalisation is the broader process of disenchantment[229], by which people are gaining a greater understanding of the world, resulting in its demystification.

In essence, rationalisation means a historical transition towards a world in which "one can, in principle, master all things by calculation"[230]. Rational action presupposes knowledge. It requires some knowledge of the theoretical and material circumstances on which our action is based, since to act rationally is to act on the basis of conscious reflection about the probable consequences of action. This knowledge must be sought by the state in order to ground its actions on a rational-legal basis; furthermore, the hypothetical consent theory, linked to deliberative democracy, requires consultation with the public in the gathering of this knowledge. Thus, for the modern state to justify its actions and so legitimise itself, it must demonstrate on an evidential basis why these actions go in some way towards maintaining efficient societal order and that these actions do not go beyond that which is necessary. This is the manner in which I contend the state must justify its actions in the particular realm of migration control.

Conclusion

This chapter has set out a very brief outline of how the modern state came to be formed in quite a haphazard fashion. It existed before mechanisms to justify its political power were conceived and attempts made to put such in place. There has been constant interplay between theory and the reality of state formation, which remains ongoing. Fukuyama's research into the origins of political order[231] suggests that the initial creation of the state came about through a transition of dubious legitimacy from tribal communities. This, and his theoretical criticism of social contract theories, undermines Rawl's notion of joining consent[232] and sets at nought attempts to legitimise the initial creation of states. As such, the pressure is on for states to make up for this illegitimate start and justify their continuance in being.

Montesquieu[233] spurred on the constitutionalist theorists in developing the idea of a higher law to which an existing state was bound in the two aspects of individual rights and the separation of powers. This ties in with Rawl's notion of an overlapping consensus[234], something Habermas[235]

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[227] *Ibid.*, pp. 641-646. Rawls makes a similar division between "public reason" and "private reason": Rawls, *Political Liberalism*, *op. cit.*, at p. 135.
[228] Weber, *Economy and Society: An Outline of Interpretive Sociology*, *op. cit.*, see generally volume II, chapter XI, 'Bureaucracy'.
[229] Weber, "Science as a vocation", in Heinrich Gerth and Wright Mills (eds.), *From Max Weber: Essays in Sociology*, Routledge and Kegan Paul ltd., London, 1948, pp. 129-158.
[230] Weber, "Science as a vocation", *op. cit.*, p. 139.
[231] Fukuyama, *The Origins of Political Order*, *op. cit.*
[232] Rawls, *Lectures on the History of Political Philosophy*, *op. cit.*
[233] de Secondat, Baron de Montesquieu, *The Spirit of Laws*, *op. cit.*
[234] Rawls, *Political Liberalism*, *op. cit.*

contends is to be found in a state's constitution. The early experiences of Parliament demonstrate however that a constitution may well provide for the protection of individual rights and the separation of powers, but it is far from given that these will be respected in practice. The actual consent of the governed on all political matters through democracy would remedy this problem but due to poor attendance of populations at polling stations in recent years, this remedy is of little use in reality.

This chapter has attempted to draw theories of deliberative democracy together with hypothetical consent theories in piecing together the optimal theory for the justification of the continuing state. Dahl's standard of enlightened understanding[236] for a meaningful democratic process and Arendt's concern that no individual alone can conceive of all possible new ways of life[237] set the stage for Habermas' discourse theory[238]. In pluralist societies, there will be constant oscillation between the substantive ideal in any given situation. Competent deliberation based on good reasons is how best to come to a political decision in his view. Hypothetical consent theories continue on from this in contending that even if there is no express agreement or even deliberation forthcoming from a population, the state must offer reasons for its actions such that rational individuals *would* consent to the measure in question.

Weber's theory of rational-legal legitimacy[239] offers more assistance to states in endeavouring to meet the standards of the hypothetical consent theory. He submits that rational individuals would consent if given reasons determined by rational means of calculation. Knowledge based on sound information must be gathered in order to determine by calculation the probable consequences of an action. Hypothetical consent is not the perfect replacement of direct democracy, but simply an acceptance that this is the best that is realistically possible. Although few individuals have the time and capacity to meaningfully participate in political affairs, it is important nevertheless that the views of those few who wish to be heard on certain matters are taken into account. Hypothetical consent will only be given if several conditions are met: rational-legal justification of measures to be taken towards the end of efficient social order, transparent decision-making and public consultation in decision-making.

In the field of migration control, relying on such bare notions as sovereignty or the protection of the nation state is insufficient to meet these criteria of rational-legal legitimacy. Transparent evidence-based decision making with appropriate consultation is essential for the state to legitimise the measures it takes in this sphere. This is of all the more importance when considered alongside the

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[235] Habermas, *Facts and Norms: contributions to a discourse theory of law and democracy*, *op. cit.*
[236] Dahl, *On Democracy*, *op. cit.*
[237] Arendt, "What is Freedom?" in Hannah Arendt, *Between Past and Future*, *op. cit.*
[238] Habermas, *Facts and Norms: contributions to a discourse theory of law and democracy*, *op. cit.*
[239] Weber, *Economy and Society: An Outline of Interpretive Sociology*, *op. cit.*

following chapter, which traces the history of and rationales behind measures of state control of the movement of people. This political field has developed relatively quickly and it is submitted too quickly for any meaningful thought to be given to the legitimacy of such measures. The notion of evidence-based decision making has only gained in momentum in the recent past and has to date been unable to contend with the path-dependent forces underlying many contemporary state measures of migration control.

3. The development of state control of migration

Introduction

In the previous chapter, developments from social control to political control through the state and the various theories justifying the latter were considered. A modern state must justify why it is the most appropriate form of political control capable of achieving the goal of efficient societal order. Beyond the backdrop of the overlapping consensus of the constitution, it must legitimise the measures it takes to this end. This research is confined to a consideration of the legitimacy of state action in the field of migration control and to this end this chapter embarks on an empirical exploration of the origins and development of such control in both Europe and America.

Two clarifications are necessary at the outset. First, although this chapter will centre its focus on immigration control, this is simply due to the fact that historically, the states chosen for consideration have mainly taken measures to control immigration as distinct from emigration. As such, the historical analysis tends to confine itself to immigration, while the theoretical analysis to follow in subsequent chapters is intended to apply to the two modes of migration.

Second, the distinction between the control of movement of persons and the control of the content of the population of a state must be emphasised. In international law, the modern state is defined as having four characteristics: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states[240]. The first two of these characteristics are relevant in examining how state control of migration evolved. From medieval times, among the powers of the early state was the control of the content of its permanent population. English common law on rules of naturalisation can be traced as far back as the end of the 13th century[241]. Such control over the content of a population through citizenship laws must be distinguished from the control of the movement of people. As regards the defined territory of the state, this was of course protected in every way possible from conquest, but movement of people and goods across territorial borders was for the most part free.

This distinction between the control of the content of the citizenry and the control of the movement of people across territorial borders is crucial going forward in this thesis as the two have tended to be conflated since the turning point in immigration control, which will be discussed in this chapter. The very recent origins of the general and systematic control of the latter is generally not

[240] Article 1 of the Convention on Rights and Duties of States (inter-American), signed at Montevideo on 26th December 1933 is commonly cited as a legal basis for this proposition.

[241] Case of *Eiyas de Rabayn* (1290) outlined in Parry, *British Nationality Law and the History of Naturalisation*, Milano, Giuffrè, 1954, [http://www.uniset.ca/naty/parry.htm].

appreciated, which in itself gives rise to questions over its legitimacy, which will be the topic of exploration in chapter 5.

Migratory flows of people have always existed and, until the instauration of the state, with relative freedom. While initial state controls were of a transient and specific nature, the phenomenon of permanent, general and systematic migration control is of very recent origin. Dummett and Nicol make the following observation in this regard:

> It is taken for granted today that any state's system of immigration control is permanent and universal. That is, a permanent legal framework exists for scrutinising all entrants and for determining which of them may stay, for how long, and under what conditions. The framework may be periodically redesigned but it is not dismantled, such permanent, universal control over immigration is of recent origin only. It would have been unthinkable in early twentieth century Britain; for one thing, it would have been regarded as a gross invasion of personal freedom, for another it would have been physically impossible to enforce. Passports were not a general requirement. Modern controls depend upon universal documentation, telecommunications, a large bureaucracy, and greater powers to invade people's privacy within the country than then existed[242].

Moses supports this contention of a marked difference between early migration control measures and those in place today: "once this historical distinctiveness is recognised, it makes little sense to assume – as today's migration debate does – that national barriers to international human mobility are natural, necessary or constant"[243]. On the American side, the passage of the 1924 Quota Act, discussed below, has been described as marking "the close of an epoch in the history of the United States"[244].

This chapter will consider the origins of state control in Britain and America and the extent to which these were of a transient and specific nature and in response to various societal problems with which the state had to deal. It will then highlight the turning points to general and systematic

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[242] Dummett and Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, Weidenfeld and Nicolson, London, 1990, pp.39-40.

[243] Moses, *International Migration: Globalisation's Last Frontier*, Zed Books Limited, New York, 2006, at p. 37; See also Dauvergne in her report for the UNHCR: *Challenges to Sovereignty: migration laws for the 21st century*, UNHCR, Working Paper No. 92, July 2003, in which she comments that "migration laws are a twentieth century invention"; Goldin, Cameron and Iaiarajan, *Exceptional People: How migration shaped our world and will define our future*, Princeton University Press, Oxfordshire, 2012; Anghie and McCormack, "The rights of aliens: legal regimes and historical perspectives", in Maloney and Korinek (eds.), *Migration in the 21st Century: Rights, Outcomes, and Policy*, Routledge, London and New York, 2011, pp. 23-53.

[244] Calavita, *U.S. Immigration Law and the Control of Labor: 1820-1924*, Academic Press Inc., London and New York, 1984, at p. 160.

control on both sides of the Atlantic to finally in the last section consider continued and enhanced state measures of migration control adopted since that turning point.

§1 Early migration control in Britain and America

(i) Britain

Early migration control in both Britain and America was of a positive nature, encouraging migration. Restrictive measures were transient and targeted specific categories of individuals in response to specific problems as they arose. In general there was freedom of movement unless an individual posed a threat. It is interesting to note first that the distinction between subject and alien was initially only relevant as regards the right to own land and had no connection to rights of free movement:

> If a King seized the lands of a tenant, all the income and services went, of course, to the King in an instant addition to his wealth. It is to a large-scale seizure of this kind that legal authorities trace back the distinction between a class of subjects and a class of aliens which was to be of central importance to the law's development: the rule that subjects could own land in England but aliens could not[245].

The economic realities at that time confirm that freedom of movement across territorial borders was by no means restricted in accordance with the status of subject or alien: "England's towns particularly London, had been cosmopolitan long before the Norman Conquest, drawing traders, visitors and settlers from abroad"[246]. Not only were there no restrictions on aliens coming to England, but from the late thirteenth century onwards the process of endenization was introduced to encourage this movement: "making a person into a 'denizen', neither subject nor alien but an intermediate status with rights including permission to hold land"[247].

Free movement was also encouraged through the use of early forms of travel documents. Moses highlights that rather than their present use as a mandatory regulatory requirement amounting to an obstacle to movement, early travel documents were used as enhanced protection for foreigners by granting them a legal right to free passage across a territory[248]. Clause 41 of the Magna Carta

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[245] Dummett and Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, *op. cit.*, p. 27.

[246] *Ibid.*, p. 25; see further Sayles, *The Medieval Foundations of England*, Methuen, London, 1948.

[247] Dummett and Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, *op. cit.*, p. 29.

[248] Early references to facultative travel documents include the letter requesting safe passage in the Hebrew Bible, Nehemiah 2:7-9 (450 BC), Passport Canada, *History of Passports*, [http://www.passport.gc.ca/pptc/hist.aspx?lang=eng];

(1215) expressly guaranteed merchants unhindered travel in accordance with ancient and lawful customs, except in times of war those from enemy lands. While the sovereign retained the right to expel or exclude specific groups of aliens, any alien could freely enter England without the explicit permission of the sovereign[249]. Moses adds that while it is important not to overlook or underestimate private and local controls on movement in Medieval Europe, "most of these controls were relatively ineffective and not understood as part of the state's sovereign power"[250].

Transient and small-scale measures of migration control began to be adopted by the state intermittently in reaction to various temporal problems encountered. Dummett and Nicol provide a detailed and contextualised account of such from the eleventh century to the twentieth[251]. Until recently, it was rare to exclude people on economic grounds, instead, the entry groups with particular skills to offer would be encouraged so as to promote industry and trade. Coming into the mercantilist period, "people, as labour, came to be understood as a scarce resource. Given the era's relatively sluggish demographic growth rates, the increasing demands for labour (in both productive and military spheres), and the ambition to colonize new worlds, states found it necessary to increase their control over demographic resources"[252].

The means of encouraging immigration included the grant of special privileges which had the disadvantage of stirring up resentment among the native population. Rebellions and riots in the fifteenth and sixteenth centuries were driven by such anti-foreign sentiment. Monarchs responded periodically to such grievances, "but in general ... they had to weigh economic and political considerations against each other"[253] and measures were poorly enforced and of short duration.

Transient measures of state control of migration were also adopted for religious ends. In the sixteenth century, King Henry VIII made himself head of both the church and state of England by a series of Acts of Parliament. Measures of control were introduced against members of the Roman Catholic Church – the arch-enemy of the church-state. In 1585, an Act ordered "all jesuits, seminary priests and other priests ... to depart out of this realm of England" [254]. The same group were also banned from entering this realm in the future under penalty of execution for high treason.

The *Bara'a* in the Medieval Islamic Caliphate, Daniel Frank (ed.), *The Jews of Medieval Islam: Community, Society and Identity*, E.J. Brill, Leiden, 1995, p. 6; the first modern passport of King Henry V of England, Dominic Casciani, *Analysis: The first ID cards*, article published on the BBC News website on 25 September, 2008,
[http://news.bbc.co.uk/2/hi/uk_news/politics/7634744.stm].

[249] Moses, *International Migration: Globalisation's Last Frontier*, *op. cit.*, at p. 40.

[250] *Ibid.*, p. 41.

[251] Dummett and Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, *op. cit.*, see chapters 2 to 6 generally.

[252] Moses, *International Migration: Globalisation's Last Frontier*, *op. cit.*, at p. 42.

[253] Dummett and Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, *op. cit.*, at p. 41.

[254] *Ibid.*, p. 58.

The application of these measures to both subjects and aliens is worthy of note[255]. Reactionary and transient measures of migration control also stemmed from the growth in influence of class bias: "official policy had a strong class bias, distinguishing between rich and poor Jews, and picking up black vagrants to ship off to Sierra Leone in much the same way that it had endorsed picking up poor, young white English men and women off the London streets to ship to Virginia in the reign of James I"[256].

More comprehensive restrictions on migration appeared with the rise of liberal thought and its success in the political sphere; in Europe they were largely a response to the French Revolution. Fears of a flood of Jacobian emissaries sparked strong doses of Francophobia and migration controls in Britain and America, among other countries. These controls were however narrowly defined, short-lived and contained sunset clauses. Again, with the passing of each threat, laws like these were eventually discontinued or rescinded[257]. The English Alien Act of 1793 (33 Geo. III c. 4)[258] is a case on point. It was quite far reaching on paper, containing such provisions as: aliens and ship masters transporting them were obliged to make declarations on arrival at British ports (ss. 1-4); aliens who had a transportation order made against them but were subsequently found within the realm were guilty of felony and to suffer death (s. 38); aliens could not travel throughout the realm from the place of arrival unless they applied for and were granted a passport (ss. 8-12) The crown was empowered to prohibit or restrict to certain ports the landing of aliens of any description if necessary for the safety of the Kingdom (s. 7).

"Faced with a vigilant Opposition, the government made only a sparing use of its power of deportation (chiefly against those who had been closely associated with Napoleon), and eventually relinquished it in the period of Liberal Toryism"[259]. Dummett and Nicol comment that even while in force, its implementation depended on the cooperation of masters, housekeepers and informers (who were awarded a proportion of the fines imposed under the Act): there was no regular police force at that time[260]. Throughout the nineteenth century and up "until around 1880 the British attitude to aliens was open and tolerant. Entry and settlement were unrestricted; refugees were

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[255] For more detail of measures taken particularly against Catholics see: Tarrago, "Bloody Bess: the Persecution of Catholics in Elizabethan England", *Logos: A Journal of Catholic Thought and Culture* (2004), Vol. 7, No. 1, pp. 117-133; Bernard, "The Church of England c. 1529-1642", *History* (1990), Vol. 75, No. 244, pp. 183-206.

[256] Dummett and Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, *op. cit.*, at p. 79.

[257] Moses, *International Migration: Globalisation's Last Frontier*, *op. cit.*, at p. 45.

[258] English Aliens Act 1793 (33 Geo. III c.4), [http://webarchive.nationalarchives.gov.uk/+/http://www.movinghere.org.uk/search/catalogue.asp?RecordID=77088&ResourceTypeID=2&sequence=1].

[259] Dinwiddy, "The Use of the Crown's power of Deportation under the Aliens Act, 1793-1826", *Historical Research* (1968), Vol. 41, Issue 104, pp. 193-211, at p. 211.

[260] For an insight into the development of British police force at this time, see Bayley, "The Police and Political Development in Europe", in Tilly (ed.), *The Formation of National States in Western Europe, Princeton University Press*, New Jersey, 1975, pp. 328-379.

welcomed, and the *ius soli* rule ensured that children of any origin born in the country were fully assimilated[261]".

At this time of the European industrial revolution, many states found themselves in need of labour force support for the realisation of large scale infrastructural projects, mining and farming. The rate of industrial development varied greatly among European states; the leading states in commercial and technological advances had such an accelerated rate of development that those states lagging behind had no possible means of competing, with their economies finding it hard to advance as a result. For this reason, workers in the latter states had no option but to migrate in search of higher incomes and more developed states were generally receptive to immigrant labour force support[262]. A. J. P. Taylor observed that at the turn of the twentieth century "a foreigner could spend his life in [Britain] without permit and without informing the police"[263], although if they became destitute, they might be pressurised to move on or even effectively deported[264].

(ii) America

Early measures of migration control in America were of a similarly transient nature. Again, the general position was freedom of movement unless an individual posed a threat. Neuman observes that between the years 1776 and 1875, five major categories of immigration policy were implemented by state legislation: "regulation of the movement of criminals; public health regulation; regulation of the movement of the poor; regulation of slavery; and other policies of racial subordination, [namely] ideological restriction and alien registration"[265]. These were to a large extent state measures, though "Federal statutes backed up the state quarantine laws and state laws barring importation of slaves or free black aliens [and] Federal diplomatic efforts gave some support to state policies against the 'dumping' of convicts and paupers"[266].

Concerning the category of ideological restriction, the Federal Government first briefly dipped into alien regulation with the adoption of the Alien and Sedition Acts of 1798, a package comprising the Alien Enemies Act, the Naturalisation Act and the Alien (or Alien Friends) Act. These essentially authorised the president to deport any resident alien considered "dangerous to the peace and safety of the United States"[267] and to apprehend and deport resident aliens if their home countries were at

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[261] *Ibid.*, p. 86.
[262] O'Brien, "Transport and Economic Development in Europe 1789-1914", in O'Brien (ed.), *The Industrial Revolution in Europe, Vol. I*, No.4, Oxford, Blackwell, 1994, pp.253-279.
[263] Taylor, *English History, 1914-1945*, Oxford, Clarendon, 1965, p.1.
[264] UK national archives website, *Events of 1901*, [http://www.nationalarchives.gov.uk/pathways/census/events/britain4.htm].
[265] Neuman, "The Lost Century of American Immigration Law (1776-1875)", *Colombia Law Review* (1993), Vol. 93, No. 8, pp. 1833-1901, at p. 1841.
[266] *Ibid.*, at p. 1883.
[267] Taylor, "The Alien and Sedition Acts", in Zelizer (ed.), The American Congress: The Building of Democracy, Houghton Mifflin Company, New York, 2004, pp. 63-76, at p. 69.

war with the United States of America. They worked on the basis of a *prima facie* right to free movement with certain specified exceptions. Novel for their time, they were not yet supported by adequate administrative systems to ensure their enforcement and were vehemently condemned on their merits; for these reasons they were not rigorously enforced. In fact, the American Act Concerning Aliens had such strong Republican opposition that President Adams didn't apply it once before it expired two years later. All the Acts of 1798 proved so unpopular among the general American public that "they contributed to the Federalists' crushing defeat in the pivotal national election of 1800"[268]. The Alien Act in particular was condemned "both on individual rights grounds and on federalism grounds – the opponents maintained that Congress had been delegated no power to control the admission of aliens"[269].

Alongside these specific categories, immigration was generally encouraged at this time. President Tyler's message to Congress on 1st June 1841 captures the essence of immigration policy in this period: "We hold out to the people of other countries an invitation to come and settle among us as members of our rapidly growing family"[270]. The state engaged in direct attempts to increase immigration:

> In 1862 Secretary of State William Seward saturated U.S. officials in Europe with pamphlets for distribution, advertising high wages in the United States ... in an effort to induce immigration. To this end, the U.S. Consul in London in 1863 employed a full-time agent to stir up emigration to the United States ... The same year President Abraham Lincoln, in his annual address to Congress, called attention to the need for labourers and pressed for more effective government action to stimulate immigration. On July 4, 1864, the Act to Encourage Immigration was passed (13 U.S. Statutes at Large)[271].

American relations with China in the 19th century are a stark example of the encouragement of immigration and the lead up to the turning point in migration control to be addressed in the next section[272]. In the first half of this century, trade between the two nations started to flourish and the issue of migration of American and Chinese citizens from one country to the other was addressed in the bilateral Treaty of 1868[273] with the professed object of establishing closer relations between

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[268] *Ibid.*, p. 63.
[269] Neuman, "The Lost Century of American Immigration Law (1776-1875)", *op. cit.*, at p. 1881.
[270] U.S. Congress, Senate Immigration Commission, 1911, Vol. 1, p. 562, quoted in Calavita, *U.S. Immigration Law and the Control of Labor: 1820-1924*, op. cit., at p. 33.
[271] Calavita, *U.S. Immigration Law and the Control of Labor: 1820-1924*, *op. cit.*, at p. 36.
[272] See the judgment of the United States Supreme Court of 13th May 1889, *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889), for a general background to US-Chinese relations at this time with regard to migration between the two countries.
[273] Burlingame Treaty 1868, San Francisco, California, [http://content.cdlib.org/ark:/13030/hb4m3nb03h/?order=7&brand=calisphere].

the two countries and their peoples. The liberal nature of this Treaty with regard to the ideal of freedom of movement of the citizens of both nations between the two territories is evident in the following two articles:

> Art. 5. The United States of America and the emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, or as permanent residents. The high contracting parties, therefore, join in reprobating any other than an entirely voluntary emigration for these purposes …
> Art. 6. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favoured nation; and, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favoured nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States.

In this way free movement of people was acknowledged as an individual right and as something positive to be encouraged, while being distinguished from the sovereign right of each State to control the content of its population through the process of naturalisation.

§2 The turning point to general and systematic control

The transition from transient and specific measures of migration control to a lasting system of general controls over all immigrants was to have a more deep-rooted cause. "This new light was the baleful glow of racial theory. By the last years of the [nineteenth] century, a collection of these scientific, philosophic and historical theories had, in more or less crude form, become part of the British mental background, and were popularised through periodicals and works of fiction"[274]. Such theories fabricated anthropologic typologies supporting the classification of human populations into physically discrete human races which were claimed to be superior or inferior. Physiological traits such as measurements of the cranium, facial features and skin pigment were believed to be connected with levels of intelligence and moral character[275]. These theories

[274] Dummett and Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, *op. cit.*, p. 95, see generally chapter 6.
[275] See notably Morton, *Crania Americana: Or a Comparative View of the Skulls of Various Aboriginal Nations of North and South America*, Jobson, Philidelphia, Simpkin, Marshall & co. Letter Press, London, 1839; Schopenhauer, *Parerga & Paralipomena: Short Philosophical Essays* (1851), Vol. II, Oxford University Press, Oxford, 1974; Haeckel, *The History of Creation* (1868), trans. 6th ed. (two volumes),

gradually fused with such theories as eugenics[276] and ethnic nationalism[277] to ground advocacy for geo-political borders parallel to racial ones.

Parallel to this development of racial theories, the ideology of collectivism in the forms of nationalism and socialism was growing in influence. The German philosopher Hegel proposed that there was a spirit of the age ("zeitgeist") inherent in a particular people at a particular time, and that, when that people became the active determiner of history, it was simply because their cultural and political moment had come. Interpretations of his writings painted Hegel as a proponent for German nationalism and in this way he became a key influence for the development of National Socialism in Germany[278]. His writings were also to influence the theories of Marx, who adopted Hegel's dialectical method in order to criticise established society, politics and economics and campaign for socialism. Marx proposed a theory of dialectic in terms of successive conflicts between economic classes instead of between nations. This "emphasis on social determinism set up a mental framework in which no theory of universal natural rights could flourish"[279].

These pervasive changes in ideology affected how those outside the collective groupings formed were perceived and treated. Immigration controls came to be adopted by nation states on a much more general and systematic level than before:

> The First World War was the great turning-point in the history of British immigration control. It established a lasting system of general controls over all entrants and alien residents, which was in the hands of the executive branch of government and officials, who between them made policy. Scrutiny by Parliament and the courts was minimal, while the role of the police and of intelligence services working under or with the war office was greatly enlarged. The traditional concept of 'alien friend' had been eroded, first by the 1905 Act's formal designation of certain types of alien as 'undesirable' but much more significantly by the 1919 assumption that all aliens should be regarded with suspicion as potential subversives. The greatest shift of all was from the historic presumption that an alien could come and go freely unless there was a specific reason to exclude him, to the new presumption that an alien had no claim to be received, or to

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Appleton & co., New York, 1914; de Gobineau, *The Inequality of Human Races* (1915), trans. Collins, Fertig, New York, 1999.

[276] Galton, *Inquiries into Human Faculty and its Development*, Macmillan, London, 1883; Vacher de Lapouge, *L'Aryen et son rôle social* (1899), "The Aryan and his Social Role" in Taguieff, *La couleur et le sang – Doctrines racistes à la française*, "Colour and Blood – Racist French Doctrines", Mille et une nuits, Paris, 2002.

[277] Ripley, *The Races of Europe: A Sociological Study*, Appleton & co., New York, 1899; Essays of Johann Gottfried Herder from 1762 to 1800 in Barnard, *Herder on Nationality, Humanity, and History*, McGill-Queen's University Press, Montreal and Kingston, 2003.

[278] Avineri, "Hegel and Nationalism", *The Review of Politics*, Vol.24, No.4 (Oct 1962), pp. 461-484.

[279] Dummett and Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, *op. cit.*, p. 96.

remain, but could enter only as the interest of the state – as defined by the state authorities – dictated[280].

Moses supports this analysis and observes that "with the outbreak of World War I, every state began to impose drastic restrictions on movements. This in itself was nothing new; but these controls were not lifted with the end of the hostilities. After World War 1, there would be no turning back to Keynes' liberal idyllic; even its memory is blurred in contemporary reflections"[281].

Evidence of the influence of the increasingly dominant racist ideologies in the period approaching World War 1 can be seen in an examination of the parliamentary debates and provisions of the immigration control measures adopted at this time in both Britain and America.

i) Britain

The British Aliens Act of 1905 marked the turning point from the liberal migration regime of the 19th century – "the first modern act to regulate alien immigration into Britain"[282]. It created a body of officers, under the responsibility of the Home Secretary, with power to refuse permission to enter the country to 'undesirable immigrants', including those with no means of financial support. Limited in its application, it only applied to 'steerage passengers' (those with the cheapest tickets) and only if they arrived on a ship carrying more than 20 alien steerage passengers and so was easily evaded by those not fulfilling these criteria . It was subject to strong criticism from the political opposition. For example, "Sir Henry Campbell-Bannerman, leader of the Liberal Opposition, explained during the third reading debate that he was voting against the Bill because 'the man most likely to make a good citizen has no chance to come into this country unless he has money in his pocket. But the worthless man, the scamp, the lazy man can come in if he has money in his pocket'"[283].

The build up to the introduction of the 1905 Act began in 1901 with a perceived increase in the number of immigrants to the country, especially Russian, Austrian and Polish Jews. Several politicians and media reporters were quick to describe this as a threat, and even as an 'alien invasion'. S. Forde Ridley, MP for South-west Bethnal Green in London, claimed that 90,000 foreigners had settled in the country in the first nine months of 1901[284]. This, however, seems to

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[280] *Ibid.*, p. 112.
[281] Moses, *International Migration: Globalisation's Last Frontier*, *op. cit.*, at p. 49.
[282] Pellew, "The Home Office and the Aliens Act 1905", *The Historical Journal* (1989), Vol. 32, No. 2, pp. 369-385, at p. 369; see also Wray, "The Aliens Act 1905 and the Immigration Dilemma", *Journal of Law and Society* (2006), Vol. 33, No. 2, pp. 302-323.
[283] Pannick QC, "A century ago immigration control was an alien concept - how it has changed", [http://www.thetimes.co.uk/tto/law/article2212883.ece].
[284] British National Archives, "Events of 1901", [http://www.nationalarchives.gov.uk/pathways/census/events/britain4.htm].

have been speculation as concrete statistics were impossible to obtain as no official record was kept. It has since been argued that the majority of those entering through British ports were *en route* for other destinations such as America and South Africa. The historian V.D. Lipman has estimated the number of Russo-Jewish immigrants to have settled permanently in Britain between 1881 and 1905 at 100,000[285].

David Pannick QC gives an insightful analysis of the rationale underlying the introduction of the British Aliens Act 1905:

> The arrival in this country of large numbers of Jews fleeing persecution in Eastern Europe and settling in the East End of London led the Conservative MP for Stepney, Major William Evans Gordon, to call for legislation. In the House of Commons in January 1902, he moved an amendment to the Queen's Speech complaining that English families were being "ruthlessly turned out to make room for foreign invaders" who were bringing disease and crime with them. In some schools "few English children are to be found"... In a particularly poisonous metaphor, he argued that "ten grains of arsenic in 1,000 loaves would be unnoticeable and perfectly harmless, but the same amount if put into one loaf would kill the whole family that partook of it".
>
> The Conservative Government's response was not to denounce such irresponsible rhetoric but to establish a Royal Commission on Aliens, which reported in the summer of 1903 ... The royal commission rejected all the sensational claims about aliens. The proportion of the population who had come from abroad was significantly lower than elsewhere in Europe. The new arrivals had not caused health hazards or a crimewave. Indeed, the royal commission noted, approvingly, that "the foreign prostitute is generally far more sober than the English". Foreign workers had skills not found in the domestic workforce: about 10 per cent of the alien population of this country worked as tailors. Only 1 per cent of aliens received Poor Law payments. They "send their children regularly to school, and are rewarded by the quickness with which these children acquire knowledge and the number of prizes gained by them"[286].

This Royal Commission nevertheless concluded its report with a recommendation for legislation controlling immigration, with two of its members dissenting on the grounds that the report's findings did not justify such recommendations. The patently unfounded prejudices of the majority were quickly perceived as a useful political tool by the conservative government in power at that time:

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[285] *Ibid.*
[286] Pannick QC, "A century ago immigration control was an alien concept - how it has changed", *op. cit.*

> The embattled Conservative Government led by Arthur Balfour (it was to lose the general election of 1906 to the Liberals in a landslide) saw a cause on which it might unite its members. A 1904 government Bill would, if enacted, have conferred a broad power on the Home Secretary to exclude aliens from this country, and would have allowed the Local Government Board to define areas of the country from which aliens would be excluded. It met with substantial opposition in the House of Commons and had to be withdrawn.
>
> A much revised Bill became the 1905 Act, despite the assurance from Keir Hardie, Labour MP for Merthyr Tydfil, that "there is no demand for this Bill from the working classes"[287].

When the Liberals came to power in 1906 they did not repeal the Act, but neither did they rigorously enforce it. The precedent had been set, however, for a century of increasing legislative controls on immigration[288].

ii) America

The first sign that the tide was turning in America came with developments in its relations with China. The discovery of gold in California in 1848 attracted large numbers of immigrants, particularly Chinese citizens, in order to obtain work as labourers and for some years little opposition was made to them[289]. With the increasing influence of racial theories however, attitudes gradually altered and a Memorial was presented to Congress in February 1879 setting out:

> that the presence of Chinese labourers had a baneful effect upon the material interests of the state, and upon public morals; that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; that the discontent from this cause was not confined to any political party, or to any class or nationality, but was well nigh universal; that they retained the habits and customs of their own country, and in fact constituted a Chinese settlement within the state, without any interest in our country or its institutions; and praying congress to take measures to prevent their further immigration[290].

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[287] *Ibid.*
[288] UK national archives website, *Events of 1901*, [http://www.nationalarchives.gov.uk/pathways/census/events/britain4.htm].
[289] See the judgment of the United States Supreme Court of 13th May 1889, *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889), at p. 594.
[290] Cited in the judgment of the United States Supreme Court of 13th May 1889, *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889), at p. 596. Calavita captures the context of this change in attitude in her detailed exposition

In response to growing political pressure, the US Government returned to the drawing board with China and by Supplemental Treaty of 17th November 1880 the latter agreed that notwithstanding the stipulations of former treaties, the US might regulate, limit or suspend the coming of Chinese labourers, or their residence therein, without absolutely forbidding it, whenever in their opinion the interests of the country, or any part of it, might require such action[291].

An Act of Congress of 6th May 1882 purported to give effect to this Treaty, though in its terms went somewhat further. It provided that for a period of ten years from its date of enactment, the coming of Chinese labourers to the US was suspended and went so far as to make it an offence for any such labourer to come, or, having come, to remain within the United States. It made it a misdemeanour for the master of any vessel knowingly to bring within the United States from a foreign country, and land, any such Chinese labourer. Registration and certification provisions were also included[292]. Given the liberal underpinnings of the 1868 Treaty, this legislation marked a significant turning point in US immigration policy. Schuck observes that "although opposition to aliens has been common throughout American history and certain categories of undesirables, such as prostitutes and public charges, were excluded as early as 1645, blanket federal exclusions began only during the 1880's with laws limiting and then barring the immigration of Chinese laborers. Blanket exclusions continued ..."[293]

The supplemental Act of 1888 was challenged in habeas corpus proceedings "as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress"[294]. The Supreme Court in *Chae Chan Ping v. U.S.* upheld its validity in holding for the first time that:

> the power of exclusion of foreigners [was] an incident of sovereignty belonging to the [federal] government of the United States as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone[295].

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of the increased hold of racial theories in America at this time, stemming from the nascent disciplines of social Darwinism and eugenics: Calavita, *U.S. Immigration Law and the Control of Labor: 1820-1924*, *op. cit.*, at pp. 104-108.

[291] See judgment of the United States Supreme Court of 13th May 1889, *Chae Chan Ping v. U.S.*, *op. cit.*, at p. 597.

[292] Chinese Exclusion Act, May 6, 1882, Chap 126, [http://library.uwb.edu/guides/usimmigration/22%20stat%2058.pdf].

[293] Schuck, "The Transformation of Immigration Law", *Columbia Law Review* (1984), Vol. 84, No. 1, pp. 1-90, at p. 13.

[294] *Chae Chan Ping v. U.S.*, *op. cit.*, at p. 589.

[295] *Ibid.*, at p. 609.

Given that this was the first time that sovereignty was used as the legal basis for federal control of migration, there is remarkably little commentary on this judgment. Its significance in respect of this thesis is in highlighting the fact that this sovereign basis for migration control is merely just over a hundred years old. The few academics that have commented thereon have tended to be critical. The finding that the power of exclusion of foreigners was an incident of sovereignty belonging to the federal government was somewhat curious given that Congress had in the past considered federal immigration measures "to be unconstitutional and 'an infringement on states' rights'. Congress, it was argued, did not have the right to bar any class of immigrants"[296]. Neuman observes that "the nineteenth-century search for the mysterious line between the exercise of the [state] police power and the regulation of commerce [a federal power] left indeterminate room for state control of immigration. [The shift in focus to foreign affairs implications] set the stage for the justification of federal immigration power as an aspect of the nation's external sovereignty in [*Chae Chan Ping v. U.S.*]"[297].

Legomsky is critical of the plenary power doctrine[298], which developed as a result of this judgment[299] – a doctrine curtailing judicial review of immigration measures due to this foundation in 'the nation's external sovereignty'. First he contends that "it ignores reality to hold that every provision concerned with immigration, as applied to every fact situation it might encompass, is so intimately rooted in foreign policy that the usual scope of judicial review would hamper the effective conduct of foreign relations"[300]. Second, he is critical of the Supreme Court's decision in this case to base the federal power to control migration not on one of its existing enumerated powers such as the commerce power, the naturalisation power or the war power, but on an unenumerated sovereign power. Nevertheless, "if even the expressly enumerated powers are subject to constitutional limitations, the case for limiting a merely implied power would seem to be even stronger"[301]. In assessing the history of US immigration control measures, Garcia puts it plainly: "as was the case during Chinese Exclusion, concepts such as sovereignty have historically

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[296] Calavita, *U.S. Immigration Law and the Control of Labor: 1820-1924*, *op. cit.*, at p. 33, citing U.S. Congress, Reports of Congressional Committees, 1856).

[297] Neuman, "The Lost Century of American Immigration Law (1776-1875)", *op. cit.*, at p. 1893; see also Jan Ting, "'Other than a Chinaman': How US Immigration Law resulted from and still reflects a policy of excluding and restricting Asian Immigration", *Temple Political and Civil Rights Law Review* (1994-1995), Vol. 4, pp. 301-315.

[298] For further criticism of this doctrine, see Motomura, "Immigration law after a century of plenary power: phantom constitutional norms and statutory interpretation", *Yale Law Journal* (1990-1991), Vol. 100, pp. 545-613; Motomura, "The curious evolution of immigration law: procedural surrogates for substantive constitutional rights", *Columbia Law Review* (1992), Vol. 92 No. 7, pp. 1625-1704.

[299] Motomura states that "the story of the plenary power doctrine's role in constitutional immigration law begins with the Supreme Court's 1889 decision in the *Chinese Exclusion Case*": Motomura, "Immigration law after a century of plenary power: phantom constitutional norms and statutory interpretation", *op. cit.*, at p. 550; see also Chin, "Chae Chan Ping and Fong Yue Ting: the origins of plenary power", in Martin and Schuck (eds.), *Immigration Law Stories*, Foundation Press, California, 2005.

[300] Legomsky, "Immigration law and the principle of plenary congressional power", *Supreme Court Review*, 1984, pp. 255-307, at p. 262.

[301] *Ibid.*, at p. 275.

served as proxies for racism"[302]. The lack of reasoning in the judgment and indeed the pronounced desire not to intervene in this executive realm in such passages as:

> Whatever license, therefore, Chinese laborers may have obtained, previous to the Act of October 1, 1888, to return to the United States after their departure is held at the will of the government, revocable at any time at its pleasure. Whether a proper consideration by our government of its previous laws or a proper respect for the nation whose subjects are affected by its action ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act are not questions for judicial determination[303].

and

> During the argument, reference was made by counsel to the Alien Law of June 25, 1798, and to opinions expressed at the time by men of great ability and learning against its constitutionality... It is enough, however, to say that it is entirely different from the act before us, and the validity of its provisions was never brought to the test of judicial decision in the courts of the United States[304].

do little to counter Garcia's submission.

Racial theories thrived and federal blanket exclusions were extended through the National Origins Quota Law of 1921 beyond Chinese nationals to all essentially non-white foreigners. Various categories of foreigners were in turn scathed. The chair of the House Committee on Immigrations and Naturalisation in a speech to Congress in 1922 warned that "in but a few years these aliens in very despair will be pounding heavily at the very pillars of our government, where those who have come ahead of them a few years back with their socialism, their communism, their Bolshevism, have been merely gnawing like rats at our foundations"[305]. Congress appointed an "expert eugenics agent" and heard testimony from a self-appointed expert on the "biological propensity of Jews towards radicalism"; it also relied on "a report in 1920 from the state department summarizing comments from consuls overseas on the 'pernicious' character of the Jews planning to emigrate. They were, according to the report, 'abnormally twisted', 'unassimilable', 'filthy un-American and often dangerous in their habits'"[306]. The resulting National Origins Quota Act of 1921 and its amending Act of 1924 thus had an incoherent racial basis:

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[302] Garcia, "Critical Race Theory and Proposition 187: the racial politics of immigration law", *Chicano-Latino Law Review* (1995), Vol. 17, pp. 118- 154, at p. 133.
[303] *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889), at p. 609.
[304] *Ibid.*, at pp. 610-611.
[305] Congressional Record, 1922, at p. 12065.
[306] Calavita, *U.S. Immigration Law and the Control of Labor: 1820-1924*, *op. cit.*, at p. 145.

> [it] comprised a constellation of reconstructed racial categories, in which race and nationality – concepts that had been loosely conflated since the nineteenth century – disaggregated and realigned in new and uneven ways. At one level, the new immigration law differentiated Europeans according to nationality and ranked them in a hierarchy of desirability [old North-Western European immigrants were favoured over the newer South-Eastern variety]. At another level, the law constructed a white American race, in which persons of European descent shared a common whiteness that made them distinct from those deemed to be not white [non-European immigrants – among them Japanese, Chinese, Mexicans and Filipinos – acquired ethnic and racial identities that were one and the same, essentially non-white][307].

§3 Continued and enhanced state control of migration

From this turning point to general and systematic control with the 1905 Act in Britain and the 1888 Chinese Exclusion Act in America, a more defined and organised state control of the movement of people across territorial borders gradually developed in the post-war period. The point of departure transformed from 'freedom unless you pose a threat' to 'control unless we want you'. Since this turning point, the focus of states has mainly been on restrictive measures of migration control as opposed to facilitative measures of migration management.

Receiving states progressively adopted additional direct and indirect measures of control. Direct measures include the establishment of permanent border controls and the collection of personal and biometric data from immigrants, the creation of obligations on transport managers, the imposition of visa requirements and the development of substantive migration rules. Indirect measures of control progressed from citizenship laws to the exclusion of categories of persons from certain economic and social opportunities to the criminalisation of immigration law violations and detention of immigrants.

Meyers observes that there has been an extraordinary similarity with regard to content and timing among the immigration control policies of the major receiving countries since the 1870s. An element of path dependency is evident in that previous measures have been built upon without questioning the legitimacy of the former[308]. This has significance for chapter 5, in which the legitimacy of this control will be analysed. In relation to the post World War II period, Meyers observes that:

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[307] Ngai, "The Architecture of Race in American Immigration Law: a re-examination of the Immigration Act 1924", *The Journal of Amercian History* (1999), Vol. 86, No. 1, pp. 67-92, at pp. 69-70.

[308] See Nafziger, "The General Admission of Aliens under International Law", *American Journal of International Law* (1983), Vol. 77, pp. 804-847.

> Between 1945 and 1972, with the exception of 1966-68, Western European countries first accepted permanent immigrants (mainly from their colonies or former colonies) or refugees, then recruited large numbers of migrant workers ... Between 1966-68, Western European countries limited the recruitment of migrant workers, and strengthened their control over private recruitment. During the second half of the 1970s, these same countries encouraged former migrant workers to return to their home countries by offering them financial incentives, but to no avail.
>
> During the 1980s and the first half of the 1990s, all receiving countries attempted to halt illegal immigration and to reduce the number of immigrants granted asylum. The measures applied included stricter controls at the borders, penalties on employers of illegal immigrants, incarceration of illegal immigrants in camps and sometimes their deportation, as well as a reform of the asylum processing procedures[309].

The main causes for such convergence, he proposes, are first, the influence of global or regional migration regimes and second, the interdependence between socioeconomic and foreign policy factors that lead to immigration control policies. This section will consider his first main cause with a focus on developments in Europe. It is beyond the scope of this research to delve into similar detail in relation to America. It is sufficient to have highlighted the similar origins of general and systematic state control of migration on both sides of the Atlantic and to note that in its broad direction, there has since been significant convergence. Europe will also be focused upon to allow for a comparison between intergovernmental and supranational governance in this field, which will be explored again in chapters 4 and 7. Broadly, I will contend that the intergovernmental arms, as groupings of individual member state concerns, have tended to be of a restrictive nature; in comparison, the introduction of the supranational arms has to some extent tempered this in bringing a broader range of interests to the negotiating table beyond narrow individual state interests.

i) Setting the context: Justice and Home Affairs in the EU

In Europe, governments came to act together in formulating and applying policies in migration control as what is now the European Union was conferred with increasing competence in the field of Justice and Home Affairs (JHA). In order to achieve the EU's objective of establishing an area without internal borders in which the free movement of persons is ensured[310], the adoption of a

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[309] Meyers, "The Causes of Convergence in Western Immigration Control", *Review of International Studies*, Vol.28 No.1 (Jan. 2002), pp. 123-141, at 125; see also Schindlmayr, "Sovereignty, Legal Regimes and International Migration", *International Migration* (2003), Vol. 41(2), pp. 109-123, at pp. 112-117; *c.f.* Money, "No Vacancy: The Political Geography of Immigration Control in Advanced Industrial Countries", *International Organisation* (1997), Vol. 51, No. 4, p. 685-720, who identifies some variance in the average annual gross flow of legal immigrant *per capita*.

[310] Article 26 of the Treaty on the Functioning of the European Union (TFEU) (ex article 14 TEC).

common policy on the crossing of external borders became necessary[311]. Measures adopted in the policy area of JHA have until very recently been adopted on an intergovernmental footing, which is essentially an extension of state control of migration, with member state governments acting together, yet with a view to addressing their own individual interests.

Peers traces the several phases of institutional evolution of the EU policy field of JHA from intergovernmental to supranational governance[312]. As compared with the supranational community method of legislating (which involves considerable participation of the Commission and European Parliament and under which the Court of Justice has general jurisdiction), the intergovernmental method leaves maximum control with member state governments. From the adoption of the Treaty of Maastricht in 1992, the first method was applied to economic, social and environmental policies falling within the 'European Communities Pillar' and the second to the 'JHA Pillar'[313].

Peers describes the institutional framework for the adoption of JHA law in the period prior to 1993 as a 'purely informal and intergovernmental phase'. He labels the Maastricht era (1993-1999) as a phase of 'formal intergovernmentalism', which, despite having a sure legal basis in the Treaty, was of limited effectiveness. This gave way to 'modified intergovernmentalism' in the Amsterdam era (1999-2005): the Treaty of Amsterdam transferred immigration and asylum policy to the first EC pillar, but also provided for transitional rules curtailing the full use of the community method[314]. It also more generally brought an already established system of 'closer cooperation' between member states into the EC and EU framework: the Schengen *acquis* was integrated into this framework, but with additional powers to opt-out for those member states who preferred not to be party to such. The period from 2005-2009 is described as a 'residual intergovernmental period' as the transitional five-year period in respect of immigration and asylum law came to an end. The Commission automatically gained its right of initiative and the co-decision procedure (with qualified majority voting) applied to all visa legislation[315].

It was not until the Treaty of Lisbon in 2009 that a full transition to the community method came

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[311] Article 77 TFEU (ex article 62 TEC).

[312] Peers, "EU Justice and Home Affairs Law (Non-Civil)", in Craig and de Burca (ed.s), *The Evolution of EU law* (2nd ed.), Oxford University Press, Oxford, New York, 2011, pp. 269-298.

[313] The intergovernmental method also applied to the 'Common Foreign and Security Policy Pillar'.

[314] These transitional rules were set out in Title IV of Part 3 of the EC Treaty. While the legal instruments of EC law (i.e. regulations and directives) could be used from the outset, for a five-year transitional period, decision-making was subject not only to unanimity in the Council and consultation of the European Parliament, but also the shared initiative of the Commission and the member states. Only final courts in each member state were able to send references to the Court of Justice. Furthermore, while there were no distinct rules regarding implementing measures, in practice the Council gave itself and even individual member states powers to adopt same. The Court of Justice upheld this unorthodox practice in light of the transitional nature of this Title (Case C-257/01, *Commission v. Council* [2005] ECR I-345).

[315] Then article 67(4)TEC. There was an exception for legislation on visa lists and visa format, which remained subject to adoption by qualified majority voting and consultation of the European Parliament (article 67(3) TEC).

about "with QMV and the ordinary legislative procedure (ex-co-decision) extended to legal migration ... the ordinary legislative procedure applied to the issues of visa lists and visa formats; full jurisdiction of the Court of Justice in all JHA areas ... and the extensive revision of most competences in this area, particularly as regards immigration, asylum and criminal law"[316]. Again, member states not willing to participate in this transformed legal framework were given the power to opt-out of certain measures.

The following sections set out particular measures of state control of migration adopted in the context of individual state policies and later within policies of states working together in an intergovernmental manner. It will be seen that the broad direction of these measures has been towards greater external restrictions, while facilitating internal free movement[317]. This will then be compared with tentatively more liberal developments of the supranational arms of the EU in chapter 4.

ii) Direct measures of migration control

a) Permanent border controls and data collection

Permanent border controls and data collection is one bundle of restrictive measures that has been adopted by states and later the intergovernmental arms of the Union. As set out above, the instauration of a permanent legislative framework for immigration control in Britain coincided with the establishment of a permanent administration of police and immigration officers in the aftermath of the 1905 Act. The continuation of migration control measures came to be valued as a tool of social control:

> The requirement that aliens register with the police was another control which had been introduced in the First World War: it was perpetuated at the insistence of MI5. By 1930, the Home Office was keen to cut back this laborious and expensive task and suggested that aliens who had been resident for more than ten years should be exempt ... Despite the obvious economies to be made, MI5 opposed the plan because it said it would have been disadvantageous to the security of the state. It dismissed the irritation that long resident aliens felt at the continuing need to register by saying 'the grievance

[316] Peers, "EU Justice and Home Affairs Law (Non-Civil)", *op. cit.*, at p. 278.

[317] Observing this general trajectory, see Dover, "Towards a Common EU Immigration Policy: a securitisation too far", *Journal of European Integration* (2008), Vol. 30, No. 1, pp. 113-130; Peers, "Building Fortress Europe: the development of EU migration law", *Common Market Law Review* (1998), Vol. 35, pp. 1235-1272; Guild, *Security and Migration in the 21st Century*, Polity Press, Cambridge, 2009; Albrecht, "Fortress Europe? – Controlling Illegal Immigration", *European Journal of Crime, Criminal Law and Criminal Justice* (2002), Vol. 10, No. 1, pp. 1-22; Guild, Carrera and Geyer, *The Commission's New Border Package: does it take us one step closer to a 'cyber-fortress Europe'?*, Centre for European Policy Studies, March 2008, No. 154.

> is largely one of sentiment'. The idea of a ten-year exemption was revived in 1932 but MI5's objections had by then hardened no doubt as the economic crisis made it more nervous of social unrest[318].

As regards development in this area in the EC/EU intergovernmental framework, prior to 1993, focus was placed on the negotiation of the original 1985 Schengen Agreement and the 1990 implementing Convention. The provisions of these instruments followed a customs union model, similar in nature to those applied to the free movement of goods by the EU. They provided for a set of common controls at the external borders[319], the abolition of internal frontiers and the freedom to travel for a three-month period between the participating states for those who were legally visiting or resident[320].

The term 'fortress Europe'[321] has been ascribed to the increasingly deep divide between possibilities of movement within the territory of the EU on the one hand and to and from this territory on the other. Measures of administrative cooperation[322] and measures to facilitate the expulsion of individuals with no right of residence within the territory of the EU[323] have been taken with a view to strengthening the external borders. A network of readmission agreements concluded between the EU and third countries also falls into this category[324]. Towards the end of the residual

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[318] Dummett and Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, *op. cit.*, p. 111.

[319] Articles 3-8 of the Schengen Convention 1990, [2000] OJ L 239.

[320] *Ibid.*, articles 19-22.

[321] This phenomenon has been the subject of considerable academic commentary: Peers, "Building Fortress Europe: the development of EU migration law", *Common Market Law Review* (1998), Vol. 35, pp. 1235-1272; Albrecht, "Fortress Europe? – Controlling Illegal Immigration", *European Journal of Crime, Criminal Law and Criminal Justice* (2002), Vol. 10, No. 1, pp. 1-22; Guild, Carrera and Geyer, *The Commission's New Border Package: does it take us one step closer to a 'cyber-fortress Europe'?*, Centre for European Policy Studies, March 2008, No. 154; Hepple, "Race and Law in Fortress Europe", *Modern Law Review* (2004), Vol. 67, No. 1, pp. 1-15; Caviedes, "The open method of co-ordination in immigration policy: a tool for prying open Fortress Europe?", *Journal of European Public Policy*, Vol. 11, No. 2, pp. 289-310; Alscher, *Knocking at the Doors of 'Fortress Europe': Migration and Border Control in Southern Spain and Eastern Poland*, The Centre for Comparative Immigration Studies, University of California, Working Paper 126, Nov. 2005; Sterkx, "The External Dimension of EU Asylum and Migration Policy: expanding fortress Europe?", in Orbie (ed.), *Europe's Global Role: external policies of the European Union*, Ashgate Publishing limited, Surrey, Burlington, 2008.

[322] See Common consular instructions and Common manual for guards at the external borders [2000] OJ L239; Council decision 2002/463/EC on the ARGO program (administrative cooperation in field of external borders, visa, asylum and immigration); Regulation 1030/2002 on a uniform format for residence permits (amended by Regulation 330/2008); Decision on the European Migration Network [2008] OJ L131/7; Decision on immigration policy information exchange [2006] OJ L283/40 ; Regulation 862/2007 on immigration and asylum statistics; Decision on an integration fund [2008] OJ L168/18; Decision establishing an information and coordination network for member states' migration and management services [2005] OJ L83/48.

[323] See Council Directive 2001/40/EC on the mutual recognition of expulsion decisions; Council Directive 2003/110/EC on assistance in cases of transit for the purposes of removal by air; Regulation 377/2004 establishing a network of immigration liaison officers; Council Regulation 2007/2004/EC on the establishment of Frontex (the European Agency for the management of operational cooperation at the external borders of the member states of the EU); Decision on the financing of expulsion measures [2004] OJ L60/55; Decision on joint expulsion flights [2004] OJ L261/28.

[324] For details, see *infra* at note 805.

intergovernmental period, Directive 2008/115/EC on common standards and procedures in member states for returning illegally staying third country nationals (the Returns Directive) was introduced, which, while endeavouring to protect the fundamental rights of those being expulsed, nevertheless forms part of the bundle of measures aiming to strengthen the external borders of the EU. The rules on the imposition of standardised external border controls were consolidated in the EU Borders Code[325]. More recently however, a regressive step has been taken even as regards internal free movement, with the adoption of Regulation 1051/2013 amending the EU Borders Code in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances.

The engagement of private actors has long been a feature of border controls: as referred to above, obligations on ship masters were a feature of both the American 1882 Act and the British 1905 Act. Such measures have since been adopted into the EC/EU intergovernmental framework on migration control: Council Directive 2001/51/EC sets out the obligations of carriers to return third country nationals who are refused entry by the member state of destination and Council Directive 2004/82/EC provides for certain obligations of carriers to communicate passenger data to the immigration authorities of member states.

Data collection is increasingly used as a tool for the enforcement of border controls. At an international level, the inclusion of biometric data in passports was recommended by the International Civil Aviation Organisation since 2001[326]. The EU has more recently taken its own steps in this regard and Regulation 2252/2004/EC (as amended by Regulation 444/2009/EC) now sets out standards for security features and biometrics in passports and travel documents issued by member states. The EU has furthermore established three specialised information systems relating to the general field of migration: the Schengen information system (SIS), the Visa information system (VIS) and Eurodac[327]. The SIS initially established as an intergovernmental initiative under

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[325] Regulation 562/2006/EC of the European Parliament and of the Council of the 15th March 2006 establishing a Community Code governing the movement of persons across borders (Schengen Borders Code), OJ 2006 L 105/1. Regulation 1931/2006/EC Rules on local border traffic at the external land borders of the member states was then adopted to alleviate the effects of the strict external border rules of the EU for those living within a 50 km radius of these external borders.

[326] For a detailed outline of the ICAO views, see its report International Civil Aviation Organisation, *Machine readable travel documents (MRTDs): History, interoperability and implementation*, 23 March 2007, ISO/IEC JTC1 SC17 WG3/TF1 for ICAO-NTWG.

[327] On each of these systems and their combined effect see: Mahmood, "The Schengen Information System: An inequitable data protection regime", *International Journal of Refugee Law* (1995), Vol. 7, pp. 179-200; Broeders, "The New Digital Borders of Europe: EU databases and the surveillance of irregular migrants", *International Sociology* (2007), Vol. 22, No. 1, pp. 71-92; Balzacq, "The Policy Tools of Securitization: Information exchange, EU foreign and interior policies", *Journal of Common Market Studies* (2008), Vol. 46, No. 1, pp. 75-100; Peers, EU Justice and Home Affairs Law (3rd ed.), Oxford University Press, Oxford, 2011; Carrera, "What does free movement mean in theory and practice in an enlarged EU?, *European Law Journal* (2005), Vol. 11, No. 6, pp. 699-721; Baldaccini, "Counter-terrorism and the EU strategy for border security: framing suspects with biometric documents and databases, *European Journal of Migration and Law* (2008), Vol. 10, pp. 31-49; Brouwer, *Digital Borders and Real Rights, Effective Remedies for Third-Country Nationals in the Schengen Information System*, Martinus Nijhoff, Netherlands, 2008; Kabera Karanja,

the Schengen Convention 1990, has been replaced by a more advanced system, SIS II[328]. It holds information on persons who may have been involved in a serious crime or may not have the right to enter or stay in the EU[329], but also on missing persons and information on certain property, such as banknotes, vehicles, firearms and identity documents that may have been stolen, misappropriated or lost. Information is entered into the SIS by national authorities and forwarded via the Central System to all Schengen states.

The VIS allows Schengen states to exchange visa information on certain categories of personal and alphanumeric data[330]. The stated purpose of this system is to improve the implementation of the common visa policy, consular cooperation and consultation between central visa authorities. Eurodac was established as a specialised data collection system in the context of the EU asylum regime[331]. Its purpose is to assist in determining which particular member state is to be responsible pursuant to the Dublin Regulation[332] for examining an application for asylum lodged in a member state. It does this through the collection and comparison of finger print data from all individuals applying for asylum in EU member states. It permits the recording of certain categories of personal and administrative data in the central database[333]. These systems have individually been criticised as far-reaching intrusions into privacy and data protection rights[334]. Proposals have nevertheless been made for their enhanced interoperability[335] and for the creation of a new generalised and

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Transparency and Proportionality in the Schengen Information System and Border Control Cooperation, Martinus Nijhoff, Netherlands, 2008.

[328] SIS II has enhanced functionalities, such as the possibility to use biometrics, new types of alerts and the possibility to link different alerts (such as an alert on a person and a vehicle). See Regulation 1987/2006/EC on the establishment, operation and use of the second generation Schengen Information System (SIS II).

[329] Article 20(2) sets out an exhaustive list of the categories of personal data that can be included with an alert.

[330] Categories specified in article 5, Regulation 767/2008.

[331] Regulation 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.

[332] Regulation 343/2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national.

[333] Article 5.

[334] See Baldaccini, "Counter-terrorism and the EU strategy for border security: framing suspects with biometric documents and databases, *European Journal of Migration and Law* (2008), Vol. 10, pp. 31-49; Mahmood, "The Schengen Information System: An inequitable data protection regime", *International Journal of Refugee Law* (1995), Vol. 7, pp. 179-200; Broeders, "The New Digital Borders of Europe: EU databases and the surveillance of irregular migrants", *International Sociology* (2007), Vol. 22, No. 1, pp. 71-92; Balzacq, "The Policy Tools of Securitization: Information exchange, EU foreign and interior policies", *Journal of Common Market Studies* (2008), Vol. 46, No. 1, pp. 75-100; Carrera, "What does free movement mean in theory and practice in an enlarged EU?, *European Law Journal* (2005), Vol. 11, No. 6, pp. 699-721; Brouwer, *Digital Borders and Real Rights, Effective Remedies for Third-Country Nationals in the Schengen Information System*, Martinus Nijhoff, Netherlands, 2008; Karanja, *Transparency and Proportionality in the Schengen Information System and Border Control Cooperation*, Martinus Nijhoff, Netherlands, 2008.

[335] Communication from the Commission on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs, COM(2005) 597 final.

automated entry-exit system[336]. The extent to which brakes have been placed on this trajectory by other arms of the EU will be assessed in the next chapter.

b) Passports and Visas

Restrictive measures in the form of permanent border controls and data collection have been complemented by the increasing use of passports and visas to the same end of migration control. As is referenced above, early travel documents served to facilitate travel; it was only after the turning point in migration control and the security issues of World War I that the modern passport as an inhibitor of movement came into being. A visa is issued by one state to the citizens of another state granting such individuals an authorisation to enter the territory of the former state. It does not however grant a right of entry, which remains subject to the permission of an immigration official. Subsequent to World War II, the wartime controls, which had required the introduction of a passport system to distinguish aliens from nationals in many European countries, were retained: "all the states concerned found this means of control too useful to abandon, and passports became essential for any international movement"[337]. Meyers makes the following observations in this regard:

> World War I led to restrictions on immigration and/or the introduction of passport and visa requirements in the United States (1917, 1918), Britain (1914), France (1917), Sweden (1914, 1917, 1918), Switzerland (1916, 1917) and Germany (1914). Many of these acts shared similar elements such as granting the executive the authority to control immigration and deport aliens. Some wartime restrictions also had a long-standing impact on immigration control policy because they were converted into ordinary laws after the war, usually during recessions[338].

Looking again to development in this area in the EC/EU framework, several measures have been adopted at this level establishing the operational framework for the EU visa regime[339]. These

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[336] Communication from the Commission on policy priorities in the fight against illegal immigration of third-country nationals COM(2006) 402 final; Communication from the Commission preparing the next steps in border management in the European Union, COM(2008) 69 final.

[337] Dummett and Andrew Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, *op. cit.*, p. 110.

[338] Meyers, "The Causes of Convergence in Western Immigration Control", *op. cit.*, at p. 135.

[339] See Council regulation 539/2001/EC listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (amended by Regulation 2414/2001, Regulation 456/2003 and Regulation 1932/2006); Council Regulation 334/2002/EC on the uniform format for visas; Regulation 851/2005/EC on EU visa reciprocity rules; Regulation 767/2008/EC establishing the Visa Information System (VIS, a database containing information on all visa applicants who have been granted/refused a Schengen visa for use in particular by national consulates); Regulation 81/2009/EC on the use of VIS at external borders; Regulation 810/2009/EC establishing a Community Code on Visas (setting out procedural rules in relation to individual visa applications).

notably set out lists of third countries the nationals of which require a visa to enter the territory of the EU and the procedures to be followed for individual visa applications.

c) Substantive migration rules

Early state control of the movement of people across borders was based on the premise of free movement for all except certain categories of undesirable aliens, such as criminals, the poor and those who posed a threat to public health. The turning points identified above, facilitated by the parallel development of physical border control systems and growing use of travel documents, led to a fundamental transition to the present premise underlying modern state control measures of no free movement except for certain categories of desirable immigrants i.e. those with required skills and family members of those already resident.

This transition came about gradually in the post-World War II period in which many receiving states began to clamp down on labour and illegal immigration. Meyers identifies the following similarities in state policies in this area at that time:

- Between 1945 and 1972, with the exception of 1966-68, Western European countries first accepted permanent immigrants (mainly from their colonies or former colonies) or refugees, then recruited large numbers of migrant workers ... Between 1966-68, Western European countries limited the recruitment of migrant workers, and strengthened their control over private recruitment. But later, between 1969-72, these measures were overlooked, and labour migration reached its peak.
- Between 1972 and 1974, Western European countries halted or sharply curtailed migrant labour recruitment. During the second half of the 1970s, these same countries encouraged former migrant workers to return to their home countries by offering them financial incentives, but to no avail ... Also during the 1970s, the United States, Canada, France, the Netherlands and Sweden attempted to reduce illegal immigration.
- During the 1980s and the first half of the 1990s, all receiving countries attempted to halt illegal immigration and to reduce the number of immigrants granted asylum ... During the past three decades, Australia, Britain, Canada and the United States have also created point-systems or new categories which have given preference to immigrant investors, entrepreneurs and those with required skills[340].

Within the EC/EU, efforts to strengthen the external borders are again evident at the level of substantive migration rules. These constitute the primary obstacle to the free movement of people

into the territory: unless an individual comes within their terms, all practical measures of exclusion come into play. This framework captures the crux of the transition to 'control unless we want you'. Commenting during the stage of formal intergovernmentalism, Peers highlighted that "the Union's policy on legal 'economic' migration affects all these other aspects of migration policy, because a restrictive approach to legal admission and integration necessarily engenders an increase in illegal immigration and a corresponding tightening of external border control and visa policies"[341].

Some measures concern the rights of third country nationals generally: Council Directive 2003/86/EC on the Right to Family Reunification[342] sets out the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the member states and Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents determines the terms for conferring and withdrawing long-term resident status. These general measures are thus only of use to those with family members legally resident in the territory of the EU or those who have themselves already been resident in the EU for a certain period of time and don't open the door very wide.

Other measures concern special categories of third country national and open the door a little further. The quest for the "best and brightest"[343] is facilitated by three measures in particular: Council Directive 2004/114/EC sets out the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; Council Directive 2005/71/EC establishes a specific procedure for admitting third-country nationals for the purposes of scientific research and Council Directive 2009/50/EC (the blue card directive) sets out the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment. More recent measures in the context of the transition to supranational governance using the community method, while opening the door further, confine themselves to facilitating short-term circular migration: Directive 2014/36/EU of the European Parliament and Council provides for the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers and Directive 2014/66/EU of the European Parliament and Council on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

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[340] Meyers, "The Causes of Convergence in Western Immigration Control", *op. cit.*, at 125.
[341] Peers, "Building Fortress Europe: the development of EU migration law", *op. cit*, at p. 1236.
[342] Although such restrictions on family reunification as those in article 7 of Directive 2003/86/EC can dissuade migrations. See International Organisation for Migration, *Family Reunification Issues*, [http://www.iom.int/jahia/Jahia/about-migration/developing-migration-policy/migration-family/family-reunification-issues].

iii) Indirect measures of migration control

a) Citizenship Laws

Indirect measures of migration control can affect migration decisions and possibilities and so merit some consideration. As highlighted above, the control of the content of its population was a power exercised by early states from medieval times; the distinct control over the movement of people was a later phenomenon. The former has however been developed as an indirect measure of the latter. Citizenship laws such as those based on *jus sanguinis* or prohibiting dual citizenship can have a deterrent effect on those wishing to travel to the state in question and a negative effect on integration levels of immigrants who do arrive. Unduly demanding conditions for naturalisation can have similar effects[344].

At the EC/EU intergovernmental level, an interesting development in this regard was the introduction of EU citizenship in the Maastricht Treaty of 1992. Article 8 of the Treaty of the European Community[345] established citizenship of the Union and provided that every person holding the nationality of a member state was a citizen of the Union. Member states, in exercising the initial control over who is entitled to national citizenship, retain some control as regards who may enjoy the bundle of rights inherent in this status, such as the right to freedom of movement and certain political rights. The next chapter will however highlight some inroads being made into this control by the supranational arms of the EU.

b) Denial of socio-economic rights

A further restrictive means of indirect control of migration by states and the intergovernmental arms of the EU has been a denial of socio-economic rights. Such rights often depend on civil status and therefore are often not enjoyed by those with an insecure or no right of residence[346]. A common example is restrictions placed on access to the employment market or to certain

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[343] Description used by Dauvergne, *Challenges to Sovereignty: migration laws for the 21st century*, UNHCR, *op. cit.*

[344] See generally OECD, *Naturalisation: A Passport for the Better Integration of Immigrants?*, OECD Publishing, Paris, 2011.

[345] Which later became article 17 TEC, then article 20 TFEU.

[346] See Schierup, Hansen and Castles, *Migration, Citizenship, and the European Welfare State: A European Dilemma*, Oxford University Press, Oxford, 2006; Scheepers, Gijsberts and Coenders, "Ethnic exclusionism in European countries public opposition to civil rights for legal migrants as a response to perceived ethnic threat", *European Sociological Review* (2002), Vol. 18, No. 1, pp. 17-34; Faist, "Transnationalisation in international migration: implications for the study of citizenship and culture" (2000), *Ethnic and Racial Studies*, Vol. 23, No. 2, pp. 189-222; Taran, "Human Rights of migrants: challenges of the new decade", *International Migration* (2000), Vol. 38, No. 6, pp. 7-51; Bastos, Ibarrola-Armendariz, Sardinha, Westin and Will, "Identity, representation, interethnic relations and discrimination", in Penninx, Berger and Kraal (eds.), *The dynamics of international migration and settlement in Europe*, Amsterdam University Press, Amsterdam, 2006.

professions[347]. Dummett and Nicol observed that in Britain "yet another wartime control had been a system of work-permits for aliens. An inter-departmental committee, sitting in 1919, eventually decided to retain it"[348]. Work permits remain a key feature of immigration regimes in modern receiving countries[349] and have been reinforced at the EC/EU level by the adoption of Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

National rules on social security can amount to a further indirect control on the movement of individuals[350]. While the EC/EU has adopted measures to improve the lot of migrants as regards entitlements to social security, these simply aim to coordinate the different national systems of social security protection, rather than provide for harmonisation. Regulation 883/2004 on the Coordination of Social Security Systems seeks to ensure that member state nationals who move from one member state to another have their social security entitlements protected as if they had remained in their member state of origin. In the more recent supranational context, Regulation 1231/2010 broadens this protection to the external sphere, extending the provisions of Regulation 883/2004 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

Socio-economic rights which can affect decisions to migrate can also be denied through omission. The Council of Europe has identified significant *de facto* discrimination against migrants in Europe in the spheres of employment, health care, housing and education[351] and calls for positive measures to be taken to address this problem in line with provisions of the European Social Charter and indeed the Charter of Fundamental Rights of the EU. These provisions will be discussed in chapter 4.

c) Criminalisation and detention

The criminalisation of breaches of immigration rules and the detention of migrants amount to further measures of indirect control of the movement of individuals by states and later, the intergovernmental arms of the Union. The Special Rapporteur on the Human Rights of Migrants in a report to the Commission on Human Rights voiced her concern by the fact that under the

[347] See section on the public sector in OECD, *Naturalisation: A Passport for the Better Integration of Immigrants?*, *op. cit.*, p.39.
[348] Dummett and Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, *op. cit.*, p. 111.
[349] See generally International Labour Organisation, *Study of Employment and Residence Permits for Migrant Workers in Major Countries of Destination*, International Labour Office, Geneva, 2009.
[350] See the observations in OSCE, IOM, ILO, *Handbook on Establishing Effective Labour Migration Policies*, Geneva, 2007 at p. 159.
[351] Taran, Ivakhnyuk, da Concceicao Pereira Ramos and Tanner, *Economic migration, social cohesion and development: towards an integrated approach*, Council of Europe Publishing, Strasbourg, 2009.

legislation of a considerable number of countries, violations of immigration law constitute a criminal offence:

> Undocumented and irregular migrants therefore become particularly vulnerable to criminal detention, which is punitive in nature, for such infractions as irregularly crossing the state border, using false documents, leaving their residence without authorisation, irregular stay, overstaying their or breaching conditions of stay. The Special Rapporteur notes with concern that criminalisation of irregular migration is increasingly being used by Governments to discourage it[352].

This phenomenon of the criminalisation of breaches of immigration law is related to another common practice of states, namely the detention of certain categories of migrants[353]. Vohra observes that:

> In the context of migration, states often detain migrants either for entering illegally, for not having correct documentation to stay, or pending deportation. More and more, states are also using detention against migrants in the name of national security, in order to validate identity or for questioning under anti-terrorism laws. There is also an increasing trend for states to use detention as a form of migration control; that is, states are using detention as a policy to maintain the 'integrity' of their borders, and as a deterrent to future arrivals[354].

She draws attention to the distinction between administrative and criminal detention: "criminal detention covers imprisonment, both pre- and post-trial, of persons charged under criminal laws. The term 'administrative detention' covers a range of situations outside the process of police

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[352] UN, ECOSOC, Commission on Human Rights, 59th Session, *Report of the Special Rapporteur, Ms Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights Resolution 2002/62*, UN Doc. E/CN.4/2003/85 (30 Dec. 2002) para. 17.

[353] On the detention of migrants generally, see Hatzis, "Detention of irregular migrants and the European public order", *European Law Review* (2013), Vol. 38, No. 22, pp. 259-276; Andrijasevic, "From Exception to Excess: Detention and Deportations across the Mediterranean Space", in de Genova and Puetz (eds.), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement*, Duke University Press, Durham, 2010, pp. 147-165; Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR commissioned report, April 2011; Welch and Schuster, "Detention of asylum seekers in the US, UK, France, Germany and Italy: a critical view of the globalising culture of control", *Criminal Justice* (2005), Vol. 5, pp. 331-355; Bloch and Schuster, "At the extremes of exclusion: deportation, detention and dispersal", Ethnic and Racial Studies (2005), Vol. 28, No. 3, 491-512; Phillips, Hagan and Rodriguez, "Brutal Borders? Examining the treatment of deportees during arrest and detention", *Social Forces* (2006), Vol. 85, No. 1, pp. 93-109; Paleologo, *Detention Centres: an unjust and ineffective policy*, European Social Watch Report, 2009, [http://www.socialwatch.org/sites/default/files/ESW2009_asgi_eng.pdf].

[354] Vohra, "Detention of Irregular Migrants and Asylum Seekers", in Cholewinski, Perruchoud, MacDonald (eds.), International Migration Law: Developing Paradigms and Key Challenges, TMC Asser Press, The Hague, 2007, at p. 49.

arresting suspects and bringing them into the criminal justice system"[355]. The detention of migrants is generally administrative detention, although to the migrants themselves, this distinction can make little difference. Furthermore, with the above trend in the criminalisation of immigration law breaches, migrants are being increasingly subject to criminal detention.

As regards EC/EU law, Directive 2008/115/EC on common standards and procedures in member states for returning illegally staying third-country nationals sets out at chapter IV the circumstances under which a migrant may be detained for the purpose of removal and the minimum standards for the conditions of such detention. Regulation 2007/2004 establishing Frontex provides at article 2 that the Agency shall perform the following tasks: (a) coordinate operational cooperation between member states in the field of management of external borders ... (e) assist member states in circumstances requiring increased technical and operational assistance at external borders; (f) provide member states with the necessary support in organising joint return operations. This in practice has given the staff of this agency the power to detain migrants as necessary for the realisation of such tasks. Generally, the increasing powers and practices of this agency in dealing with migrants have been subject to considerable criticism[356].

Conclusion

This chapter has uncovered how initial state control of migration was of a specific and transient nature – measures taken in response to underlying societal problems such as the protection of society from those who posed a threat to public health, public security or who were a potential charge on the public purse. The turning point around the beginning of the twentieth century with the prevalence of racial theories and the growth of the administrative and policing structures in modern states marked the introduction of general and systematic migration controls. The point of departure transformed, with little theoretical analysis, from 'freedom unless you pose a threat' to 'control unless we want you'. The latter part of the chapter traces the continued and enhanced restrictive measures that have been adopted by states and, by extension, the intergovernmental arms of the European Union. These will be contrasted in the next chapter with the more balanced measures taken by or with the input of the supranational arms.

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[355] *Ibid.*, p. 51.

[356] See Report of the Special Rapporteur on the human rights of migrants, Francois Crepeau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, 24th April 2013, A/HRC/23/46; Special Report of the European Ombudsman, Emily O'Reilly, in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, Strasbourg, 12th November 2013; Neal, "Securitization and risk at the EU border: the origins of Frontex", *Journal of Common Market Studies* (2009), Vol. 47, No. 2, pp. 333-356; Vaughan-Williams, "Borderwork beyond inside/outside? Frontex, the Citizen-detective and the war on terror", *Space and Polity* (2008), Vol. 12, No. 1, pp. 63-79; Pollak and Slominski, "Experimentalist but not accountable governance? The role of Frontex in managing the EU's external borders", *West European Politics* (2009), Vol. 32, No. 5, pp. 904-924; Rijpma, *Frontex: successful blame shifting of the member states?*, Real Instituto Elcano, ARI, 2010; Leonard, "EU border security and

The fact that state measures on migration control are no longer taken in response to underlying societal problems poses a problem based on the conclusions of the first two chapters. The lack of reliable data on international migration, as identified in chapter 1, suggests that given the present state of knowledge, no one is in a position to state whether or not migration is advantageous or disadvantageous for a given state or indeed in general. The fact that, beyond its traditionally legitimate functions, the modern state draws its legitimacy from evidence-based decision making, as proposed in chapter 2, suggests that without this reliable data, general and systematic state control of migration (unconnected to an underlying and free-standing identified problem in society) is illegitimate. The following chapter explores the external limits that have been placed on state migration control and suggests that these put us further on inquiry as to the legitimacy of the latter.

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migration into the European Union: Frontex and securitisation through practices", *European Security* (2010), Vol. 19, No. 2, pp. 231-254.

4. Limits on state control

Introduction

The relatively new general and systematic state control of migration based on the premise of 'control unless we want you', the development of which was traced in the previous chapter, was however to encounter certain limiting forces. These limiting forces are external to the state and have developed parallel to this state control from the post world war period. At that time, various measures were taken by the international community to address the many pressing problems that both led to and resulted from the world wars: the Refugee Convention sought to address the refugee crisis, the European Convention of Human Rights system answered the call for a means of ensuring respect for human rights generally and the European Coal and Steel Community (leading to the EEC/EC/EU) initially set out to achieve economic stability in Europe. Economic theorists have more recently voiced the economic advantages of migration, placing pressure on states to reduce measures of control. This chapter will consider the extent to which such limiting forces as the protection of refugees, the protection of certain fundamental rights, the establishment of free-movement regimes and economic pressures curtail state control of migration. This is with a view to demonstrating that, alongside the shaky foundations of general and systematic state control of migration as identified in chapter 3, these external limits place a further question mark over the legitimacy of this control.

In the final section of the previous chapter, it was stated that when detail was required, focus would be placed on developments in Europe as it was beyond the scope of this research to delve into similar detail in relation to America: it was sufficient to have highlighted the similar origins of general and systematic state control of migration on both sides of the Atlantic and to note that in its broad direction, there had since been significant convergence. Europe would also be focused upon to allow for a comparison between intergovernmental and supranational governance in this field. For the same reasons, this chapter will also focus on developments in Europe.

§1 International protection

The international protection of various categories of forced migrants has gradually expanded in scope since its inception, though not without efforts by states to halt this trajectory. "Whereas the history of protection of refugees dates back at least a few centuries, not to mention refugee situations in Antiquity, the history of international protection starts with the League of Nations"[357].

[357] Jaeger, "On the History of the International Protection of Refugees", *International Review of the Red Cross*, Vol. 83, No. 843, Geneva, 2001 at p. 727.

Following several regionally and temporally confined texts throughout the time of the League[358], the current Convention relating to the Status of Refugees was adopted in 1951. This itself was initially temporally limited to "events occurring before 1st January 1951". States furthermore insisted on the option of a geographical limit on its scope in accordance with which this phrase would be understood to mean "events occurring in Europe" prior to this date. The Additional Protocol of 1967 removed these limitations thereby instilling the 1951 Convention with universal temporal and geographical scope.

The precise obligations on state parties as regards the protection of refugees have varied in this period. Hathaway observes that the predecessors to the 1951 Convention responded to the refugee crisis in Europe by facilitating the movement of refugees to safe states: it was "assumed that there was little likelihood that refugees would be accommodated in the first asylum country"[359]. In contrast, the 1951 Convention provides for one central obligation on state parties – that of *non-refoulement* or the obligation not to expel or return a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The important prohibition of "non-admittance at the frontier" of the 1933 Convention was omitted and so with the 1951 Convention, "the challenge of getting … into (or to the door of) a country of potential asylum is left up to the refugee"[360].

The expansion of international protection also results from progressive interpretations of key concepts contained within the 1951 Refugee Convention and the adoption of other forms of international protection. The term "refugee" is defined in the 1951 Convention as any person who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

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[358] See, Convention relating to the International Status of Refugees of 1933, Convention concerning the Status of Refugees coming from Germany of 1938 and Additional Protocol of 1939, International Refugee Organisation established on 15th December 1946 in order to resettle refugees mainly from Central Europe; see in general Gilbert Jaeger, "On the History of the International Protection of Refugees", *op. cit.*

[359] Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, London, 2005, at p. 964. See also Holborn, "The Legal Status of Political Refugees 1920-1938", *American Journal of International Law*, Vol. 32, No. 4, 680 at p. 683.

[360] Hathaway, *The Rights of Refugees under International Law*, *op. cit.*, at p. 964. See also Hathaway, *The Law of Refugee Status*, Butterworths, Ontario, 1991, pp. 50-55, for an outline of state practice going further in drawing negative credibility findings from illegal entry or stay in the receiving state.

State delegates defended the requirement for a civil or political status nexus in claiming that the purpose of the Refugee Convention was to assist only persons who "lacked the protection of a government"[361], that "too vague a definition" would entail unknowable and excessive responsibilities[362] and that its provisions were sufficiently inclusive to meet the claims of all known European refugees at the close of the Second World War[363]. Despite such delegate claims however, key concepts contained in this definition such as "persecution" [364], "particular social group" [365] and "political opinion"[366] have since been interpreted expansively thereby increasing the number of circumstances in which states may be obliged not to *refoule* an individual.

The requirement for a civil or political nexus has been criticised on the one hand as insufficiently broad in not capturing persons in flight from natural disaster, civil strife, war or economic calamity[367] and on the other hand as out-dated in the contemporary context[368]. The latter criticism has in some way been addressed through the development of additional forms of protection catering for modern forms of conflict, such as temporary protection and subsidiary protection. Versions of both of these concepts have existed in the past[369], however, it is not until relatively recently that formal measures have been taken in the context of the European Union. Council

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[361] Per Mrs. Roosevelt, of the USA, 5 UNGAOR, 2nd December 1949 at p. 473.

[362] Per Mr.Henkin of the USA, UN Doc. E/AC. 32/SR. 3, at para. 40; see Goodwin-Gill and McAdam, *The Refugee in International Law* (3rd ed.), Oxford University Press, Oxford, 2007, pp. 35-37.

[363] Per Mr. Henkin of the USA, UN Doc. E/AC.7/SR. 166, 22nd August 1950 at p. 14.

[364] *Chan v. Minister of Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA) at 430; followed in *S. v. Chief Executive of the Department of Labour*, CA18/06; [2007] NZCA 192, New Zealand: Court of Appeal, 8 May 2007;
R v. Secretary of State for the Home Department, Ex parte Adan and Others, United Kingdom: Court of Appeal (England and Wales), 23 July 1999.

[365] UNHCR, *Guidelines on International Protection: Membership of a Particular Social Group with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/02, 7 May 2002 at para. 11; Bundesverwaltungsgericht (German Federal Administrative Court), 15 March 1988, 9 C 378.86, vol. 79, BverwGE 143; *Matter of Kasinga*, 21 Immigration & Nationality Decisions 357 (BIA 1996); *Islam v. Secretary of State for the Home Department*, (1999) 2 AC 629; *Chen Shi Hai v. The Minister for Immigration and Multicultural Affairs* [2000] HCA 19, 13 April 2000, P41/1999.

[366] *Ciric v. Canada* (Minister of Employment and Immigration) (T.D.), [1994] 2 FC 65; *Klinko v. Canada (Minister of Citizenship and Immigration) (T.D.),* [2000] 3 FC 327, [2000] FCJ No. 228.

[367] See Heyman, "Redefining Refugee: a proposal for relief for the victims of civil strife" (1987), 24 *San Diego Law Review*, 449; Hathaway, *The Law of Refugee Status*, *op. cit.*, pp. 135-141.

[368] Gibney and Stohl, "Human Rights and US Refugee Policy" in Gibney (ed.), *Open Borders? Closed Societies? The Ethical and Political Issues*, Greenwood Press, London, 1988; Gagliardi, "The Inadequacy of Cognisable Grounds of Persecution as a Criterion for According Refugee Status" (1987-1988), 24 *Stanford Journal of International Law*, pp. 259-287 at 281.

[369] In relation to previous versions of temporary protection, see Joan Fitzpatrick, "Temporary Protection of Refugees: Elements of a Formalised Regime", The American Journal of International Law, Vol. 94 No. 2 (April 2000) at p.279. Subsidiary protection has resulted from a considerable collection of caselaw of the European Court of Human Rights in relation to circumstances in which article 3 ECHR will prohibit the deportation of an individual. See such cases as *Soering v. United Kingdom*, judgment of 7th July 1989, App. No. 14038/88; *Vilvarajah and others v. United Kingdom*, judgment of 30th October 1991, App. Nos. 13163, 13164, 13165, 13447, 13448/87; *Chahal v. United Kingdom*, judgment of 15th November 1996, App. No. 22414/93; *Hirsi Jamaa and others v. Italy*, judgment of 23rd February 2012, App. No. 27765/09; *Sufi and Elmi v. United Kingdom*, judgment of 28th June 2011, App. Nos. 8319, 11449/07; *D v. United Kingdom*, judgment of 2nd May 1997, App No. 30240/96.

Directive 2001/55/EC establishes minimum standards for giving temporary protection[370] in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof. Arenas contends that the discretionary power of the Council to determine whether or not such a mass influx exists is limited by "the distribution of competences (Council-Commission-Member States-UNHCR) and the fact that the Council Decision has to be motivated"[371], yet the reality is that to date, this mechanism has never been triggered.

Subsidiary protection[372] was officially introduced by Council Directive 2004/83/EC 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[373]. Essentially, an individual who does not fulfil the elements of the definition of a refugee is eligible for subsidiary protection if there are nevertheless substantial grounds "for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm … and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country"[374]. Subsidiary protection constitutes a more onerous burden on member states than the article 3 ECHR protection against torture, inhuman or degrading treatment or punishment in that the former is a civil status, entailing the enjoyment of a bundle of rights in the receiving state.

Furthermore, the transition from the requirement to demonstrate a *civil or political status reason* for the persecution feared in the refugee definition to protection where a real risk of serious harm for *any reason* is demonstrated involved a radical expansion of the scope of international protection law and thus a major inroad into states' ability to control migration. It furthermore opens the

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[370] For further commentary on this mechanism of temporary protection, see Arenas, "The concept of 'mass influx of displaced persons' in the European Directive establishing the temporary protection system", *European Journal of Migration and Law* (2005), Vol. 7, pp. 435-450; Kerber, "The Temporary Protection Directive", *European Journal of Migration and Law* (2002), Vol. 4, pp. 193-214; Tessenyi, "Massive Refugee Flows and Europe's Temporary Protection", in Peers and Rogers (eds.), *EU Immigration and Asylum Law*, Martinus Nijhoff Publishers, Netherlands, 2006, pp. 487-504.

[371] Arenas, "The concept of 'mass influx of displaced persons' in the European Directive establishing the temporary protection system", *op. cit.*, at pp. 449-450.

[372] Subsidiary protection has been the subject of much academic commentary, see Tiedemann, "Subsidiary Protection and the Function of article 15(c) of the Qualification Directive", *Refugee Survey Quarterly* (2012) Vol. 31, No. 1, pp. 123-138; Battjes, "A balance between fairness and efficiency? The Directive on International Protection and the Dublin Regulation", *European Journal of Migration and Law* (2002), Vol. 4, pp. 159-192; Errera, "The CJEU and Subsidiary Protection: reflections on Elgafaji – and After", *International Journal of Refugee Law* (2010), Vol. 23, No. 1, pp. 93-112; McAdam, "The European Union Qualification Directive: the Creation of a Subsidiary Protection Regime", *International Journal of Refugee Law* (2005), Vol. 17, pp. 461-516; Guild, "The Europeanisation of Europe's Asylum Policy", *International Journal of Refugee Law* (2006), Vol. 18, pp. 630-651.

[373] See also the Recast Qualification Directive – Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted.

[374] Article 2(e).

gateway to further principled extensions of this umbrella concept of international protection. Such principled extension can tentatively be observed in the case of 'environmentally displaced persons'[375]. In its report on the proposal for the qualification directive, the European Parliament made the following comments in this regard:

> while current definitions of asylum seekers deal only with those suffering persecution, or the fear of it, at the hands of human agents, we are ignoring the growing number of people who are forced to leave their homes due to poverty and environmental degradation ... Maybe that should provide step 2 of a Common European Asylum Policy[376].

This section has focused on the substantive expansion of the umbrella category of international protection with corresponding state backlash. It must be noted however that states, notably within the intergovernmental context of the EU, have in recent times taken a large number of procedural measures restricting access to this protection at all, such as the external processing of applications[377], the designation of safe countries[378] and the transfer of asylum seekers to the responsible state under the Dublin Regulation[379]. Despite continuous state opposition to this expansive trajectory, it nevertheless places a significant and growing limit on the power of states to control the movement of individuals.

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[375] On this subject generally see, Lopez, "The Protection of Environmentally-displaced persons in International Law" (2007) *Environmental Law*, Vol. 37, pp. 365-409; Havard, "Seeking protection: recognition of environmentally displaced persons under International human rights law" (2007), *Villanova Environmental Law Journal*, Vol. 18, pp. 65-82; Kolmannskog and Finn, "Environmental Displacement in European Asylum Law", *European Journal of Migration and Law*, Vol. 11, No. 4 (2009), pp. 313-326; Gemenne, "Why the numbers don't add up: a review of estimates and predictions of people displaced by environmental changes", *Global Environmental Change* (2011), Vol. 21S, pp. S41-S49.

[376] European Parliament, *Report on the Proposal for a Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection,* A5-0333/2002, 8th October 2002, at p. 55.

[377] Gammeltoft-Hansen, "The externalisation of European migration control and the reach of international refugee law", in Guild and Minderhoud (eds.), *The First Decade of EU Migration and Asylum Law*, Martinus Nijhoff Publishers, Leiden, 2010, pp. 273-298; Andrijasevic, "Deported: the right to asylum at EU's external border of Italy and Libya", *International Migration* (2010), Vol. 48(1), pp. 148–174; Betts and Milner, *The Externalisation of EU Asylum Policy: the position of African states*, Working Paper no. 36, Centre on Migration, Policy and Society, University of Oxford, 2006.

[378] Costello, "The asylum procedures directive and the proliferation of safe country practices: deterrence, deflection and the dismantling of international protection" *European Journal of Migration and Law* (2005), Vol. 7(1), pp. 35-69; Gil-Bazo, "The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited", *International Journal of Refugee Law* (2006), Vol. 18(3-4), pp. 571-600; Byrne, "Changing paradigms in Refugee Law", in Cholewinski, Perruchoud and MacDonald (eds.), *International Migration Law: developing paradigms and key challenges*, TMC Asser Press, The Hague, 2007, at pp. 163-175.

[379] Moreno Lax, *Dismantling the Dublin System: M.S.S. v Belgium and Greece*, Social Science Research Network, 30 September 2011; Papadimitriou and Papageorgiou, "The New 'Dubliners': Implementation of European Council Regulation 343/2003 (Dublin-II) by the Greek Authorities", *Journal of Refugee Studies* (2005), Vol. 18(3), pp. 299-318; Hailbronner and Thiery, "Schengen II and Dublin: Responsibility for asylum applications in Europe", *Common Market Law Review* (1997), Vol. 34, pp. 957-989; Battje, "A balance between fairness and efficiency? The directive on international protection and the Dublin regulation", *European Journal of Migration and Law* (2002), Vol. 4(2), pp. 159-192.

§2 Fundamental rights regimes

Various international and regional human rights regimes have also had a limiting effect on state control of the movement of persons. The international human rights regime is based on the premise that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"[380]. There are therefore certain rights that must be afforded by states to both citizens and non-citizens equally[381]. The content of this inner core of rights is uncertain, mainly because it is in constant evolution. International human rights are set out in various international[382] and regional[383] legal documents; however, their content is clarified and often expanded by the interpretations of the relevant human rights committees and judicial bodies. The international human rights system is renowned for its lack of binding authority over states and depends to a large extent on the cooperation of the latter[384]. There is nevertheless a considerable political pressure placed on states[385] that have been condemned by such committees or judicial bodies both from the international community of states, but also internally from national actors, such as NGOs, parliaments and the media.

The section on international protection above relates to how the control of movement by receiving states is limited by obligations of international law in respect of serious violations of human rights by states of origin. This section, in contrast, is concerned with the protection of human rights by the host state itself. This distinction must be nuanced to some extent as the host state has an obligation itself not to *refoule* any individual present on its territory, however, the substance of this issue has been dealt with in the international protection section and for that reason will not be discussed here.

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[380] Universal Declaration of Human Rights 1948, Preamble, recital 1.

[381] For a more detailed consideration of the rights of non-citizens, see Weissbrodt, "The protection of non-citizens in International human rights law", in Cholewinski, Perruchoud and MacDonald (eds.), *International migration law: developing paradigms and key challenges*, TMC Asser Press, The Hague, 2007, pp. 221-235; Office of the United Nations High Commissioner for Human Rights, *The rights of Non-citizens*, New York and Geneva, 2006.

[382] Universal Declaration of Human Rights 1948; International Convention on the Elimination of all Forms of Racial Discrimination 1965 (ICERD); International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR); International Covenant on Civil and Political Rights 1966 (ICCPR); Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT). An international human rights instrument that specifically protects migrants is the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families 1990 (ICRMW).

[383] Important such documents include in Europe: European Convention on Human Rights 1950, European Social Charter 1961, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987, Framework Convention for the Protection of National Minorities 1995; In Africa: African Charter on Human and Peoples' Rights 1981; In America: American Convention on Human Rights 1969, Inter-American Convention to Prevent and Punish Torture 1985.

[384] Harris-Short, "International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child", *Human Rights Quarterly* (2003), Vol. 25, No. 1, pp. 130-181; Hafner-Burton and Tsutsui, "Human Rights in a Globalizing World: The Paradox of Empty Promises" *American Journal of Sociology* (2005), Vol. 110, No. 5, pp. 1373-1411; Bilder, "Rethinking International Human Rights: Some Basic Questions", *Wisconsin Law Review* (1969), No. 1, pp. 551-608.

[385] Koh, "How Is International Human Rights Law Enforced?" *Indiana Law Journal* (1999), Vol. 74, No. 4, Article 9, pp. 1397-1417; Hathaway, "Do human rights treaties make a difference?", *Yale Law Journal* (2002), Vol. 111, No. 8, pp. 1935-2042.

There is no general right under international law to free movement across territorial borders. The right to free movement is limited to the provisions of article 12 ICCPR: free movement within the territory of a state, freedom to leave any state[386] and the right not to be arbitrarily deprived of the right to enter one's own country. Article 13 furthermore provides for a right specific to aliens lawfully in the territory of a state party not to be arbitrarily expelled therefrom. The remainder of this section discusses particular fundamental rights which nevertheless have a limiting effect on a contracting state's power to control migration. Interference in the enjoyment of some rights[387] may be legitimate if such treatment serves a legitimate state objective and is proportional to the achievement of that objective[388].

(i) Right to liberty and security of the person

Of all the human rights of non-citizens, the right to liberty and security of the person, enshrined in numerous international human rights documents[389], is of particular significance as regards indirect state controls of free movement. This is due to the increasing use by states of detention to this end, as evidenced in the previous chapter. The Working Group on Arbitrary Detention has stated furthermore that this right reflects the principles of customary international law, and is therefore binding on all states, whether or not parties to such international human rights instruments[390]. This right contains two basic concepts: that of the prohibition of arbitrariness and the requirement of legality. As regards the first limb, the Human Rights Committee has stated that:

> 'arbitrariness' is not to be equated with against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances [and] must be necessary in all the circumstances[391].

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[386] The extent to which this right has been curtailed by the EU externalisation of border control policies has been a concern of the Commissioner for Human Rights: see *The Right to Leave a Country*, Issue Paper by the Council of Europe Commissioner for Human Rights, 2013, section 6.

[387] This does not apply to the enjoyment of absolute rights such as the right not to be subjected to torture, though such rights are not considered in detail in this section.

[388] The proportionality test is most developed in the caselaw of the European Court of Human Rights. See, e.g., *Berrehab v. the Netherlands*, No. 10730/84, judgement of 21 June 1988; *Beldjoudi v. France*, No. 12083/86, judgement of 26 March 1992; *Mehemi v. France*, No. 25017/94, judgement of 26 September 1997; *El Boujaïdi v. France*, No. 25613/94, judgement of 26 September 1997.

[389] See, e.g., article 9 of the Universal Declaration of Human Rights, article 9 ICCPR, article 16 ICRMW, article 5 ECHR, article 6 of the African Charter on Human Rights and People's Rights and article 7 of the American Convention on Human Rights.

[390] ECOSOC, Report of the Working Group on Arbitrary Detention, *Civil and Political Rights, Including the Questions of Torture and Detention*, UN doc. E/CN.4/2005/6, 1st December 2004, para. 53.

This applies to both criminal and administrative detention[392]. Jurisprudence of the Human Rights Committee also suggests that "to avoid the taint of arbitrariness, detention must be a proportionate means to achieve a legitimate aim, having regard to whether there are alternative means available which are less restrictive of rights"[393]. As regards the second limb of legality, "the term 'law' is to be understood here in the strict sense of a general-abstract, parliamentary statute or an equivalent, unwritten norm of common law accessible to all individuals subject to the relevant jurisdiction"[394]; purely administrative provisions are insufficient. Article 5(1) ECHR, setting out this general right in the European regional context, expressly includes the possibility for states to deprive an individual of his liberty in the event of "... (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition" [395]. As such, the control of movement across territorial borders is *per se* a legitimate aim, though the question of proportionality remains in play.

In theory, this right to liberty and security of the person seems quite strong, however, in practice it is a minimal restraint on the indirect state control of movement through the detention of migrants. Vohra draws a sombre picture of the ever-widening gap between theory and practice in this area of law:

> Regrettably, it is the 'standard setters', wealthy industrialised countries such as the United States, Australia and many European countries which have adopted particularly restrictive and hostile policies to all those entering their borders illegally or in search of asylum, and the practice of detention is on the rise. In the absence of official statistics, the precise scale of arbitrary, unlawful or inhumane detention is unknown. However, the reports of the Special Rapporteur on the human rights of migrants, the Working Group on Arbitrary Detention, and organisations such as Amnesty International and Human Rights Watch, as well as information from the media, all point to the fact that detention practices, in the name of migration control, regularly violate fundamental rights, and that this is happening in all parts of the world[396].

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[391] *Alphen v. the Netherlands*, Communication no. 305/1988, Human Rights Committee Report 1990, Vol. II, UN doc. A/45/40, 4th October 1990, para. 5.8.

[392] Human Rights Committee, General Comment no. 8, reproduced in UN doc. HRI/GEN/1/Rev. 7, 12th May 2008.

[393] See observations in Australia Human Rights and Equal Opportunity Commission Inquiry Report, *Those who've come across the seas: Detention of unauthorised arrivals*, May 1998.

[394] M. Nowak, *UN Covenant on Civil and Political Rights: Commentary*, NP Engel, Strasbourg, 1993, at p. 171.

[395] For restrictive interpretations of this possibility by the ECtHR, see *Saadi v. UK*, no. 13229/03, § 74; *Ryabikin v. Russia*, no. 8320/04; *Ergashev v. Russia*, no. 12106/09; *Elmuratov v. Russia*, no. 66317/09.

[396] Vohra, "Detention of Irregular Migrants and Asylum Seekers", in Cholewinski, Perruchoud and MacDonald (eds.), *International Migration Law: developing paradigms and key challenges*, T.M.C. Asser Press, The Hague, 2007 at p. 63; see also Weissbrodt, "The protection of non-citizens in international human rights law", in the same book, pp. 221-236.

This contrast between the obligations states take on in the form of international and regional human rights treaties and state practices in the field of migration control is relevant to the theoretical legitimacy analysis to be undertaken in the next chapter.

(ii) Right to respect for private and family life

International human rights law has also placed certain limits on direct state control of the movement of persons. The right to family and private life[397] is the most significant in this regard. Where a state determines it necessary for some legitimate reason not to allow an individual to enter or remain in its territory, often this will amount to an interference with that individual's family and/or private life. The proportionality of this interference must then be considered. The ECtHR has a wealth of case-law on this issue.

In the caselaw, three situations have arisen in which contracting state measures of migration control have amounted to an interference with article 8 ECHR: First, the expulsion or deportation of aliens with family in the host state, usually as a result of criminal convictions[398]. Secondly, requests for family reunification with spouses or children living abroad[399] and more recently a third new category of cases in which an immigrant claims that his legal or illegal residence should be respected under the heading of private life[400]. The latter category constitutes a radical development as "the long-term residence status obtains autonomous human rights protection with important implications for the status of illegal immigrants who may in particular circumstances gain a human right to regularize their illegal stay"[401].

The ECtHR consistently accepts that the aims of protecting the "economic well-being of the country" and "public safety" and the prevention of "disorder or crime" are legitimate in such cases. The substance of the reasoning focuses on whether or not the measure restricting movement is proportionate to the legitimate aim pursued. While the *Boultif* criterion for consideration in this

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[397] See *inter alia* article 17 ICCPR, article 8 EHCR, article 7 Charter of Fundamental Rights of the EU.

[398] *Boultif v. Switzerland*, judgment of 2 August 2001, no. 54273/00; *Uner v. Netherlands*, judgment of 18 October 2006, no. 46410/99; *Moustaquim v. Belgium*, judgment of 18 February 1991, no. 12313/86; *Beldjoudi v. France*, judgment of 26 March 1992, no. 12083/86; *Amrollahi v. Denmark*, judgment of 11 July 2002, no. 56811/00; *Keles v. Germany*, judgment of 27 October 2005, no. 32231/02; *Omoregie v. Norway*, judgment of 31 July 2008, no. 265/07 (see notably the dissenting opinion of Judge Malinverni at paras. 12-13); Grant v. United Kingdom, judgment of 8 January 2009, no. 10606/07.

[399] *Abdulaziz et al v. the United Kingdom*, judgment of 28 May 1985, no. 9214/80, 9473/81 & 9474/81; *Sen v. the Netherlands*, judgment of 21 December 2001, no. 31465/96; *Tuquabo-Tekle et al v. the Netherlands*, judgment of 1 December 2005, no. 60665/00.

[400] *Slivenko et al v. Latvia*, judgment of 9 October 2003, no. 48321/99; *Sisojeva et al v. Latvia*, judgment of 15 January 2007, no. 60654/00; *Ariztimuno Mendizabal v. France*, judgment of 17 January 2006, no. 51431/99; *Rodrigues Da Silva & Hoogkamer v. the Netherlands*, judgment of 31 January 2006, no. 50435/99.

[401] Thym, "Respect for private and family life under article 8 ECHR in immigration cases: a human right to regularise illegal stay?", *International and Comparative Law Quarterly* (2008), Vol. 57, No. 1, pp. 87-112, at p. 96.

proportionality test of 'whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious' is still applicable, the recent case of *Rodrigues Da Silva & Hoogkamer v. the Netherlands*[402] makes clear that illegal entry and residence status are only one, albeit important, element in the proportionality test. Applying that test in the case, the ECtHR effectively granted the applicant a right to regularise her illegal stay.

At this juncture, mention should be made of recent developments in the caselaw of the CJEU. Whereas initially, the EEC contained no provisions concerning the protection of human rights, the Court of Justice in its caselaw over the years introduced the 'general principles of EC law' into the community *acquis*[403]. To trace the development of human rights protection from these initial cases is beyond the scope of this research[404]; however, it is relevant to note that more recently the court has paid increasing homage to the right to respect for private and family life enshrined in article 8 ECHR. There has been a series of cases concerning the right to family life in which the member states in question had relied on such derogations as public policy or public security in order to expel a migrant or to refuse to make some form of social security payment. Although drawing attention to this fundamental right, it has generally left to the national courts to determine whether in fact there has been any disproportionate breach of same[405]. A further, certainly significant at a symbolic level, step was taken when the EU's own Charter of fundamental Rights became legally binding with the entry into force of the Lisbon Treaty on 1st December 2009. The court has to date treated article 7 thereof (right to respect for private and family life) in a similar manner to article 8 ECHR, referring to both as important rights, but leaving the crucial determination on the facts to the national courts[406].

As in the case of the right to liberty, the constant tension between a state's international obligations, freely entered into, and its practices in the migration control field is evident. The increasing role of the supranational arms of the EU is of note and will be discussed in the coming section on regional migration regimes.

(iii) Fair procedures in criminal law

Criminalisation was set out as a form of indirect state control of migration in the last chapter. This

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[402] Judgment of 31 January 2006, no. 50435/99.
[403] See such early cases as *Stauder v. City of Ulm*, C-29/69; *Internationale Handelsgesellschaft*, C-11/70; *Nold v. Commission*, C-4/73.
[404] See for a detailed account, Craig and de Búrca, *EU Law: Text Cases and Materials* (4th ed.), Oxford University Press, Oxford, 2008, at pp. 379-427; Borgmann-Prebil, "European Citizenship and the rights revolution", *Journal of European Integration* (2008), Vol. 30(2), pp. 311-319.
[405] See, e.g., *Orfanopoulos*, C-482 and 493/01; *MRAX v. Belgium*, C-459/99; *Baumbast*, C-413/99; *Carpenter*, C-60/00; *Akrich*, C-109/01.
[406] *Chakroun*, C-578/08; *Baden-Württemberg*, C-145/09; *Dereci*, C-256/11.

can take the form of both criminalising breaches of immigration laws, but also the discriminatory treatment of migrants in the criminal process, through profiling or sentencing. As regards this latter aspect, the abovementioned case of the ECtHR, *Uner*, contained an apposite dissenting opinion. Judges Costa, Zupančič and Türmen took issue with how the various factors of the "Boultif criteria" were to be assigned relative weight in such cases, but more fundamentally, they believed a question of principle to be at stake:

> 17. The principle is that of "double punishment", or rather the discriminatory punishment imposed on a foreign national in addition to what would have been imposed on a national for the same offence ... it is our view that a measure of this kind, which can shatter a life or lives – even where, as in this case, it is valid, at least in theory, for only ten years (quite a long time, incidentally) – constitutes as severe a penalty as a term of imprisonment, if not more severe ... That is why some States do not have penalties of this kind specific to foreign nationals, while others have largely abolished them in recent times ...
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> 18. ... we would have liked to see this dynamic approach to case-law tending towards increased protection for foreign nationals (even criminals) rather than towards increased penalties which target them specifically.

The rule against double punishment is an aspect of the rule against double jeopardy, a fundamental principle of fair procedures in criminal law. Its primary purpose is to protect accused persons from being repeatedly punished for the same offence[407]. The dissenting judgment above supports the view that imposing an administrative sanction in addition to a criminal sanction solely on non-citizens as punishment for the commission of a criminal offence violates an individual's right to fair procedures in criminal law[408].

The CJEU for its part has made efforts to decouple the possibility for member states to derogate from the free movement of persons principle on public policy grounds from the criminal process, thus ensuring that deportations do not flow as of course from criminal convictions. In *Bouchereau*[409], it held that recourse by a state to the concept of public policy presupposed "the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society"[410]. Secondary legislation has strengthened this

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[407] O'Malley, *Sentencing Law and Practice*, Thomson Roundhall, Dublin, 2006, at p. 115.

[408] The right to fair procedures in criminal law is protected by various international instruments, e.g. article 14 ICCPR, article 6 ECHR, article 47 Charter of Fundamental Rights.

[409] Case C-30/77, [1977] ECR I-2000.

[410] For an indication of what the court deems to be "fundamental interests of society", see *Calfa*, Case C-348/96, [1999] ECR I-21; *Olazabal*, Case C-100/01, [2002] ECR I-11002; *Orfanopoulos and Olivieri*, C-482/01, [2004] ECR I-5257; *Tsakouridis*, Case C-145/09, ECR I-11979; *P.I.*, Case C-348/09.

principle in accordance with the individual's degree of integration in the host state. Article 28 of the Citizenship Directive 2004/54/EC (to be discussed further below) provides that measures of expulsion against Union citizens with permanent residence status in the host member state must be based on 'serious grounds of public policy or public security'. This phrase is replaced with 'imperative grounds of public security' in respect of those who have resided in the host member state for a period of 10 years. In relation to third country nationals, article 12 of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents provides that such a long-term resident may be expelled "solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security".

Although not immediately obvious, as can be seen from the above, the right to fair procedures in criminal law proceedings does play a role in reducing the extent to which states can control migration. The growing voice of the supranational arms of the EU in this sphere, something that will be discussed further in the section on regional migration regimes, is reinforcing this reality.

(iv) Right to privacy

A further right guaranteed to all individuals under international human rights law which places certain limits on direct state control of the movement of persons is the right to privacy[411]. This right is a key tool notably in limiting the increasing use of data collection and biometrics in state migration control systems. At an early stage the Human Rights Committee set out the following interpretation of article 17 ICCPR in this regard:

> 10. ... Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant ...[412].

Redpath observes that notwithstanding such guidelines, the growing use of data in the migration context poses four principal risks in practice to the right to privacy[413]. The first risk, that of functional creep, is that personal data collected for one purpose will be used for another without the consent of the individual concerned. She offers the example of data collected for immigration purposes subsequently being used for the prevention and detection of crime or the regulation of

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[411] This right is set out in such provisions as article 12 Universal Declaration of Human Rights, article 17 ICCPR, article 8 ECHR, article 11 American Convention on Human Rights and article 14 ICRMW.

[412] Human Rights Committee, *General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*, 8th April 1988, U.N. Doc. HRI/GEN/1/Rev.6 at 142 (2003).

access to state benefits. Secondly, clandestine tracking is the concern that the creation of large databases of personal data would enable a government to secretly monitor the activities of individuals. The third risk relates to the divulging of further information: biometric data can divulge information about an individual additional to the purposes for which it was collected. Redpath's example here is the fact that an iris scan can provide information on an individual's state of health. The fourth risk concerns access to information. It is always possible that information will be used in an unlawful manner, either by the authorised holder or a third party.

An aggravating factor to such risks is the fact that, though commonly perceived as such, biometric systems are not infallible: "Inherent to any biometric system is the occurrence of 'false positives' and false negatives' ... A system which has a low level of false positives means that it addresses security concerns; this, however, usually correlates to a high level of false negatives (that is, the wrongful rejection of individuals) ... [furthermore], each system involves rates of 'failure to acquire' and 'failure to enrol'"[414]. Against this background, respect for the corollary right to fair procedures in the use of personal data for the control of the movement of persons becomes imperative. Another aggravating factor as regards the right to privacy is recent efforts to improve the interoperability of databases on personal information as referred to in the previous chapter. Redpath suggests that this is a worldwide trend: "... migration / security management, *inter alia*, increasingly involves the prospect of biometric information being gathered and exchanged throughout the world, where principles of data and privacy protection are applied unevenly"[415].

It seems that these risks and aggravating factors have been taken to some extent on board by the EU. With the enhanced functionalities of SIS II came the realisation that this would have to be accompanied by further measures of data protection. Whereas under the old system, the procedural protections were left very much in the domain of national law, the SIS II Regulation provides explicitly for certain procedural rights[416]. Furthermore, on 25th January 2012, the European Commission submitted proposals for a comprehensive reform of the existing EU data protection rules[417] with the pronounced aim to strengthen online privacy rights and boost Europe's digital economy[418]. Despite these further protections, the European Data Protection Supervisor (EDPS)

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[413] Redpath, "Biometrics and international migration", in Cholewinski, Perruchoud and MacDonald (eds.), *International migration law: developing paradigms and key challenges*, TMC Asser Press, The Hague, 2007, pp. 427-445.

[414] *Ibid.* at p. 441. See also European Data Protection Supervisor, *Opinion on the Proposal for a Regulation of the European Parliament and the Council concerning the Visa Information System (VIS) and the exchange of data between member states on short stay visas*, COM (2004) 835, 23rd March 2005.

[415] Redpath, "Biometrics and international migration", *op. cit.*, at p. 436.

[416] See articles 24, 25 and chapter VI on data protection.

[417] The existing rules are set out in Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[418] Proposal for a regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data, COM(2012) 11 final; Proposal for a directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of

remains concerned that they are insufficient[419]. The European Parliament has also voiced concerns[420]. The forces at play in these struggles between member states and the supranational arms as evidenced in this section and the last chapter will be explored further in the next chapter.

§3 Regional migration regimes

A further limiting force to the developing system of general and systematic state control over the movement of persons across territorial borders is the establishment of regional migration regimes. The EU is the most prominent regime of this nature, yet other regional regimes are following suit. Focus will be place on the EU for two reasons: first, due to its advanced state of development as compared to other regional regimes and second, because of my intention to compare the restrictive intergovernmental measures as surveyed in the previous chapter with the more liberal influence of the supranational arms.

Some reference should however be made to other regional migration regimes around the globe. On the African continent, two economic regimes similar to the ideal of the early EC include protocols for the free movement of persons: ECOWAS[421] and SADC[422]. Regimes of a more consultative nature in the regions include IGAD-RCP[423], MIDSA[424], MIDWA[425] and the 5+5 Dialogue[426]. In South America, again, two essentially economic regimes include among their goals the free movement of persons: MERCOSUR and the Andean Community[427]. The close neighbour of the

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prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM(2012) 10 final.

[419] See Hustinx, European Data Protection Supervisor, "Data Protection and Schengen Governance", *Conference on upholding freedom of movement: an improved Schengen governance, European Parliament*, Brussels, 8th February 2012; Opinion of the European Data Protection Supervisor on the proposals for a Regulation establishing an Entry/Exit System (EES) and a Regulation establishing a Registered Traveller Programme (RTP), 18th July 2013, 2014/C 32/12.

[420] European Parliament recommendation to the Council of 24th April 2009 on the problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control, (2010/C 184 E/25); European Parliament resolution of 10th March 2009 on the next steps in border management in the European Union and similar experiences in third countries (2010/C 87 E/01).

[421] Economic Community of West African States.

[422] South African Development Community. For a good analysis of these two regimes, see Martens, "Moving freely on the African continent: the experiences of ECOWAS and SADC with free movement protocols", in Cholewinski, Perruchoud and MacDonald (eds.), *International Migration Law: developing paradigms and key challenges*, T.M.C. Asser Press, The Hague, 2007 at p. 360.

[423] Intergovernmental Authority on Development – Regional Consultative Process on Migration.

[424] Migration Dialogue for Southern Africa.

[425] Migration Dialogue for West Africa.

[426] Dialogue on Migration in Western Mediterranean.

[427] For more detail on these regimes, see Santestevan, "Free movement regimes in South America: the experience of the MERCOSUR and the Andean Community", in Cholewinski, Perruchoud and MacDonald (eds.), *International Migration Law: developing paradigms and key challenges*, *op. cit.*

Caribbean has its own CARICOM[428], which launched the CSME[429] in 1989 in order to gradually liberalise the movement of services, capital and skilled labour[430].

The EU is the most developed of all these regimes, but while other regional migration regimes have not evolved as quickly or had the same profound impact as that of the former, there has been progress nonetheless. Inter-regional cooperation in respect of the movement of persons and the potential for further developments in this respect will be discussed in chapter 7.

(i) Free movement of persons in the European Union

From the early days of what is now the European Union it was considered that to work towards the freedom of movement of the factors and products of production would ultimately benefit the member states involved, rendering their economies more efficient and competitive in the global economy. The Spaak Report made clear that the principle of free movement necessary to form a common market did not only involve products and services, but was also to apply progressively to capital and persons. Hope was to be placed in an untapped workforce which, "instead of a burden for certain states, is transformed into a resource for Europe"[431]. Furthermore, the common market to be created was to be protected "against the risk of becoming a zone of elevated external protection, tending to isolate it from the rest of the world or to detract from currents of exchange"[432]. An elevated protection from the rest of the world was excluded *a priori* and a progression to liberal economic exchanges with third countries was envisaged.

By this time, the systematic and general control of immigration was a reality in most member states. They apparently did not agree with the Spaak report regarding the advantages of the free movement of persons and were not prepared to give in easily to such a far-reaching limit being placed on their power to control such movement:

> The negotiation of [the EEC] Treaty revealed to what extent the member states most likely to import workers feared uncontrolled migration flows. That fear has subsequently resurfaced on almost every occasion when new member states have

[428] Caribbean Community and Common Market.
[429] Caribbean Single Market and Economy.
[430] For more information on CARICOM, see Nonnenmacher, "Free movement of persons in the Caribbean Community", in Cholewinski, Perruchoud and MacDonald (eds.), *International Migration Law: developing paradigms and key challenges*, *op. cit.* at p. 399.
[431] *Spaak Report, Report of the Heads of Delegation to the Ministers of Foreign Affairs*, Brussels, 1956 at p. 18.
[432] *Ibid.*, p.22.

acceded to the EEC, EC, and subsequently the EU, reaching its apogee prior to the accession of ten new member states between 2004 and 2007[433].

It must be emphasised that this initial opposition from member states related to internal free movement; the fact that today this is almost taken as a given demonstrates in itself to what extent the EU's free movement regime has developed. Despite this opposition from member states, the principle of the free movement of persons was established in the Treaties as what is now article 45 TFEU (free movement of workers)[434] and 49 TFEU (freedom of establishment)[435]. The principle of non-discrimination on the grounds of nationality included in these provisions was to be a key tool in the realisation of these freedoms. This section will trace the efforts of the supranational arms of the EC/EU in developing these rights to free movement, both internally and externally. Bringing this section back to the central research question, it must be borne in mind that in circumstances where an individual has a right to free movement under EU law, direct and many indirect controls established by member states become inapplicable and so this limit on state control is arguably the most significant of this chapter.

ii) Internal free movement

a) Ratione personae

One means by which the court has developed the scope of internal free movement is by expanding the category of persons falling within its remit. Initially this movement had a purely economic underpinning as the strengthening of the European economy was essentially the *raison d'être* of the EEC and subsequent EC. The concept of "worker" itself has been given an expansive interpretation as the court held that to give this term a restrictive interpretation "would reduce free movement to a mere instrument of economic integration" and "would be contrary to its broader objective of creating an area in which community citizens enjoy freedom of movement"[436]. The inclusion of job seekers within the context of the free movement of workers was a particularly expansive step[437]. A collection of secondary legislative measures adopted in the 1990s was to follow in this expansive suit, some explicitly on foot of the caselaw of the court[438] and others following proposals from the Commission[439].

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[433] O'Leary, "Free Movement of Persons and Services" in Craig and de Búrca (eds.), *The Evolution of EU Law*, Oxford University Press, London, 2011, pp. 499-546 at p. 503.
[434] Ex article 39 TEC, former article 48 TEC.
[435] Ex article 43 TEC, former article 52 TEC; article 56 which provides for the free movement of services is also relevant to the free movement of persons (ex article 49 TEC, former article 59 TEC).
[436] *Lawrie-Blum*, Case C-66/85, para. 12; see also *Levin*, Case C-53/81; *Royer* C-48/75; *Ninni-Orasche* C-413/01; *Kempf* C-139/85; *Raulin* C-357/89; *Hostellerie le manoir* C-27/91; *Raccanelli* C-94/07.
[437] See *Antonissen* C-292/89; *Collins* C-138/02; *Vatsouras* C-22/08 and C-23/08.
[438] Directive 93/96, replacing Directive 90/366/EEC on the right of residence for students.
[439] Commission Proposals COM 89/275 and COM 89/675. See Directive 90/365 on the right of residence for employees who have ceased their occupational activity and Directive 90/364 providing for a general right of

The establishment of Union citizenship through the insertion of notably articles 17 and 18 TEC (now articles 20 and 21 TFEU) into the Maastricht Treaty in 1992 marked a significant symbolic step and facilitated further liberal movement in this vein on the part of the supranational arms[440]. Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states attempted to consolidate EU law in this area. It clarifies that all Union citizens and members of their families have the right to enter into and reside in another Member State. For a period of three months, no economic status is required. However, there is no right to social security assistance and the rights protected are subject to the individual not becoming an unreasonable burden on the host state, unless the status of worker, self-employed person or family member is established.

A right of residence for more than three months is also provided for, but there is little change from previous legislation. This right only applies to workers, self-employed persons, students, persons of independent means and their family members and the latter two categories are still required to have sufficient resources and sickness insurance. One significant development however is the introduction of a right of permanent residence. This is acquired by Union citizens who have resided legally in the host state for a period of five years and, once acquired, no economic status is necessary for continued residence. This Directive epitomises how far the expansion of the *rationae personae* of internal free movement has come. The subject of EC worker has been transformed to EU citizen, which of course includes non-Union citizen family members. This has driven significant inroads into the power of member states to control migration within the territory of the Union.

b) Ratione materiae

The court has also expanded the remit of the principle of internal free movement through the gradual expansion of its material scope and that of the associated right to non-discrimination. In the last chapter, the means of direct and indirect control of movement were set out. The principles of internal free movement have considerably circumscribed the former, but the significance of the latter has gradually come to be appreciated and circumscribed in its own right; the principle of non-discrimination has been the tool.

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residence for nationals of member states who do not enjoy this right under other provisions of community law. For continuing efforts to liberalise free movement on the part of the Commission, see Caviedes, "The open method of co-ordination in immigration policy: a tool for prying open Fortress Europe?", *Journal of European Public Policy* (2004), Vol. 11, No. 2, pp. 289-310.

[440] For commentary see O'Leary, *The evolving concept of community citizenship: From the free movement of persons to Union Citizenship*, Kluwer Law, The Hague, 1996; O'Leary, "Putting flesh on the bones of European Union Citizenship", *European Law Review* (1999), Vol. 24, No. 1, pp. 68-79; Gocmen, "Does the concept of European Union citizenship lack content?", *GAU Journal of Social and Applied Science* (2008), Vol. 2, No. 4, pp. 56-66.

From an early stage in its development, EC/EU law recognised the effects of indirect controls of member states on the free movement of persons in such areas as access to the employment market, family rights, housing and social welfare. The right to non-discrimination in access to the employment market seems incongruent in the initial setting of internal free movement as at the outset, this only extended to those who were already economically active. However, with the expansion of its *ratione personae*, the right to non-discrimination has considerably limited member states' power to impose indirect controls as regards access to employment. The principal secondary EC/EU measure in this regard was Regulation 1612/68 on freedom of movement for workers within the community, since codified by Regulation 492/2011. In respect of all Union citizens, article 24 of Directive 2004/38 sets out a general right to equal treatment with nationals of the host state, but with certain exceptions as regards social assistance both in the first three month period and prior to the acquisition of permanent residence.

An area of concern for member states is the effect of Union citizenship and its corollary equal treatment rights on the national provision of social welfare. The court has emphasized that the phrase "social advantages" in article 7(2) must not be interpreted restrictively[441] and "must include all advantages which, whether or not linked to a contract of employment, are generally granted to national workers"[442]. Determining the *scope materiae* of EC/EU law took on a new importance with the case of *Martinez Sala* C-85/96 as in this case the implications of the above mentioned expansion of the scope *ratione personae* of same became clear. The court held that "a citizen of the European Union ... lawfully resident in the territory of the host member state can rely on article 6 of the Treaty[443] in all situations which fall within the scope *rationae materiae* of community law". It found that the child-raising allowance of concern indisputably fell within the scope *ratione materiae* of community law and so all Union citizens lawfully resident in a member state other than that of their nationality, even though not coming within the scope *rationae personae* of these regulations, enjoyed the right to equal treatment in access to such an allowance[444].

In later cases, member states voiced their concerns at the expansionist route the court was taking as regards entitlements to social advantages. In *Grzelczyk* C-184/99, the essential question for the court was whether articles 6 and 8 TEC precluded entitlement to a non-contributory social benefit on the part of a Union citizen in a host state from being made conditional on their falling within the scope of Regulation 1612/68 when no such condition applied to nationals of the host state. The Belgian and Danish Governments submitted that "citizenship of the Union does not mean that

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[441] *Cristini*, C-32/75.
[442] *Even*, C-207/78; *Deak*, C-94/84, *Reed*, C-59/85. For further expansive interpretations see *Vera Hoeckx*, C-249/83; *D'Hoop*, C-224/98; *Martinez Sala*, C-85/96; *Hartmann*, C-212/05; *Cristini*, C-32/75; *Mutsch*, C-137/84; *Reed*, C-59/85; *John O'Flynn*, C-237/94.
[443] Now article 18 TFEU, former article 12 TEC.

Union citizens obtain rights that are new and more extensive than those already deriving from the EC Treaty and secondary legislation"[445]. The French Government submitted that to establish "total equality between citizens of the Union established in a member state and nationals of that state ... would be difficult to reconcile with rights attaching to nationality"[446]. The court nevertheless responded with the strong statement that:

> Union citizenship is destined to be the fundamental status of nationals of the Member States [and furthermore that] in no case may such measures [as revocation of a residence permit] become the automatic consequence of a student who is a national of another member state having recourse to the host member state's social assistance system.

In the subsequent case of *Baumbast* C-413/99, the court provided further detail to this balancing act between the right to free movement of Union citizens and the public finances of member states. Despite the United Kingdom Government submission that family rights could be adequately protected by domestic law[447], the court held that where a child had a right to pursue education pursuant to article 12 of Regulation 1612/68, his non-Union citizen parent, acting as primary carer, had a right to reside with them to facilitate the former Union law right. It furthermore emphasised that a Union citizen who no longer enjoyed the right of residence as a migrant worker in a host state could enjoy there a right of residence by direct application of article 18(1) TEC. Although limitations could be placed on this by member states and beneficiaries could not become an unreasonable burden on the public finances of the host state, any limitations imposed must respect the general principles of Union law, in particular the principle of proportionality.

The test being that a migrant could not become an 'unreasonable burden', it follows that a migrant could be a 'reasonable burden'. In *Grzelczyk*, the court observed that community law accepted a "certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary". This gained general influence in cases of economically inactive citizens and the court came to use the 'genuine / real link' concept to determine how reasonable a burden a migrant constituted. The court has repeatedly held that it is legitimate for a national legislature to

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[444] In the case of *D'Hoop* C-224/98 this principle was further extended to Union citizens who had exercised their right to free movement but had then returned to their member state of nationality, following the reasoning of *Surinder Singh* C-370/90.
[445] At para. 21.
[446] At para. 22.
[447] At para. 67.

wish to ensure that there is a real link between an applicant for a certain social advantage and the geographic employment market concerned[448].

A further indirect member state control that has been somewhat affected by EC/EU law is that of citizenship laws. This category of law has long constituted a core state function and so supranational intervention in this realm is significant indeed. The status of Union citizenship is intended to be additional to and not to replace national citizenship. Member states retain the power to determine whether or not an individual is entitled to national citizenship; it is only on being conferred with such status that the individual in question can enjoy the bundle of rights inherent in Union citizenship. However, the case of *Rottmann* C-135/08[449] threw this clear division into disarray. Here, the court concluded that it is not contrary to article 17 EC for a member state to withdraw from a Union citizen the nationality of that state acquired by deception, on condition that the decision to withdraw observes the principle of proportionality. The reasoning of the court highlights the delicate balance between Union and national law as regards citizenship. It was clear to the court that the situation of a Union citizen who was faced with a decision capable of causing him to lose this status and the rights attaching thereto fell, by reason of its nature and its consequences, within the ambit of EU law. While member states had the power under international law to lay down the conditions for the acquisition and loss of nationality, they must, when exercising this power, have due regard to EU law[450], notably the principle of proportionality.

The corollary non-discrimination rights to free movement are clearly considered of utmost importance to the realisation of the free movement of persons within the territory of the EU and as such the EU, mainly *via* the case law of the Court of Justice, has taken great strides to expanding the *rationae materiae* of EC/EU free movement law. However, discontented member states continue to push against this movement in an effort to salvage some even indirect control of migration within the territory of the Union.

(iii) External free movement

From the initial steps of the Schengen Agreement 1985, the creation of an area of internal free movement necessarily entailed the establishment of an external border. In principle, the freedom of movement of persons under EC/EU law refers to movement within the internal borders of the

[448] See cases *D'Hoop* C-224/98; *Collins* C-138/02; *Bidar* C-209/03; *Ioannidis* C-258/04. For differing opinions on the desirability of this test, see O'Leary, "Free Movement of Persons and Services", *op. cit.*, at p. 538; O'Brien, "Real links, abstract rights and false alarms: the relationship between the ECJ's 'real link' case-law and national solidarity" (2008) 33 *European Law Review* 643.

[449] See d'Oliveira; de Groot and Seling, "Double Casenote: Rottmann", *European Constitutional Law Review* (2011), 7 (1), pp. 138-160.

[450] See *Micheletti and Others* C-369/90, paragraph 10; *Mesbah* C-179/98, paragraph 29; *Kaur* C-192/99, paragraph 19; and *Zhu and Chen* C-200/02, paragraph 37.

territory of the EU, however, case-law of the court has also had an impact on the movement of third country nationals across the external border into this territory.

Even the early secondary legislation on internal free movement[451] made clear that it applied to family members of community national migrant workers irrespective of nationality and so both to nationals of member states and third country nationals. As the scope *ratione personae* of this freedom has developed to cover all Union citizens, the number of potential family members with derivative rights has increased.

Further case-law of the court has explicitly dealt with the derivative rights of third country national family members. In the cases of *MRAX* C-459/99[452], the court held that once such a family member was in a position to prove his identity and family ties to a Union citizen, a member state could not refuse this individual entry at the border nor the grant of a residence permit on the ground that he is not in possession of a valid identity card or passport or, if necessary, a visa. A member state could furthermore not refuse the issue of a residence permit to or issue an expulsion order against such person on the sole ground that he had entered the territory of the member state concerned unlawfully.

The court took a significant stride in *Zhu and Chen* C-200/02. The Union citizen in question was a baby who had never exercised her EC/EU right to free movement. Her parents were of Chinese nationality and her mother had come to Northern Ireland while pregnant in order to have her child on that territory to benefit from the Irish *jus soli* national citizenship rules. Although the child had never moved from one member state to another and although she herself did not personally have sufficient resources and despite the fact that her birth on British territory was intentional, the court held that she had a right to reside for an indefinite period in that state under EU law. It furthermore held that to not afford her mother, the carer of the child, a right of residence in the host state "would deprive the child's right of residence of any useful effect".

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[451] Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security and public health; Directive 68/360/EEC on the abolition of restrictions on movement and residence within the community for workers of member states and their families; Regulation 1612/68 on freedom of movement for workers within the community; Regulation 1251/70 on the right of workers to remain in the territory of a member state after having been employed in that state; Directive 73/148/EEC on the abolition of restrictions on movement and residence within the community for nationals of member states with regard to establishment and the provision of services; Directive 75/34/EEC concerning the right of nationals of a member state to remain in the territory of another member state after having pursued therein an activity in a self-employed capacity.

[452] See also *Commission v. Spain* C-157/03.

King's description of this case as typifying "a recent trend of the Community undermining the sovereignty of the member states"[453] sheds light on the relevance of such cases to the central research question of this thesis in that they do indeed mark a restraint on member states' ability to control migration. However, given the clarification of the concept of sovereignty in chapter 2 and the misuse to which this notion is put as will be discussed in chapter 6, it is submitted that this restraint by no means equates with undermining a state's sovereignty.

The case of *Metock* C-127/08[454] caused further stir among member states as the court confirmed that a member state could not require a third country national family member of a Union citizen to have previously been lawfully resident in another member state before arriving in that host member state in order to benefit from the provisions of Directive 2004/38. This case established that member states had lost full substantive control[455] of the first entry of such third country nationals across the external border of the EU.

Whereas in *Zhu and Chen* there was some inter-state aspect to the case justifying the application of Union law (as opposed to national substantive immigration rules) in the fact that the minor citizen in question was born and resided in Britain but obtained an Irish passport, the same was less clear in the subsequent case of *Zambrano* C-34/09[456]. This case also concerned minor Union citizens who had never exercised their right of free movement and their third country national parent. The European Commission and seven non-party governments which submitted observations to the court argued that this factual matrix did "not come within the situations envisaged by the freedoms of movement and residence guaranteed under European Union law. Therefore, the provisions of European Union law referred to by the national court are not applicable to the dispute in the main proceedings"[457]. The court nevertheless held that to deprive a third country national, upon whom his Union citizen children are dependent, a right of residence and a work permit would "deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen"[458].

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[453] King, "Chen v. Secretary of state: expanding the residency rights of non-nationals in the European Community", *Loyola of Los Angeles International and Comparative Law Review* (2007), Vol. 29, pp. 291-307, at p. 307.

[454] See Fahey, "Going back to basics: re-embracing the fundamentals of the free movement of persons in Metock, *Legal Issues of Economic Integration* (2009), Vol. 36, pp. 83-89.

[455] The Schengen *acquis* deals with the procedural controls at the external border of the EU.

[456] See Van Elsuwege, "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* (2011), Vol. 38(3), pp. 263–276.

[457] At paragraph 37.

[458] Although not explicit, this case seems to follow the reasoning of the *Rottmann* case discussed above. For a subsequent circumscription of the case however see *McCarthy* C-434/09.

In *Dereci* C-256/11[459] the Union citizens concerned had never exercised their right to free movement and were not dependent on the applicant family members. The court explicitly interpreted *Zambrano* as referring "to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole". This finding was however without prejudice to the question whether, on the basis of other criteria, *inter alia*, by virtue of the right to the protection of family life, a right of residence cannot be refused. If the referring court considered, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants was covered by EU law, it was obliged to examine whether the refusal of their right of residence undermined the right to respect for private and family life provided for in Article 7 of the Charter of Fundamental Rights of the EU. If, on the other hand, it took the view that that situation was not covered by EU law, it should undertake that examination in the light of Article 8(1) of the ECHR.

The derivative rights of third country national family members are now set out in Directive 2004/38. Further secondary legislation was nevertheless to grant rights to third country nationals in their own right within the new parameters of a Union of Freedom, Security and Justice. The Conclusions of the Tampere European Council meeting in 1999 affirmed at paragraph 18 that "a more vigorous integration policy should aim at granting [third country nationals] rights and obligations comparable to those of EU citizens". Several measures[460] have been taken to this end which bring the status of such individuals very close to if not on a par with the status of Union citizenship itself[461].

The intergovernmental legislative measures set out in chapter 3 providing for limited legal migration into the territory of the Union remain focused on high-skilled and circular movement of third country nationals[462]. Pressures from the supranational arms, facilitated by the full transition to the community method[463], as set out in this section are gradually pushing for a more balanced,

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[459] See Adam and Van Elsuwege. "Citizenship Rights and the Federal Balance between the European Union and Its Member States: Comment on Dereci." *European Law Review* (2012) Vol. 37 (2), pp. 176–190.

[460] Notably, Directive 2003/86 on the right to family reunification, Directive 2003/109 concerning the status of third-country nationals who are long-term residents and Directive 2011/98 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

[461] For commentary see Boelaert-Suominen, "Non-EU nationals and Council Directive 2003/109/EC on the status of Third Country Nationals who are long-term residents: Five paces forward and possibly three paces Back", *Common Market Law Review* 42(4) 2005, pp. 1011-1052.

[462] The European Parliament has notably called for more progress towards common rules on immigration policy which is not limited to highly skilled workers: European Parliament resolution of 22nd April 2009 on a common immigration policy for Europe, 2010/C 184 E/06, para. 18.

[463] In addition to the measures on external free movement set out in this and the previous chapter, note the following upcoming measures: Council doc. 17758/10, considering Commission Proposal COM(2007) 298 on the extension of long-term residents' legislation to include beneficiaries of international protection; Commission Proposal COM(2013) 151 for a Directive on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training , voluntary service and au pairing; (see Peers, "EU Justice and Home Affairs Law (Non-Civil)", in

rights-based approach, which is again subject to continuous member state opposition. The limiting forces of the regional migration regime of the EU on member state controls of migration are substantial and growing. It furthermore marks the interplay between human rights concerns, the focus of the first part of this chapter, and economic concerns, to be discussed in the next section.

§4 Global free market economy

The final limiting force to the developing system of general and systematic state control over the movement of persons across territorial borders is the influence of actors in the economic sphere, including economists, economic lobbying groups and international organisations.

(i) Economic studies

Economic studies demonstrate that in general, migration results in an increase in the aggregate gross domestic product (GDP) of both the global economy[464] and the national economies[465] in question (both sending and receiving states). This of course does not take into account possible losses for certain segments of the population. Brucker highlights that:

> A large number of economic models predict that labour migration creates an efficiency gain. This gain results from the relocation of human resources from where their productivity is relatively low to where their productivity is relatively high. This simple insight is often ignored in the public debate on the economic and social effects of migration, which focuses largely on its impact on the welfare of natives in host countries[466].

Craig and de Burca (ed.s), *The Evolution of EU law* (2nd ed.), Oxford University Press, Oxford, New York, 2011, pp. 269-298).

[464] Moses, *International Migration: globalisation's last frontier*, Zed Books ltd., London 2006, chapter 6; Moses and Letnes, "If People Were Money: Estimating the Gains and Scope of Free Migration" in Borjas and Crisp (eds.), *Poverty, International Migration and Asylum*, Palgrave, New York, 2005, pp. 188-210; Borjas, *Does immigration grease the wheels of the labor market*, Brookings Papers on Economic Activity, 2001, pp. 69-133.

[465] See Bilsborrow, "Global patterns of migration, sources of data and the new policy consensus" and Peri "The labor market effects of immigration: a unified view of recent developments", both in Maloney and Korinek (eds.), *Migration in the 21st Century: Rights, Outcomes, and Policy*, Routledge, London and New York, 2011, pp. 79-125; Dustmann, Fabbri and Preston, "The Impact of Immigration on the British Labour Market", *The Economic Journal* (2005), Vol. 115, pp. F324-F341; George Borjas, "The economic analysis of immigration", in Ashenfelter and Card (eds.), *Handbook of Labor Economics*, Vol. 3A, Elsevier Science, Amsterdam, 1999; Simon, *The Economic Consequences of Immigration* (2nd ed.), University of Michigan Press, Michigan, 1999.

[466] Brucker, "Can International Migration solve the Problems of European Labour Markets?", *Economic Survey of Europe*, 2002, Issue 2, pp. 109-165 at p. 150.

Giordani and Ruta observe that:

> It is easy to prove that, on net, foreign workers unambiguously raise national welfare as they increase the benefits accruing to native capitalists by more than the costs they impose on native workers ... The optimal immigration policy—that is, the policy that maximizes natives' welfare as a whole—is then an "open door" policy. However, as we do never observe "open door" policies across receiving countries, the theory presents us with a clear policy puzzle[467].

The crux is in the 'costs they impose on native workers' issue, the truth of which, as determined by economists, will be explored in this section. The fear is that, in accordance with basic economic theory, an increase in the labour market through immigration will result in either a decrease in wage levels or an increase in unemployment. Due to a number of methodological problems, a level of uncertainty surrounds empirical findings on this issue. Brucker notes that "with some notable exceptions, empirical literature indicates that the impact of migration on wages and employment opportunities of natives is significantly below that predicted by [economic theory]"[468]. Hatton and Williamson identify a consensus in the literature that emerged in the mid-1990s that the effects of immigration on host country labour markets are small[469]. However, they remain concerned with the lack of consistency across these different studies, even for the same country. They suggest that one reason for such findings of a negligible effect is because "the annual flow of immigration is usually small relative to the size of the labour market"[470] and that studies have demonstrated that "the bigger an immigration shock, the clearer and the larger are its observed effects"[471]. Thus to have any discernible effects on national wage and employment levels, the flow of immigration must be exceptionally large compared to the native population of the receiving country.

Hanson remarks that in light of economic theory, "it is surprising that an immigration-induced increase in the relative supply of low-skilled US labour would *not* depress relative wages for native

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[467] Giordani and Ruta, "The Immigration Policy Puzzle", *Review of International Economics*, 2011, 19(5), pp.922-935 at p. 922. Using a dynamic model however, Ben-gad finds that the advantages to capital are smaller than previously thought: Ben-Gad, "The economic effects of immigration – a dynamic analysis", *Journal of Economic Dynamics and Control* (2004), Vol. 28, pp. 1825-1845.

[468] Brucker, "Can International Migration solve the Problems of European Labour Markets?", *op. cit.*, at p. 152.

[469] See Borjas, "The Economic Benefits from Immigration", *Journal of Economic Perspectives*, 1995, 9, pp. 3–22; Friedberg and Hunt, "The impact of immigrants on host country wages, employment and growth", *Journal of Economic Perspectives*, 1995, 9(2), pp. 23-44; Borjas "The Economics of Immigration", *Journal of Economic Literature*, 1994, 32(4), pp. 1667–1717.

[470] Hatton and Williamson, *Global migration and the world economy*, MIT press, London and Cambridge, 2005 at p. 294.

[471] *Ibid.*, see pp.299-304; see also Coleman and Rowthorn, "The economic effect of immigration into the United Kingdom", Population and Development Review (2004), Vol. 30, No. 4, pp. 579-624.

workers in this skill group"[472]. Rather than simply attributing this negligible effect to the relatively small numbers of migrants involved, he submits that there are three possible ways to reconcile this difference between theory and reality: the 'crowding-out effect', increased investment and innovation and the substitutability / complementarity dichotomy[473]. These three possibilities will be considered in turn.

(a) The crowding-out effect

The 'crowding-out effect' supposes that an immigrant influx in a region induces natives to move out. Considering the studies on this issue[474], Hanson concludes that this is another issue about which there is disagreement: "we have another instance in which time-series evidence suggests one thing while cross-sectional evidence suggests something else. The cross-section evidence is again subject to concerns about the endogeneity of immigrant settlement patterns, but these concerns have been insufficient for the literature to come to a consensus about how immigration affects the location decisions of natives"[475].

The issue may however not be one of crowding-out but ageing-out in many developed countries. Brucker argues that "international migration can create a substantial fiscal gain for countries in western Europe due to their rapidly ageing populations. International migration will not hold up the secular process of ageing, but it can nevertheless affect the demographic structure of the western European economies significantly – even if immigration rates remain at their historical levels"[476].

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[472] Hanson, *The Economic Consequences of the International Migration of Labor*, National Bureau of Economic Research, Working Paper No. 14490, Cambridge, 2008 at p.23. See also Card, "Is the New Immigration Really so Bad?" *Economic Journal*, 2005, 115(507), pp. 300-323; Hanson, Scheve, Slaughter and Spilimbergo, *Immigration and the US Economy: Labor-market impacts, illegal entry and policy choices*, SSRN Working Paper, May 2001.

[473] Important recent research confirms his submissions in relation to the latter two possibilities while outlining further positive economic effects of migration: Fargues (ed.), *Is what we hear about migration really true? Questioning eight stereotypes*, Migration Policy Centre, Florence, 2014.

[474] See Card, "Immigrant Inflows, Native Outflows, and the Local Labor Market Impacts of Higher Immigration," *Journal of Labor Economics*, January 2001, pp. 22-64; Borjas, "Native Internal Migration and the Labor Market Impact of Immigration," *Journal of Human Resources*, 2006 (41), pp. 221-258; Borjas, "The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market," *Quarterly Journal of Economics*, 2003 (118), pp. 1335-1374; Hatton and Tani, "Immigration and Inter-Regional Mobility in the UK, 1982-2000", *Economic Journal* (2005), Vol. 115, pp. F342-F358; Hatton and Williamson, *Global migration and the world economy*, *op. cit.*

[475] Hanson, *The Economic Consequences of the International Migration of Labor*, *op. cit.*, at p.24.

[476] Brucker, "Can International Migration solve the Problems of European Labour Markets?", *op. cit.*, at p. 152. On this issue, see Feldstein, *The effects of the ageing European Population on economic growth and budgets: implications for immigration and other policies*, National Bureau of Economic Research, Working Paper 12736 (2006); Bermingham, "Immigration: not a solution to problems of population decline and ageing", *Population and Environment* (2001), Vol. 22, No. 4, pp. 355-363; Storesletten, "Sustaining fiscal policy through immigration", *Journal of Political Economy* (2000), Vol. 108, No. 2, pp. 300-323.

(b) Increased investment and innovation

The second possible reason is that immigration induces firms to raise investment and increase innovation, partially or fully offsetting the wage impacts of labour inflows. Hanson regrets however that there is relatively little empirical research on this issue at the regional or national level. Some studies suggest that regions absorb immigrants through their industries becoming more intensive in the use of immigrant labour[477]. On a theoretical level, Brucker highlights that looking at the labour market out of context ignores the interaction between migration and trade and capital accumulation. It does not reflect the fact that "economies can adjust to an additional labour supply through migration not only through the labour market, but also through a change in the output mix and the structure of traded goods"[478]. Furthermore, "it does not take into account that migration can further increase production and income in the host country through additional incentives to accumulate capital. Once again, these effects are long term ones"[479].

As such, an increase in productivity through migrant labour can stimulate the growth of trade and accumulation of capital in the long term. However, on a personal level, individual migrants may also influence such growth through links and networks retained with their country of origin. Migrants can thus serve as a link to foreign consumer markets and sources of investment[480]. Research has also demonstrated that migrants are particularly prone to engage in entrepreneurship themselves[481]. It is furthermore seldom noted that migrants are not only workers but also consumers and their presence serves to increase the local consumer market. Hanson identifies evidence which suggests that international migration may increase the flow of ideas between countries, thus maximising the accumulation of human capital in both receiving and sending state[482].

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[477] Lewis, "Immigration, Skill Mix, and the Choice of Technique" Mimeo, Dartmouth College, 2005; Acemoglu, "Why Do New Technologies Complement Skills? Directed Technical Change and Wage Inequality" *Quarterly Journal of Economics*, 1998, pp. 1055-1089; Gandal, Hanson and Slaughter, "Technology, Trade, and Adjustment to Immigration in Israel" *European Economic Review*, 2004 (48), pp. 403-428.

[478] Brucker, "Can International Migration solve the Problems of European Labour Markets?", *op. cit.*, at p. 152.

[479] *Ibid.* at p. 152.

[480] See Head and Ries, "Immigration and trade creation: econometric evidence from Canada", *Canadian Journal of Economics* (1998), Vol. 31, No. 1, pp. 47-62.

[481] See Levie, "Immigration, In-migration, ethnicity and entrepreneurship in the United Kingdom", *Small Business Economics* (2007), Vol. 28, pp. 143-169; Froschauer, "East Asian and European entrepreneur immigrants in British Columbia, Canada: post-migration conduct and pre-migration context", *Journal of Ethnic and Migration Studies* (2001), Vol. 27, No. 2, pp. 225-240; Honig and Drori, "A Review of related streams of immigration and global entrepreneurship research", in Honig, Drori and Carmichael (eds.), *Transnational and immigrant entrepreneurship in a globalised world*, UTP publishing, Toronto, 2010, pp. 199-210.

(c) The substitutability / complementarity dichotomy

The final proposed reason, the substitutability / complementarity dichotomy supposes that immigrant and native workers are imperfect substitutes in production, such that on net, foreign labour inflows do not hurt native workers (and may actually help them). In this way, immigrant labour takes up very high skilled or low skilled work that the native labour force either does not wish or has insufficient skill to carry out. These vacancies being filled, productivity increases and employment is generated in the sectors in which the native labour force does work.

Research on this issue suggests that immigrant labour is in general complementary to native labour[483]. Bauer estimated the elasticities of substitution and complementarity for different types of labour[484]. Surprisingly, his findings indicate that even where both migrants and natives are unskilled, the former are complementary to the latter. He found that an increase in the share of unskilled foreign workers of one percentage point increases the wages of unskilled natives by 0.2 %. The only group of native workers which is negatively affected by migration are medium skilled natives, whose wages decline by 0.03 % if the proportion of unskilled migrants increases by one percentage point. Further statistical studies find small but positive effects on native wages suggesting complementarity[485].

Ottaviano and Peri found evidence that immigrant and native labour were imperfect substitutes[486]. Their estimates imply an overall average positive effect of immigration on native wages of about 0.6%. Interestingly, they also imply an overall average negative effect on the wages of previous immigrants of about – 6%[487]. However, more generally, Borjas, Grogger, and Hanson suggest that

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[482] Hanson, "The Economic Consequences of the International Migration of Labor", *op. cit.*, p.33.

[483] Friedberg and Hunt, 'The Impact of Immigration on Host Country Wages, Employment and Growth', *Journal of Economic Perspectives*, Vol. 9, no.2 (1995) pp. 23-44; Borjas, "Economic Theory and International Migration", *International Migration Review*, Vol. 23 no.3 (1989) p. 481; Coppel, Dumont and Visco, *Trends in Immigration and Economic Consequences*, OECD Economics Department Working Papers no. 284 (ECO/WKP 2001) 10, 1st February 2001; Bean, Lowell and Taylor, "Undocumented Mexican Immigrants and the Earnings of Other Workers in the United States", *Demography*, Vol. 25 no. 1 (1988) pp. 35-52; Grossman, "The Substitutability of Natives and Immigrants in Production", *Review of Economics and Statistics*, vol. 64, no. 5 (1982) pp. 593-603.

[484] Bauer, "Do Immigrants Reduce Native Wages? Evidence From Germany", *Münchner Wirtschaftswissenschaftliche Beiträge*, 1997 (97), University of Munich, see Brucker, "Can International Migration solve the Problems of European Labour Markets?", *op. cit.* at p. 142.

[485] Gavasto, Venturini and Villosio, "Do Immigrants Compete with Natives?", *Labour*, CEIS, Rome, 1999 (13), pp. 603-622; Brucker, "Can International Migration solve the Problems of European Labour Markets?", *op. cit.* at p. 142.

[486] Ottaviano and Peri, "Rethinking the Effects of Immigration on Wages", *Journal of the European Economic Association* (2012), Vol. 10, No. 1, pp. 152-197.

[487] On negative impacts on previous immigrants, see further Hamermesh and Bean (eds.), *Help or Hindrance? The economic implications of immigration for African Americans*, Russell Sage Foundation, New York, 1998, Part I.

across a wide variety of sectors one cannot reject the hypothesis that comparably skilled immigrants and natives are perfect substitutes in employment[488].

Ruhs and Anderson submit that because of the complexity of this substitutability / complementarity issue, a micro-economic, qualitative and in-depth empirical analysis is preferable to a global quantitative approach. Taking such an approach in a study of the UK economy, they discover that the role of migrants in the local labour force varies to a great extent between different sectors and occupations. They also identify a problem with the common division between skilled and unskilled workers in labour migration policies and argue that the design of immigration policy needs to take a flexible approach to defining skills or skill requirements[489]. Furthermore, "a key finding of employer surveys in both the UK and the US is that many value so-called 'soft skills', including a good attitude, loyalty to the employer and job, and willingness to work as instructed"[490]. Many employers prefer migrants over natives for their work ethic:

> Migrants tend to be more productive than local workers who fill jobs in the bottom rungs of the labour market. The reason is simple: many local workers applying for low-skill farm, construction, and care-jobs often have personal characteristics that prevent them from holding higher wage jobs, including lack of education and skills, mental and drug or alcohol problems and motivation issues. Newcomers from abroad, whose frame of reference is a lower wage rate at home, are sometimes described as the 'professionals' of low wage labour markets abroad[491].

Determining whether or not and to what extent migrant workers are needed in a given economy as complementary to the native labour market is a complex issue which cannot be achieved taking a global approach, but must take into account the national, local and indeed sectorial context. This is the reasoning behind the recent establishment of the independent Migration Advisory Committee (MAC) in the UK, a development which will be further discussed in chapter 7.

The division between skilled and unskilled workers in labour migration policies has become widespread and generally, and officially, the former are accepted and the latter rejected. This is due the presumed fiscal effects of both categories: skilled migrants are expected to be net fiscal contributors whose migration is not expected to affect negatively the welfare of natives in the host country and the opposite is argued for the migration of unskilled workers. Aside from the fact that

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[488] Borjas, Grogger and Hanson, "Imperfect Substitution between Immigrants and Natives: A Reappraisal", NBER Working Paper No. 13887, 2008.

[489] Demonstrating how complex the skilled/unskilled question can be see Brockmann, Clarke and Winch, *Knowledge, skills and competence in the European labour market: what's in a vocational qualification?* Routledge, Oxford, 2011.

[490] Ruhs and Anderson, *Who needs migrant workers: labour shortages, immigration and public policy*, *op. cit.*, p. 310.

this distinction is questionable, as set out above, Michael questions the strength of the underlying assumptions of this position. He uses a theoretical model with the two categories of labour and capital mobility to investigate the welfare consequences of immigration policies. He concludes that:

> When capital and both types of labor are mobile, skilled labor is a general equilibrium complement with unskilled labor and general equilibrium substitutes with capital, then a decrease in the immigration cost of skilled labor, which causes inflow of skilled labor, can decrease the welfare of natives. Thus, the common wisdom that the inflow of skilled workers, which are net fiscal contributors, increases the welfare of natives is unlikely to be true since this inflow causes movements of capital or unskilled labor which could affect negatively the welfare of natives. Similarly, the inflow of net fiscal beneficiary unskilled labor is likely to increase social welfare[492].

It is thereby demonstrated that due to the complementary relationship between skilled and unskilled labour, an increase in one category can cause an increase in the other. On the contrary, a decrease in one category can cause a decrease in the other and an overall negative growth in the economy. Consistent with this undermining of orthodox belief and on reviewing the existing empirical studies on the fiscal effect of international migration, Hanson simply concludes that "we cannot say much to policy makers about the net fiscal impacts of international migration other than preliminary evidence suggests they are not very big"[493].

(ii) Economic pressure from national and international bodies

Such economic studies limit the freedom of the state to restrict labour immigration through their use by economic lobbying groups and international organisations. Menz argues that economic competitiveness has become a central preoccupation of the European competition state of the early 21st century. "The contemporary post-fordist neoliberal competition state seeks to maximise its 'competitiveness' by assuring a business-friendly climate. In doing so, it is particularly prone to consider suggestions from employers on the design of its migration policy"[494]. For this reason, he observes that economic lobbying groups within member states of the EU are becoming increasingly influential in the area of migration policy. He also highlights that their respective needs tend to be varied in accordance with factors such as "the production strategy, the relative weight of

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[491] *Ibid.*, p. 303.
[492] Michael, "Welfare Effects of Immigration Policies in the Presence of Skilled, Unskilled Labor and Capital Mobility", *Review of Development Economics*, 2011, 15(4), pp. 651–663, at p. 660.
[493] Hanson, "The Economic Consequences of the International Migration of Labor", *op. cit.*, at p.31.
[494] Menz, *The political economy of managed migration*, Oxford University Press, New York, 2009, at p.9; see also Paul, "limits of the competition state? The cultural political economy of European labor migration policies", *Critical Policy Studies* (2012), Vol. 6, No. 4, pp. 379-401.

component sectors of the economy and the labour market regulation"[495]. His empirical studies found an increase in lobbying activities by labour market interest groups in the UK, France, Germany, Ireland and Italy.

Several international organisations have added to this pressure on states. Notable pronouncements on the subject include a prediction by the World Bank that, if carefully managed, a 3 % increase in the next 20 years in the share of migrants in the labour force of industrial countries would boost global real income by $356 billion, a greater potential gain than that expected from global reform of merchandise trade[496]. The World Commission on the Social Dimension of Globalisation has described efforts to remove barriers to global labour mobility as "the unfinished business of globalisation"[497] and in a report submitted to the Global Commission on International Migration in 2005, labour migration was described as the "oft-lamented 'missing global flow'"[498].

The WTO has made continuing efforts to broaden the scope of its General Agreement on Trade in Services (GATS). Mode 4 of its article 1 definition of scope concerns the movement of natural persons from one member state to another for the supply of services. Regarding national commitments on this mode, most contracting states have scheduled an initial "unbound" and then qualified it by granting admission to selected categories of persons, with a marked bias towards persons linked to mode 3 or a commercial presence (e.g. intra-corporate transferees) and highly skilled persons (managers, executives and specialists). In addition to limiting access to certain categories of persons, other restrictions frequently inscribed in schedules include: defined duration of stay, quotas, economic needs tests or labour market tests, pre-employment conditions and residency and training requirements.

Very little progress has been made however in liberalising this mode since the initiation of the Doha round of negotiations in 2001. Outside the context of the negotiations, various international organisations have taken measures to facilitate discussion between interested parties on the topic of GATS mode 4[499]. The Hong Kong Ministerial Conference in December 2005 put the Doha

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[495] Menz, *The political economy of managed migration*, *op. cit.*, p.12.
[496] World Bank, *Global economic perspectives 2006: Economic Implications of Remittances and Migration*, Geneva, Washington DC, World Bank 2005.
[497] World Commission on the Social Dimension of Globalisation, *A Fair Globalisation: Creating Opportunities for All*, Geneva, International Labour Office, 2004.
[498] Martin, "Migrants in the Global Labour Market", Paper submitted to the Global Commission on International Migration, September 2005, at p. 2.
[499] Joint seminar of the OECD, World Bank and IOM in November 2003, the conclusions of which are contained in a report of the OECD: *Trade and Migration: Building Bridges for Global Labour Mobility*, Paris, OECD, 2004; Joint seminar of the World Bank, IOM and WTO: Managing the Movement of People: What can be learnt for Mode 4 of the GATS? (4-5 October 2004).

negotiations themselves back on track[500]. Solomon makes the following observation on the relationship between mode 4 negotiations and global labour migration:

> These negotiations are likely to have a significant impact on prospects for the development of an international legal framework for the movement of people, both within the context of the mode 4 negotiations ... and by fostering spin-off efforts to create more coherent means of managing labour mobility at the regional and global levels. While great progress in mode 4 is highly unlikely at this time, the pressure to conclude a trade agreement is usefully serving as a catalyst for the greater exploration of ways to create a more efficient, fair and safe approach to the management of global labour mobility[501].

Conclusion

This chapter has traced the external forces which have limited state control of migration in parallel to the development of the latter and roughly since the turning point in this development as identified in the last chapter. The first two sections fall broadly into a human rights category, while the final two sections generally relate to economic pressures, though the European Union is increasingly a hybrid of these two broad spheres. The first section outlined the development from asylum law, i.e. international obligations on states to refoule refugees, to international protection law embracing further categories of forced migrants whom states must protect. The second section continues in the human rights vein in cataloguing the fundamental rights to which migrants are entitled in their host state and which have in practice affected the power of states to control their movement. The third section makes the transition to the economic sphere with a discussion of regional migration regimes, focusing on the advanced example of the EU. While initially this regime, including its free movement of persons aspect, had an economic rationale, human rights are increasingly coming to the fore. This is notably due to the efforts of such supranational arms as the Court of Justice and the European Parliament and is epitomised in the coming into force of the Charter of Fundamental rights. The economic and human rights rationales have both played a part in the development of both the internal and external free movement of persons. Finally, the studies of economists pointing out the economic benefits of migration are being used by economic lobbyists and international organisations in an effort to influence state policy in the control of migration.

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[500] Declaration of the WTO Ministerial Conference, 6th session, Hong Kong, 13-18 December 2005, WTO Doc. WT/MIN(05)/DEC, 22nd December 2005, Annex C, see in particular articles 1(d)(i) and (ii).

[501] Klein Solomon, "GATS Mode 4 and the mobility of labour", in Cholewinski, Perruchoud and MacDonald (eds.), *International migration law: developing paradigms and key challenges*, TMC Asser Press, The Hague, 2007, pp. 107-128, at p.127; see also, Winters, "The Economic Implications of Liberalising Mode 4 Trade", paper prepared for the Joint WTO-World Bank Symposium on *The Movement of Natural Persons (Mode 4) under the GATS*, Geneva, 11-12 April 2002.

While the previous chapter highlighted the insidious origins of today's general and systematic state control of migration, this chapter has demonstrated that almost since its 'turning point' inception, this has been constantly subject to external limiting forces. Both the racial theory origins of and the human rights and economic limiting forces against this state control serve to put us on inquiry as to its legitimacy. This leads us to the next chapter which will take a more theoretical form in examining the possible bases for this legitimacy.

5. The legitimacy of state control

Introduction

The considerable limiting forces on the development of the system of general and systematic state control over the movement of persons across territorial borders as an empirical fact puts us on inquiry as to whether or not this system is itself legitimate. In chapter 2, while considering the legitimacy of the state, reference was made to Max Weber's three main sources of legitimacy: traditional, charismatic and rational-legal. Due to the inherent instability of the first two categories, Weber considered the move towards a rational-legal structure of authority inevitable in the end. His theory is based on the legitimacy of those who exercise the power of the state, i.e. its composition. However, his discussion of rational-legal legitimacy seeps into the realm of the legitimacy of the continuing functions of the state in that to be legitimate, those who comprise the state must continuously justify their actions in a rational-legal manner.

Chapter 2 traced how the modern state came to be formed in a somewhat haphazard manner. From its earliest forms however, its *raison d'être* was to ensure efficient societal order. The three functions of the feudal state as observed by Paul, the protection of the territory of the Kingdom and the preservation of security and order remain pertinent today; these are the core functions of the modern state. While some measures of the state can be legitimised on a traditional basis, such as the control of citizenry membership, where this is not possible, reliance must be placed on rational-legal legitimacy. On the latter basis, the state must be able to justify in a rational manner all its measures as necessary in the exercise of its core functions. Part of this obligation requires that it be able to show the link between the end goal and the action taken – that the latter will result in the former or at least move towards the achievement of the former.

This chapter will consider to what extent the general and systematic state control of migration can be legitimised first on the basis of tradition and secondly on a rational-legal basis. The first section will clarify the parameters of this exercise: my aim is to consider the state's role in curtailing the movement of people and not to extend the analysis to the associated yet distinct question of the state's role in determining the membership of its citizenry. Due to the close relationship of these questions however, a brief discussion is warranted.

§1 Movement as distinct from membership

(i) Various phases of migration

At this juncture it is necessary to clarify the limits of this research. Benhabib identifies various

phases of migration from emigration to actual first entry into a foreign country to cultural, economic or social incorporation of a shorter or longer duration (for such purposes as visiting, business or study), to incorporation (i.e. residency of a significant duration), to naturalisation (i.e. access to political citizenship)[502]. As an individual passes through these phases, the rights to which he is entitled tend to gain in number and strength. These corollary rights progress from varying degrees of security of residency to social, economic and civil rights to political rights.

My concern is with the physical movement of individuals across territorial borders, with the legitimacy of state control of this movement and so mainly with rights of residency. These are arguably the most important of all rights for migrants as often the acquisition of any other rights depends on an initial civil status within a state: many migrants find themselves in a nightmarish legal limbo and often for protracted periods in circumstances where although not deported, they have no civil status and so no right to such essentials as housing, social welfare, to work, to education etc.[503] This research does not seek to consider in detail to what degree social, economic and civil rights of migrants must be protected by the receiving state nor the conditions under which an individual might be granted political membership of that state through naturalisation. However, given that the residency of an individual within a state necessarily leads to these questions, the main issues associated with both the acquisition of rights and the acquisition of citizenship must at the very least be acknowledged.

(ii) Individual rights of migrants

Migrants are entitled to a broad range of individual rights deriving from their status as human beings as opposed to citizens. Problems arise however in determining which state should be responsible for the protection of these rights and in particular in relation to socio-economic rights, which have traditionally been perceived as a drain on public resources. Schierup, Hansen and Castles submit that currently a dual crisis exists in Europe: that of the welfare state and of national identity. They explain the crux of this dual crisis as follows:

> This new-old 'wall' ... is supposed to protect regulated labour markets and welfare states in the West against wage and welfare 'dumping' or so-called welfare tourism. It is also supposed to stem the rise of new nationalist, racist-populist political movements

[502] Benhabib, *The Rights of others: aliens, residents and citizens*, Cambridge University Press, Cambridge, 2004, see chapter 4.

[503] See Calavita, *Immigrants at the margins: law, race and exclusion in Southern Europe*, Cambridge University Press, Cambridge, 2005; Gonzalesa, *Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood*, American Sociological Review (2011), Vol. 76, pp. 602-619; Cox, "The Legal Limbo of Indefinite Detention: How Long Can You Go", *American University Law Review* (2001) Vol. 50(3), pp. 725-754; Schaap, "Enacting the right to have rights: Jacques Ranciere's critique of Hannah Arendt", *European Journal of Political Theory* (2011), Vol. 10(1), pp. 22-45; Chavez, *Shadowed lives: undocumented immigrants in American society* (3rd ed.), Wadsworth, Belmont, 2013.

> centred on the 'problem of immigration' and the associated alleged threat to the welfare and identity of state and nation.
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> Simultaneously, however, influential employers, politicians and civil servants continue repeatedly to voice the need for low- and high-skilled migrant labour as a short-term remedy for acute bottlenecks in the labour markets, but from a longer-term and wider perspective as a necessary large-scale cure for Europe's imminent 'demographic deficit'[504].

Yet to speak of a current 'European dilemma' they contend "presupposes that there is some shared creed in Europe, some genuinely inclusive communal moral conviction to be invoked"[505]. This is akin to Rawl's notion of an overlapping consensus as discussed in chapter 2[506]. Their analogy with the 'American dilemma' which stemmed from the treatment of black people in the US in the 1940s adds weight to their submissions. The dilemma then faced by white liberal elites was that if they continued to ignore the widespread racism suffered by the black people, they would jeopardise economic progress; on the other hand, "if they were to seize the dilemma by its horns, they would provoke serious confrontations with numerous and still powerful white conservative interest groups and trigger serious political turbulence"[507]. Again political stability opposed economic need. They submit that it was the shared American creed of 'constitutional patriotism', the common denominator of rights and political institutions in the American Constitution, incentivised through patriotism, which appeared to be shared by almost everybody independent of race, religion and class, that made it possible to overcome the American dilemma. Again, this ties back to Habermas' location of an overlapping consensus in a state's constitution, as addressed in chapter 2[508]. Scierup, Hansen and Castles pose the question as to what shared creed might exist in Europe. What are the rights to which all, including migrants, like black people in mid-20th century America, are entitled?

Europe has no neat document on which to base its common creed given the varying expanses of the region (geographic Europe, the Council of Europe and the EU) and the diversity of documents on human rights and political institutions (Conventions of the Council of Europe, Treaties of the EU and Constitutions of individual European states). Yet a common creed must be found if the European dilemma between political stability and economic need in the field of migration is to be overcome.

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[504] Schierup, Hansen and Castles, *Migration, citizenship and the European Welfare State: A European dilemma*, Oxford University Press, Oxford, 2006 at p. 4.
[505] *Ibid.*, p. 10.
[506] Rawls, *Political Liberalism*, Columbia University Press, New York, 1993, p. 15.
[507] Schierup, Hansen and Castles, *Migration, citizenship and the European Welfare State: A European dilemma, op. cit.*, at p. 9.

Commencing the quest with the European Convention on Human Rights, article 1 makes clear that "the High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention", yet this Convention is confined to the protection of civil and political rights. Furthermore, article 16 allows the contracting parties to impose restrictions on the political activity of aliens. Council of Europe protection of socio-economic rights is less progressive. The European Social Charter is based on the obligation of the contracting parties to have as "the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the [protected socio-economic rights] may be effectively realised"[509]. Although there is no clear provision specifying that everyone "within their jurisdiction" is entitled to the benefits of this political aim, specific rights are stated to be to the benefit of specific beneficiaries, ranging from "all workers", to "everyone" to "migrant workers who are nationals of a party". The distinction between the latter two beneficiaries suggests that migrants from third countries fall within the designation of "everyone". Rights to which everyone is a beneficiary include the opportunity to earn his living in an occupation freely entered upon[510], to appropriate facilities for vocational training[511], to social and medical assistance[512], to benefit from social welfare services[513], to protection against poverty and social exclusion[514] and the right to housing[515]. The Council of Europe as such provides the outline of a tentative common creed for Europe, however, its intergovernmental nature and lack of powerful means of enforcement against contracting states renders it relatively weak, particularly in comparison to the strength of the EU, to which we will now turn.

The EU has two systems of rights as regards migrants: that relating to nationals of other EU member states, i.e. Union citizens, and that relating to nationals of third countries[516]. The Citizenship Directive 2004/38 has now codified the first system (though third country national family members also come within its remit), which functions on the basis of a tiered approach to migrant rights. Migrants gain greater security of residence as they pass through periods of up to three months residence, between three months and five years residence and over five years residence. The important right of equal treatment of article 24 ensures that migrants, once lawfully resident, enjoy equal treatment with the nationals of that member state within the scope of the

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[508] Habermas, *Facts and Norms: contributions to a discourse theory of law and democracy*, (translated by William Rehg), The MIT Press, Cambridge, 1996, see Appendices I and II, pp. 465-466 and 499-500.
[509] European Social Charter 1961 (revised version of 1996), part I.
[510] Article 1.
[511] Article 10.
[512] Article 13.
[513] Article 14.
[514] Article 30.
[515] Article 31.
[516] The need for a specific system in the EU of protection of third country national rights in the form of a "uniform European regulation of permanent residency status" was advocated at an early stage by van Amersfoort. See van Amersfoort, "International Migration and Civil Rights: the dilemmas of migration control in the age of globalisation", in Guild (ed.), *The Legal framework and social consequences of the free movement of persons*, Martinus Nijhoff Publishers, The Netherlands, 1999.

Treaty. This principle of equal treatment is limited as regards the protection of socio-economic rights however. The directive attempts to come to a balance between the protection of this category of rights for migrants and the protection of the social assistance systems of the member states. In the first three months of residency, migrants may lose their right of residence if they become "an unreasonable burden on the social assistance system of the host member state"[517]. However, the directive further provides that "an expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host member state"[518]. The host member state is not obliged to provide social assistance to migrants during the initial period of three months. They are also not obliged to provide such assistance to migrants who came to the host member state in search of employment, are continuing to search for same beyond the three month period and who have a genuine chance of being engaged. Furthermore, during the period from between three months and five years, they are not obliged to provide financial assistance for the purpose of studies or vocational training to migrants other than workers or self-employed persons[519].

The EU's second system relating to nationals of third countries is based on the Long term residents directive 2003/109[520]. Again, this uses a tiered system of acquisition of rights, but only applies to the lengthier period of five years residence. Member States are obliged to grant long-term resident status to third country nationals who have resided legally and continuously[521] within their territory for five years immediately prior to the submission of the relevant application[522]. Once this status is granted, article 11 kicks in to ensure equal treatment with nationals, though its provisions are considerably more detailed than article 24 of Directive 2004/38. Article 11(1) makes clear that member states must afford equal treatment as regards certain socio-economic rights, such as access to employment and self-employed activity, education and vocational training and social assistance[523] and article 11(5) confirms that member states may accord equal rights to long-term residents in other areas. There is again a balancing act between the protection of this category of rights for migrants and the protection of the social assistance systems of the member states. It remains for member states to determine the status of an individual's residence in the first five years and residence or even legal residence is not enough to become entitled to the status of long term

[517] Article 14(1).
[518] Article 14(3).
[519] Article 24(2).
[520] Third country nationals have also certain protections in relation to social security stemming from Regulation 1231/2010 extending Regulation 883/2004 on the coordination of social security systems to nationals of third countries who are not already covered by this Regulation solely on the ground of their nationality.
[521] Article 3 specifies however that the Directive does not apply to third country nationals with this length of legal and continuous residence if this was in order to pursue studies, on the basis of international protection, of a temporary nature or on the basis of diplomatic relations. Directive 2011/51 has since extended the scope of Directive 2003/109 to beneficiaries of international protection.
[522] Article 4.
[523] Article 11(1)(d) uses the terms "social security, social assistance and social protection as defined by national law".

resident. Article 11(2), (3) and (4) allow member states to restrict equal treatment in certain cases, notably "in respect of social assistance and social protection to core benefits"[524]. This balance has been adjusted somewhat by the Court of Justice as it has held that in the interpretation of such terms as "core benefits", regard must be had to the objective of the directive as set out in its preamble and to the provisions of the Charter of Fundamental Rights of the EU. In *kamberaj* C-571/10, the Court drew attention in this regard to the following recitals of the preamble:

> (2) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, stated that the legal status of third-country nationals should be approximated to that of Member States' nationals and that a person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union.
> (3) This Directive respects the fundamental rights and observes the principles recognised in particular by the [ECHR] and the [Charter].
> (4) The integration of third-country nationals who are long-term residents in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the Community stated in the [EC] Treaty.

The EU is as such slowly setting the parameters of a strong common creed for Europe, the common denominator of rights and political institutions which could be shared by everybody and which could facilitate the overcoming of the European dilemma set out above. However, if patriotism was the incentive to share the common American creed, what might be the incentive in such a diverse territory as the EU?

What is now the European Union was first established with a view to ending a line of bloody wars between neighbours, which culminated in the Second World War. As of 1950, the European Coal and Steel Community began to unite European countries economically and politically in order to secure lasting peace. Economic cooperation and progress were perceived as a means to working through differences to achieve this end. Although in the intervening years, this entity has greatly developed, Nic Shuibhne argues, in the context of a discussion on EU citizenship, that the economic market remains its core *raison d'être*. The internal market remains the driving force behind the increasing protection of EU citizenship rights[525]. Evidence of this same driving force in relation to the rights of third country nationals can be found in the preamble to the Long term residents Directive 2003/109 at recital 4, cited above, which identifies a link between the integration of third-country nationals who are long term residents in the member states and the

[524] Article 11(4).

promotion of economic and social cohesion.

The relationship between the protection of individual rights and economic progress is symbiotic. If the economy is less understood as a cold drive towards profit and more as a collective effort by individuals pursing their goals in the context of respect for individual rights, this relationship becomes clear. On the one hand, the more individuals are free to pursue their individual goals, while respecting the right of others to do likewise, the more the collective economy will thrive. On the other hand, a strong economy ensures sufficient resources are available for the protection of individual rights, notably socio-economic rights. Economic progress also provides the necessary incentive to the formation of a common creed in Europe. While patriotism served as an incentive in America, economic progress understood as the opportunity for each individual to pursue their goals might serve as an incentive in Europe. The European common creed might thus be found in 'rights based economic progress'[526].

A tiered system of the acquisition of rights by migrants based on length of residency promotes both economic and social cohesion in the territory of the EU. The latter is promoted in two ways: first, with the acquisition of rights comes the corollary acquisition of duties. When migrants see themselves afforded increasing rights, they have more reason to respect the laws and customs of the host state. Second, with the acquisition of rights, the status of migrants approaches that of nationals, thus decreasing differences in law between the two. Equal treatment in law can positively encourage equal treatment in society. Nevertheless, a distinction remains between citizens and non-citizens in any state and indeed between these two and the intervening status of denizen. The conditions for the acquisition of rights by migrants are distinct from the conditions for their acquisition of membership of a state through naturalisation, a question which will be discussed in the next section.

(iii) Conditions for naturalisation

If there is a gradual acquisition of rights and corresponding duties with increasing residence in a territory, what added value does the acquisition of citizenship offer? If there is an added value, under what conditions should migrants be entitled to this status? These are questions that will be

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[525] Nic Shuibhne, "The Resilience of EU Market Citizenship", *Common Market Law Review*, Vol. 47 (2010), pp. 1597-1628.

[526] This suggestion also draws support from theories comprehensively set out by Dworkin in his series of essays 'What is Equality?': "Part 1: Equality of Welfare", *Philosophy & Public Affairs*, Vol. 10, No. 3 (1981), pp. 185-246; "Part 2: Equality of Resources", *Philosophy & Public Affairs*, Vol. 10, No. 4 (1981), pp. 283-345; "Part 3: The Place of Liberty", *Iowa Law Review*, Vol. 73 (1987-1988), pp. 1-54; "Part 4: Political Equality", *University of San Francisco Law Review*, Vol. 22 (1987-1988), pp. 1-30. Dworkin demonstrates why a theory of equality of resources is preferable to a theory of equality of welfare, that the protection of individual liberties is built into the former and that political equality requires a separate theory because politics, he concludes, is a matter of responsibility and not another dimension of wealth.

considered in this section.

Authors such as Walzer and Meilaender place emphasis on the value that comes with membership of a community. Walzer[527] asserts that what justice requires depends on shared understandings about the nature of social goods distributed within political communities and that membership is the primary good distributed by such communities. His central claim is that exclusion is justified by the right of communities to self-determination. Meilaender[528], in seeking to demonstrate the legitimacy of state control of immigration policy, comments that "to neglect the communities that human beings naturally form and the special bonds which these communities inevitably produce is to lead a less than fully human life, a life that ignores important parts of what it is to be human". He continues to quote Aristotle – "man is by nature an animal intended to live in a polis" – and David Hume who placed great weight upon the "social disposition of mankind" claiming that the "propensity to company and society is strong in all rational creatures". Both authors however fail to distinguish between control of immigration, i.e. the movement of people across territorial borders and the control of membership of a community through naturalisation, a central distinction in this thesis. Their argument has some merit when applied to the latter, though their terminology suggests they intend to refer to the former or both. Applied to the former, their argument fails to explain how the movement of people can affect the attributes of any given community; indeed communities exist at all levels in spite of free movement of people within the territories of most states and increasing movement of people internationally.

Furthermore, they seem to conflate a sense of identity and community with cultural membership, two concepts which I feel should be kept distinct. A sense of identity and community can derive from various sources depending on each individual and not necessarily from shared cultural beliefs. The international community has furthermore put in place mechanisms to protect elements of culture otherwise than through exclusion from membership e.g. the framework of the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage 1972. One can be proud to be Irish and not necessarily like Guinness or be able to speak Irish and I would hazard a guess that one could be proud to be American and dislike "baseball, hotdogs and apple pie"[529]. Baubock[530] has coined the phrase 'citizenship constellation', a structure in which individuals are simultaneously linked to several political entities, so that their legal rights and duties are determined not only by one political authority, but by several. In reply to authors who have analysed denizenship as a quasi-citizenship status that diminishes the value of citizenship in the host country, he remarks that they have tended to ignore that denizens are often at the same time

[527] Walzer, *Spheres of Justice*, Basic Books, New York, 1983.
[528] Meilaender, *Toward a theory of immigration*, Palgrave, New York, 2001.
[529] An example given by Meilaender of shared American cultural attributes contained in the 'chevrolet ad', see *ibid.* at p. 86.
[530] Baubock, "Studying citizenship constellations", *Journal of Ethnic and Migration Studies*, Vol. 36, No. 5 (2010), pp. 847-859.

foreign nationals of a country of origin. He captures the varying sources of a sense of identity and community in citizenship in the following passage:

> Migrants respond to their experience in different ways, some by fully embracing the national identity of their host societies, others by reinventing themselves as national diasporas of their countries of origin, still others by shifting their primary identities towards the local communities where they have come from or where they settle, and a few by identifying as Europeans citizens. From a perspective that focuses on citizenship constellations rather than on immigration receiving nations, each of these identities contains a potential for meaningful membership in a political community and none are necessarily mutually exclusive[531].

Further to the value of citizenship in this sense of identity and community, Benhabib places an emphasis on political membership and the acquisition of political rights. Political rights are in this way distinguished from civil, economic and social rights which were discussed in the preceding section. She seeks to delineate a balance between respect for existing communities and the right of non-members to membership. As regards the conditions for the acquisition of membership, she submits that although these are for the community to decide upon, they must satisfy requirements of 'just membership', which entails 'the right to citizenship on the part of the alien who has fulfilled certain conditions':

> Permanent alienage is not only incompatible with a liberal-democratic understanding of human community; it is also a violation of fundamental human rights. The right to political membership must be accommodated by practices that are non-discriminatory in scope, transparent in formulation and execution, and justiciable when violated by states and other state-like organs. The doctrine of state sovereignty, which has so far shielded naturalisation, citizenship and denationalisation decisions from scrutiny by international as well as constitutional courts, must be challenged[532].

Approaching political membership from the standpoint of a normative theory of deliberative democracy, her basic premise is that "only those norms and normative institutional arrangements are valid which can be agreed to by all concerned under special argumentation situations named discourses"[533]. She develops the concept of 'democratic iterations' to this end: "complex processes of public argument, deliberation and learning through which universalist right claims are contested

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[531] *Ibid.* at p. 853.

[532] Benhabib, *The Rights of Others: Aliens, Residents and citizens*, Cambridge University Press, Cambridge, 2004 at p.2.

[533] *Ibid.* at p.12. For a proposed extension of these discourses to include the view-point of 'outsiders', see Cole, "Beyond reason: the philosophy and politics of immigration", *op. cit.*, at p. 516.

and contextualised, invoked and revoked, throughout legal and political institutions as well as in the public sphere of liberal democracies"[534]. While the paradox that those who are not members of the political community will remain affected by its decisions of inclusion and exclusion can never be completely eliminated, "its effects can be mitigated through reflexive acts of democratic iteration by the people who critically examines and alters its own practices of exclusion"[535].

Baubock captures both the identity/community and political membership elements of citizenship from his citizenship constellations perspective in claiming that this perspective:

> defends the idea that citizenship is not merely a bundle of rights derived from residence, but also a significant identity that integrates diverse societies with mobile as well as sedentary populations. In this view, citizenship means membership in a self-governing political community that stretches across generations and is attached to a specific territory. In a citizenship constellation such communities are no longer fully separate, but they remain nonetheless distinct[536].

While this section suggests a possible tiered system for the acquisition of civil, economic and social rights by immigrants and advocates for just membership and an acceptance of citizenship constellations when it comes to membership of a political community, it is recalled that the central focus of this thesis is on the legitimacy of state controls on the physical movement of people across territorial borders.

§2 Based on Tradition

Although Weber notes a general move towards rationalisation, there are some functions of the state that continue to be justified on a traditional basis. The rules of customary international law are a prime example, which have been described as surviving "ultimately because of what can be called an aura of historical legitimacy"[537]. Whether or not the legitimacy of general and systematic state

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[534] Benhabib, *The Rights of Others: Aliens, Residents and citizens*, *op. cit.*, at p. 19. For more on this notion of just membership see Barker, "Democracy and deportation: why membership matters most", in Franko Aas and Bosworth (eds.), *The Borders of Punishment: migration, citizenship and social exclusion*, Oxford University Press, Oxford, 2013, pp. 237-256; Benhabib, "Another Universalism: on the unity and diversity of human rights", *Proceedings and Addresses of the American Philosophical Association* (2007), Vol. 81(2), pp. 7-32; Oman, "Hannah Arendt's 'right to have rights': a philosophical context for human security", *Journal of Human Rights* (2010), Vol. 9, pp. 279-302; van Houdt, Suvarierol and Schinkel, "Neoliberal communitarian citizenship: current trends towards 'earned citizenship' in the United Kingdom, France and the Netherlands", *International Sociology* (2011), Vol. 26(3), pp. 408-432; Gerdes and Faist, "Transnational transformations of citizenship", in Faist, Pitkanen, Gerdes and Reissenauer (eds.), *Transnationalisation and Institutional Transformations*, Centre on Migration, Citizenship and Development, Working Paper No. 87, 2010, pp. 21-49.

[535] Benhabib, *The Rights of Others: Aliens, Residents and citizens*, *op. cit.*, at p. 20.

[536] Baubock, "Studying citizenship constellations", *op. cit.*, at p. 855.

[537] Shaw, *International Law* (5th ed.), Cambridge University Press, Cambridge, 2003 at p. 68.

control over the movement of persons across territorial borders can be established under this body of law will now be considered.

(i) Customary international law

Article 38(1)(b)of the Statute of the International Court of Justice is widely recognised as the most authoritative statement as to the sources of international law[538]. A major issue that has arisen is to what extent this body of law represents a limit on or permission for state action. The former view contends that everything is permitted unless there is a rule of international law prohibiting a particular exercise of jurisdiction[539]. This view has however been greatly criticised and in the 9th edition of Oppenheim it is stated that there is:

> increasing acceptance that the rules of international law are the foundation upon which the rights of states rest, and no longer merely limitations upon states' rights which, in the absence of a rule of law to the contrary, are unlimited[540].

In the *Fisheries* case before the International Court of Justice, Judge Alvarez confirmed the modern principle:

> It is also necessary to pay special attention to another principle which has been much spoken of: the right of States to do everything which is not expressly forbidden by international law. This principle, formerly correct, in the days of absolute sovereignty, is no longer so at the present day... Any State alleging a principle of international law must prove its existence ...[541]

It follows from the above that in order for a state to have a certain power under international law, such a power must either be expressly set out in an international treaty or proven to be a rule of customary international law. A state is not free to act under international law beyond these two circumstances.

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[538] See *ibid.*, p.66 and Jennings and Watts (ed.s), *Oppenheim's International Law, Volume 1: Peace*, Longman, Harlow, 1992, at p.24.
[539] *S.S. Lotus* (*France v. Turkey*), 1927 P.C.I.J. (ser. A) No.10 (sept. 7), at para. 46.
[540] Jennings and Watts (ed.s), *Oppenheim's International Law*, *op. cit.*, at p.12. See also Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General principles and sources of law", *British Yearbook of International Law* (1953), Vol. 30, pp. 1-70, at pp. 8-18; Waldock, "General Course on Public International Law", *Hague Academy, Recueil des Cours* (1962-II), Vol. 106, pp. 161-191; Lauterpacht, *The development of International Law by the International Court*, Cambridge University Press, Cambridge, 1982, at pp. 359-367.
[541] *United Kingdom v. Norway* (*Fisheries* case) [1951] ICJ 3, judgment of 18 December 1951, at p. 152.

Article 38(1)(b)of the Statute of the International Court of Justice describes customary international law as "evidence of general practice accepted as law". There are thus two basic elements: the actual behaviour of states, i.e. evidence of a uniform and consistent practice of states, and the subjective belief that such behaviour is obligatory (*opinio juris sive necessitatis*).

Nafziger poses precisely the question: "has the exclusionary proposition [that the state has a right to exclude all aliens] ripened into [customary international law]?"[542] As regards the actual behaviour of states, he examines two principal sources: publicist writings describing same and national laws. He finds that many publicists that tend to support the exclusionary proposition "either fail to indicate authority, or rely on questionable authority or interpretations of that authority[543] [and that] a consensus of persuasive publicists confirms the teachings of the classic publicists and early case law, namely, that a state may exclude some, but not all, aliens"[544]. Furthermore, he observes that national laws generally reveal a willingness to admit well-defined classes of migrants.

As regards *opinio juris*, his analysis of judicial authority traces the origins of the exclusionary proposition back to the 1889 U.S. Supreme Court case of *Chae Chan Ping v. U.S.* discussed in chapter 3. Because this landmark decision has since been repeatedly, if not ritually invoked, he felt it merited careful consideration. Three of his observations are important: first, subsequent case law[545] has misinterpreted this case as laying down the absolute exclusionary proposition, whereas it actually made the congressional power to exclude dependant on a consideration that the alien(s) in question were dangerous to the country's peace and security. Second, the diplomatic correspondence cited in the case expressed only a qualified power to exclude. Finally, two Supreme Court opinions delivered in quick succession following this case[546] cite demonstrably questionable academic authority[547]. He thus submits that while present judicial authority is mixed, that which propounds the absolute exclusionary proposition is based on unsound authority.

Further evidence of *opinio juris* can be obtained from statements of heads of state. At the time of this initial caselaw:

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[542] Nafziger, "The General Admission of Aliens under International Law", *American Journal of International Law* (1983), Vol. 77, pp. 804-847, at p. 829.
[543] See e.g. Brierly and Waldock, *The Law of Nations* (6th ed.), Clarendon Press, Alderly, 1963, at p. 276; Hyde, *International Law chiefly as interpreted and applied by the United States* (2nd ed.), Little Brown, Boston, 1951, at pp. 216-217; Kelsen and Tucker, *Principles of International Law* (2nd ed.), Rinehart and Winston, New York, 1966, at pp. 372-73; Sinha, *New Nations and the Law of Nations*, A.W. Sijthoff, Leyden, 1967, at p. 97; Von Glahn, *Law among Nations: an Introduction to Public International Law* (3rd ed.), Macmillan, New York, 1976, at p. 214.
[544] *Ibid.*, at p. 832.
[545] *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895); *Galvan v. Press*, 347 U.S. 522 (1954); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).
[546] *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).
[547] Nafziger, "The General Admission of Aliens under International Law", *op. cit.*, at pp. 824-828.

> contemporary statements of Secretary of State Foster and Presidents Harrison, Cleveland and Roosevelt reveal that the Government thought it had to show that the new immigration restrictions could be reconciled with the principle of open admission and to clarify how the restriction of certain classes bore a relation to the self-preservation of the state or the protection of its people from clearly defined threats[548].

Also of relevance in this regard is the fact that the Institute of International Law in 1892 adopted a proposal of International Regulations on the Admission and Expulsion of Aliens[549], incorporating such provisions as article 6 "free entrance of aliens to the territory of a civilised state, may not be generally and permanently forbidden except in the public interest and for very serious reasons ..." and 7 "the protection of national labor is not, in itself, a sufficient reason for non-admission". Although of less significance today, this proposal nevertheless refutes claims that the international legal community acquiesced in the exclusionary proposition when it was formulated.

Nafziger concludes by rejecting that the exclusionary proposition has ripened into customary international law. If any rule has in this way been created he suggests that it is to the effect that states "may exclude aliens if, individually or collectively, they pose serious danger to its public safety, security, general welfare, or essential institutions"[550]. This tentative suggestion captures the essence of this thesis: chapter 3 identified a turning point in state immigration policies from 'freedom unless you pose a threat' to 'control unless we want you', which occurred with little theoretical analysis. I am now contending that while the former was legitimate, the latter was and remains not so, for the theoretical reasons offered in this chapter.

A further notable aspect of *Chae Chan Ping v. U.S.* was its legacy once the Supreme Court had decided that Congress could breach a treaty in order to meet popular demand for harsh immigration laws: from this point on "the level of concern for international law in shaping U.S. immigration policy diminished dramatically"[551]. Preuss[552] provides an example of this legacy in the Senate debates concerning the U.S. acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ). The following exclusion to this jurisdiction was accepted by 51 to 12 votes: "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States, as

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[548] *Ibid.* at p. 841, citing Moore, *A Digest of International Law* 67 (1906) 151, at pp. 153-160.
[549] For an English translation of the proposal, see Scott (ed.), *Resolutions of the Institute of International Law dealing with the law of nations*, Oxford University Press, American Branch, 1916.
[550] Nafziger, "The General Admission of Aliens under International Law", *op. cit.*, at p. 846.
[551] Fitzpatrick and McKay Bennett, "A lion in the path? The influence of international law on the immigration policy of the United States", *Washington Law Review* (1995), Vol. 70, pp. 589-628, at p. 625.
[552] Preuss, "The International Court of Justice, the Senate and matters of domestic jurisdiction", *American Journal of International Law* (1946), Vol. 40, pp. 720-736; see also Rajan, "United States attitude towards domestic jurisdiction in the United Nations", *International Organisation* (1959), Vol. 13, No. 1, pp. 19-37.

determined by the United States"[553]. Its acceptance, even though "a contradiction of compulsory jurisdiction itself"[554] and in circumstances where "during the course of the debate ... it became obvious that little was known about domestic jurisdiction 'except its extreme sanctity'"[555], suggests an inability on the part of the supporting senators to relinquish their attachment to the notion of state sovereignty. Indeed, this notion has been described as "an archaic nemesis for international law"[556] and such unthinking attachment thereto ties together the conceptual analysis of this notion in chapter 2 with an outline of its misuse in political rhetoric to be given in chapter 6.

For present purposes, the point is that since *Chae Chan Ping v. U.S.* and as evidenced in this Senate debate, immigration law has been lodged in the realm of domestic jurisdiction and the potential use of international law in the governance of migration summarily cast aside. Despite the fact that "migration by its nature is international and has international consequences"[557], as submitted in chapter 1, this Senate debate was peppered with alleged examples of areas of domestic jurisdiction, including immigration law[558]. Without deeper analysis, this position has come to be accepted by modern international law publicists, such as Shaw, who simply comments that:

> State functions which are regarded as beyond the reach of international legal control and within the exclusive sphere of state management include the setting of conditions for the grant of nationality and the elaboration of the circumstances in which aliens may enter the country[559].

From the above, it is clear that international law does not as yet govern migration control: the exclusionary proposition has not ripened into customary international law and states have maintained that this area of law falls within the sphere of domestic jurisdiction. That is not to say that it can never be governed by international law as "the concept of domestic jurisdiction is dynamic"[560]. It does however cast a questionable light over such mantras as "the Contracting States' ... right, as a matter of well-established international law and subject to their treaty obligations, to

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[553] Congressional Record, Vol. 92, No. 154, 2 August 1946, p. 10841.
[554] Per Senator Thomas, Congressional Record, Vol. 92, No. 153, 1 August 1946, p. 10765.
[555] Preuss, "The International Court of Justice, the Senate and matters of domestic jurisdiction", *op. cit.*, at p. 725.
[556] Schindlmayr, "Sovereignty, Legal Regimes and International Migration", *International Migration* (2003), Vol. 41(2), pp. 109-123, at p. 120.
[557] Nafziger, "The General Admission of Aliens under International Law", *op. cit.*, at p. 821.
[558] Preuss, "The International Court of Justice, the Senate and matters of domestic jurisdiction", *op. cit.*, at pp. 725-726, 731.
[559] Shaw, *International Law*, *op. cit.*, at p. 574; on the notion of domestic jurisdiction, see further, Crawford, *Brownlie's Principles of Public International Law* (8th ed.), Oxford University Press, Oxford, 2012; Rajan, *United Nations and Domestic Jurisdiction* (2nd ed.), Asia Publishing House, London, 1961.
[560] Nafziger, "The General Admission of Aliens under International Law", *op. cit.*, at p. 820.

control the entry, residence and expulsion of aliens"[561]. This thesis seeks to require states to go further in justifying their measures of migration control.

(ii) Traditional internal state function

If the legitimacy of general and systematic state control of migration cannot be established under customary international law or falls outside the scope of this body of law, it remains to be considered whether or not its legitimacy can be demonstrated on a traditional basis as an internal state power.

Chapter 3 charts the development of state control of the movement of persons across territorial borders. Early migration control in Britain and America was based on a free movement default position with transient and small-scale controls established to protect particular interests of the native population, such as public order, health security and religious beliefs. With the onset of various wars in Europe, emergency measures were introduced to control the entry of enemy aliens. The transition from transient and small-scale measures of migration control to a general and systematic control was deemed to be rooted in the "baleful glow of racial theory"[562]. The American turning point is most clearly evident in its relations with China, culminating in the Chinese Exclusion case of the Supreme Court of 13th May 1889[563]. The wartime measures in Britain were ostensibly intended to be of a temporary nature and the measures taken to control the immigration of Chinese nationals adopted in America of a limited nature. Thus, as initial exceptions to the norm, they reinforced the default position at that time of 'free movement unless you cause a threat'.

These measures were however continually renewed and gradually expanded. In Britain, "the 1905 legislation was cemented in the 1914 Aliens Restriction Act ... It was initially anticipated that the 1914 Act would be repealed at the end of the war. Instead, the Aliens Restriction (Amendment) Act 1919 was passed, which extended the 1914 Act for one year and repealed the 1905 Act in its entirety. The Act was then renewed on a yearly basis without significant parliamentary debate"[564]. In America, from the pivotal Act of 1882, the US gradually increased its control on immigration by extending the categories of persons excluded from its territory: "blanket exclusions continued with the 1917 statute ... barring political radicals and some Asians. The 1921 and 1924 laws ... imposed quotas based upon the "national origins" of the existing United States population"[565].

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[561] This standard formula was first used by the ECtHR in *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, para. 67, discussed further below.
[562] Dummett and Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, *op. cit.*, p. 95.
[563] *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889).
[564] Somerville, *Immigration under New Labour*, The Policy Press, Bristol, 2007, at p. 13.

In determining whether or not general and systematic state control of migration can be legitimised as a traditional internal power of the state, the above major turning points are a crucial consideration. Prior to this, states did not control migration for its own end, but controlled it in a transient and small-scale manner in order to protect other legitimate interests of the state such as public security and order. Subsequent to these turning points, the control of migration gradually came to be an end in itself. The default position was to turn on its head from free movement with justified exceptions to general and systematic control with free movement as the exception.

In judicial commentary on state power to control migration, this key turning point seems to be lost. Furthermore, there are conflicting views as to the source of legitimacy of this power. In the Chinese Exclusion case itself, the US Supreme Court makes the following commentary in this regard:

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power ... The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations...[566]

> The exclusion of paupers, criminals, and persons afflicted with incurable diseases, for which statutes have been passed, is only an application of the same power to particular classes of persons, whose presence is deemed injurious or a source of danger to the country. As applied to them, there has never been any question as to the power to exclude them. The power is constantly exercised; its existence is involved in the right of self-preservation[567].

This quotation sets out three interests deemed to be protected by state control of migration of the 'control unless we want you' genre: independence, sovereignty and the right to self-preservation. At that time, the US government had already declared its recognition of "the inherent and inalienable right of man to change his home and allegiance"[568]. Before the turning point, the default

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[565] Schuck, "The Transformation of Immigration Law", *Columbia Law Review* (1984), Vol. 84, No. 1, pp. 1-90, at p. 13.
[566] *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889), United States Supreme Court, 13th May 1889, at p. 604.
[567] *Ibid.*, at p. 609.
[568] Burlingame bilateral Treaty of 1868 between the US and China, article 5, cited in chapter 3.

position was 'free movement unless you pose a threat', a position which at the time was not deemed to affect either the independence or the sovereignty of the state. It is thus curious why these interests were suddenly at stake at the time of the Chinese Exclusion case. The state's function as regards immigration was to control limited categories of people who were deemed a threat to interests that it has traditionally had to protect such as public security, health and order. Before the turning point, this control was deemed sufficient to protect the right of self-preservation.

A recent opinion of the US Supreme Court sets out the following basis for the United States' power to control immigration:

> The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens ... This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of Naturalisation," U.S. Const., Art. I, §8, cl.4, and its inherent power as sovereign to control and conduct relations with foreign nations ....[569]

This case concerned the division of power between the federal government and individual states and the constitutionality of various measures adopted by Arizona in an effort to take control of the large number of irregular immigrants already present in the state. Academic commentary on the case tends to be confined to a discussion of this division of power without going further to question the legitimacy of either federal or state power in its own right[570]. However, the above quotation remains pertinent to this thesis in revealing how the US Supreme Court bases the federal government's power to control immigration. Several points can be made of this basis: first, there seems to be a conflation of two different powers: that of control of the population of a state through such rules as those on naturalisation and that of control of the movement of individuals across territorial borders. Second, the US Supreme court seems to base the power to control immigration on the external powers of the state as a sovereign entity, which is an area of international law, a basis contrary to the finding made in the previous section that the control of migration is not at present governed by international law. Finally, there is no acknowledgment of the major turning point in US immigration control from 'free movement unless you pose a threat' to 'control unless we want you'.

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[569] *Arizona v. United States*, 567 U.S. (2012), at p.3.

[570] See Guttentag, "Immigration pre-emption and the limits of state power: reflections on Arizona v. United States", *Stanford Journal of Civil Rights and Civil Liberties* (2013), Vol. 9, pp. 1-46; Charles, "Recentering foreign affairs preemption in Arizona v. United States: Federal plenary power, the spheres of government and the constitutionality of S.B. 1070", *Cleveland State Law Review* (2012), Vol. 60, pp. 133-158; Lasch, "Preempting immigration detainer enforcement under Arizona v. United States", *Wake Forest Journal of Law and Policy* (2013), Vol. 3, pp. 281-331; Eastman, "Papers, please: does the constitution permit the states a role in immigration enforcement?", *Harvard Journal of Law and Public Policy* (2012), Vol. 35, pp. 569-592; Keaney and Huerta, "Restrictionist states rebuked: how Arizona v. United States reins in states on immigration", *Wake Forest Journal of Law and Policy* (2013), Vol. 3(2), pp. 249-280.

A recent statement of the UK House of Lords on this issue was given by Lord Bingham of Cornhill in the case of *Regina (European Roma Rights Centre) v. Immigration Officer at Prague Airport*[571]:

> *The Convention and international law issue*
> 11 The power to admit, exclude and expel aliens was among the earliest and most widely recognised powers of the sovereign state. In England, it was a prerogative power of the crown. Sir William Holdsworth (*A History of English Law*, vol X, pp 395-396) considered Jeffreys CJ undoubtedly correct when he said in *East India Co v. Sandys* (1684) 10 ST 371, 530-531:
> "I conceive the King had an absolute power to forbid foreigners, whether merchants or others, from coming within his dominions, both in times of war and in times of peace, according to his royal will and pleasure; and therefore gave safe-conducts to merchants strangers, to come in, at all ages, and at his pleasure commanded them out again."
> But the Crown's prerogative power over aliens was increasingly questioned, and since 1793 the power to exclude aliens has in this country been authorised by statute, whether temporary in effect (33 Geo 3, c 4; 56 Geo 3, c 86; 11 & 12 Vict c 20) or permanent (for example, the Aliens Act 1905, the Aliens Restriction Act 1914).

This statement relies on an earlier judicial statement which itself is misleading in failing to appreciate the transient and limited nature of early state control of movement and proceeds to suggest that legislation has curtailed this control, while the evidence set out in chapter 3 suggests the contrary. It then bases the legitimacy of the exercise of this power on both a temporary and permanent basis in domestic statute, not international law as in the US *Arizona* case.

In another case before the House of Lords concerning domicile and divorce proceedings, Baroness Hale of Richmond gives an insightful historical analysis of immigration control in the UK. On first referring to the observations of Dummett and Nicol, as set out in full in chapter 3 of this thesis[572], she continues:

> [17] Monarchs did from time to time seek to expel or exclude aliens, although whether this was an aspect of the royal prerogative is disputed. Blackstone put it this way … :
> 'For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king's protection; though liable to be sent home whenever the king sees occasion.'
> From time to time, temporary legislation was passed to meet a temporary crisis … The calls for permanent controls on entry began towards the end of the 19th century in

[571] [2005] 2 A.C. 1.
[572] See *supra* at p. 66.

> response to the arrival of large numbers of Jewish people escaping the pogroms in Eastern Europe. These culminated in the recommendations of the Royal Commission on Alien Immigration (Cmd 1741) (1903). These were highly controversial and emerged, much watered down, in the Aliens Act 1905 ... The Aliens Restriction Act 1914 was rushed through the day after war was declared, allowing Orders in Council to be made imposing much more severe controls over all aliens in times of war, imminent national danger or great emergency. After the war, however, it was continued and extended by the Aliens Restriction (Amendment) Act 1919, which also repealed the 1905 Act. It was renewed annually until superseded by the Immigration Act 1971[573].

This analysis clearly alludes to the turning point from temporary to permanent measures of state control of immigration and Baroness Hale seems unconvinced as to the legitimacy of same. However, its sole use in this case was in supporting a finding that there was no reason in principle why a person whose presence was unlawful could not acquire a domicile of choice in England and Wales.

In Europe, the European Court of Human Rights has on many occasions had to determine the correct balance between immigration controls exercised by member states and the respect by the latter for the individual rights contained within the European Convention of Human Rights, most notably the right to respect for family and private life of article 8 as outlined in chapter 4. In the early such case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*[574], the ECtHR could not "ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory"[575]. This exact concise phrase has been reiterated in numerous cases since[576]. In determining the correct balance, detailed analysis is given to the extent to which actions of the particular member state have encroached upon the rights to respect for family and private life and yet this is the degree of detail given to the state side of the balance. Weight is given to the state side by the simple existence of this "right to control the entry of non-nationals into its territory". The use of the term "right" in itself, as distinct from the term 'power' used in all the cases cited above, lends this side additional weight. Moreover, the basis for this 'right' is again found to be in international law, contrary to the analysis in the previous section.

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[573] *Mark v. Mark*, [2005] 3 All ER 912, at p.920
[574] Judgment of 28th May 1985, Series A no. 94.
[575] *Ibid.*, at para. 67.
[576] See *Moustaquim v. Belgium*, judgment of 18 February 1991, no. 12313/86, para 43; *Boujlifa v. France*, 21 October 1997, Reports of Judgments and Decisions 1997-VI, para. 42; *D. v. The United Kingdom*, no. 30240/96, at para. 46; *Uner v. Netherlands*, no. 46410/99, para. 54; *Omoregie v. Norway*, no. 265/07, para. 54.

The failure to appreciate the distinction between the control of membership of the citizenry of a state and the control of movement of people across territorial borders is fatal to efforts to found the legitimacy of the latter in tradition. This failure is perhaps connected to an underlying dichotomy between conceptions of the state based on territory or identity. In chapter 2, it was observed that for the sovereign state, territoriality is key and so membership derives from residence within its borders; yet for the nation state, a common identity is the defining feature. For the reasons set out in that chapter, the former conception is preferred in this thesis. However, in order for state control of the movement of people to be legitimised on the basis of tradition, this dichotomy must be acknowledged. In all the case law set out above, only Baroness Hale pays heed to the key turning point from transient control of movement in the interests of social order to general systematic control, as distinct from the control of the citizen population, which has been a power of the state stretching much further back in history.

There remains the question as to whether the internal power of states to control the movement of people across borders has acquired traditional legitimacy since the key turning points at the end of the 19th century in the US and after World War II in Europe. Certainly, Meyers submits that there has been extraordinary similarity with regard to content and timing among the immigration control policies of the major receiving countries since this time[577]. This proposition however faces two key difficulties, which I will call the 'impractically vague' and the 'opposing trends' arguments. First, by the 'impractically vague' argument I mean that although similar in trends, the precise immigration policies taken in different countries remain diverse, which creates a problem in identifying which precise practice is claimed as traditionally legitimate. The similar trends also vary across time. Postwar measures for recruiting foreign labour ranged from general government run schemes to bilateral agreements and had different sectoral and geographical remits[578]. Later measures attempting to halt illegal immigration ranged from stricter controls at the borders, penalties on employers of illegal immigrants, incarceration of illegal immigrants in camps and deportation[579]. The second 'opposing trends' argument refers back to chapter 4, which devoted itself to an exposition of the increasing number of limiting forces the system of general state control of immigration has met. If it is intended to base the legitimacy of the general and systematic state control of migration on a traditional basis as opposed to a rational one, it is submitted that at a very minimum, the practice would have to not be patently irrational in the sense of being opposed to a number of other state obligations. The reality is that there are an increasing number of limiting forces opposing this control and as such it is contended that tradition over this relatively short

[577] See *supra* at p. 89.
[578] Castles, "The Guest-worker in Western Europe – an obituary", *International Migration Review* (1986), Vol. 20(4), pp. 761-778; see also Plewa and Miller, "Postwar and Post-Cold War generations of European temporary foreign worker policies: implications from Spain", *Migraciones internacionales* (2005), Vol. 3(2), pp. 58-83.
[579] Meyers, "The Causes of Convergence in Western Immigration Control", *Review of International Studies*, Vol.28 No.1 (Jan. 2002), pp. 123-141, at 125.

period is insufficient to legitimise same. This irrationality argument will be explored further in the following section.

§3 Based on rationality

Chapter 2 concluded that the rational-legal justification of measures to be taken towards the end of efficient social order is one of the conditions necessary in order for a state to establish its legitimacy through hypothetical consent. If this legitimacy cannot be based on tradition for the reasons set out above, this section will consider whether or not general and systematic measures of migration control are or can be rationally justified as necessary for achieving the end of efficient social order.

Hypothetical consent theories were found to dictate that even if there is no express agreement or even deliberation forthcoming from a population, the state must offer reasons for its actions such that rational individuals would consent to the measure in question. Weber's theory of rational-legal legitimacy brought in the notion of evidence-based decision-making – that rational individuals would consent if given reasons determined by rational means of calculation. Two other necessary conditions were identified as transparent decision-making and public consultation in decision-making.

It must again be recalled that the state is a social construction which can only act in order to pursue its function in achieving efficient societal order; beyond this remit, individual freedom is primary. Thus, if measures cannot be justified through rational means, the default position is individual freedom. Otherwise, the single voice of the state reigns, with no evidence that this is for the common good in the achievement of efficient societal order. The state should not intervene unless it can demonstrate a rational basis for its intervention, especially in relation to measures which are permanent in nature.

The following sections will suggest that to date, states have failed to meet these conditions for hypothetical consent in the field of migration control. Perhaps due to an over-reliance on a traditional basis for the legitimacy of measures in this sphere, very little effort has been made to justify same on a rational-legal basis. Furthermore, and as mentioned in the previous section, these measures tend to be internally irrational in the context of the entire framework of state functions in that they are in direct opposition to many other state obligations.

(i) Absence of transparent rational justification of state migration control measures

If the case law set out above fails to ground the general state control of migration on a traditional

basis, it falls to the state itself to legitimise this control by demonstrating through rational means that this control is a means to achieving efficient societal order in the common good. While this is often simply stated to be the case, more is required in order for the rational-legal justification condition to be satisfied. The state is required to gather evidence and calculate to the best of its abilities that this is the case. Furthermore, the tendency on the part of state officials to offer blanket justification for general control of immigration as in the common good fails to live up to the intellectual standard required. The analysis in chapter 1 makes clear that the concept of migration is highly complex, comprising movement for differing personal reasons, stemming from various external determinants, including circular patterns and return migration and giving rise to a great number of political, sociological and economic effects. A blanket policy in the name of the blanket interest of the common good fails to take adequate account of the specific interests involved of the host society, the sending society and the individual migrant and his family.

This is not to say that all valuable state resources should be pumped into fuelling research essential to all state action. The scarcity of state resources is a concern for all states, particularly during periods of economic recession. However, at present, states take it as given that general and systematic state control of migration is legitimate on a traditional basis which, for the reasons set out above it is submitted, is not the case. Some degree of transparent evidence-based justification is required.

Current awareness of this requirement can be seen in the subjects for discussion at the third meeting of the global Regional Consultative Processes on Migration (RCPs), under the aegis of the IOM, in 2011, one of which was entitled "Emerging Migration Challenges and Opportunities: Towards Evidence-Based Policymaking"[580]. These RCPs will be considered in more depth in chapter 7, but the inclusion of this subject in the most recent meeting reflects a more general trend towards increased requirements of evidence-based policy making and transparency, the continuing process of rationalisation identified by Weber. Indeed, a general move towards more transparent and evidence-based policy making[581] is evident in such initiatives as the European Transparency Initiative[582] and proposals for evidence based policy making in the EU[583], the Open Government

[580] Global Consultation of Chairs and Secretariats of Principal Regional Consultative Processes on Migration (RCPs), Gaborone, Botswana, 25-26 October 2011.

[581] See generally Davies, Nutley and Smith (eds.), *What works? Evidence-based policy and practice in public services*, The Policy Press, Bristol, 2009; Robinson, "Active labour-market policies: a case of evidence-based policy-making?", *Oxford Review of Economic Policy*, Vol. 16(1), pp. 13-26.

[582] Communication of the European Commission, *European transparency initiative - A framework for relations with interest representatives*, COM/2008/0323 final. Measures include the 'Transparency Portal', launched by the European Commission on 7th June 2012,
[http://ec.europa.eu/transparency/index_en.htm]
and the 'Transparency Register', Interinstitutional Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, OJ L 191 of 22nd July 2011, pp. 29-38, [http://europa.eu/transparency-register/index_en.htm].

Initiative and calls for more evidence-based policy decisions in the US[584] and the Evidence-based Policymaking Initiative in the UK[585].

The analysis undertaken in chapter 1 relating to the availability of reliable statistics on international migration does not bode well for the capacity of states to provide evidence-based justification of migration controls. It was found that while significant improvements have been made in the comparability and reliability of data on international migration, international bodies continue to rely on the efforts and cooperation of individual states in its compilation. The recent 2005 report of the Global Commission on International Migration suggested that a lack of national political will continues to curb progress towards truly reliable international migration statistics[586]. If states are not willing to adapt their administrative systems in order to create similar international terms of reference, reliable data on international migration are impossible to attain.

Beyond the fact that states to date have been unwilling to cooperate to this end for many reasons, the very need for such cooperation in order for evidence to be obtained raises a deeper question of the capacity of individual states to provide evidence-based justification for measures of migration control. States could of course carry out research on immigration or emigration at a national level; however, the complexity of the concept of migration, as demonstrated in the first part of chapter 1, requires an interdisciplinary approach to its understanding. Furthermore, an understanding of migration across territorial borders requires analysis of determinants in receiving states, sending states and transit states. Analysis limited to a single state cannot provide a comprehensive picture.

I should clarify that I am not contending that state measures of migration control are illegitimate *per se*, but simply that the state is required to do more by way of justifying how the measures it does take will further the common good. I am also focusing on the post-turning point 'control

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[583] Papers of the Directorate-General for Research, Socio-economic sciences and humanities of the European Commission, *Scientific evidence for policy-making* (2008) and *Communicating research for evidence-based policymaking: a practical guide for researchers in socio-economic sciences and humanities* (2010); Lee and Kirkpatrick, "Evidence-based policy-making in Europe: an evaluation of European Commission integrated impact assessments", *Impact Assessment and Project Appraisal* (2006), Vol. 24(1), pp. 23-33.

[584] Memorandum on Transparency and Open Government, issued by President Obama on 21st January 2009, [http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government]
and implementing Directive of 8th December 2009,
[http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf].
Orszag, Director of the Office of Management and Budget, *Building Rigorous Evidence to Drive Policy*, Post of 8th June 2009,
[http://www.whitehouse.gov/omb/blog/09/06/08/BuildingRigorousEvidencetoDrivePolicy].

[585] Sutcliffe and Court, *Evidence-based Policymaking: What is it? How does it work? What relevance for developing countries?* Overseas Development Institute, London, 2005; Staley, *Evidence-based Policy and Public Sector Innovation*, Institute of Public Affairs, Victoria, 2008; Sanderson, "Evaluation, Policy learning and evidence-based policy making", *Public Administration* (2002), Vol. 80(1), pp. 1-22; Parsons, "From muddling through to muddling up – evidence based policy making and the modernisation of British government", *Public Policy and Administration* (2002), Vol. 17(3), pp. 43-60.

[586] Parker, *International migration data collection: A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration*, op. cit.

unless we want you' system of control, as the previous 'freedom unless you pose a threat' system found legitimacy precisely in the threat identified. Indeed remnants of this latter system remain, for example, the possibility for member state derogations from free movement principles on the grounds of public policy or security[587] and the possibility of expulsing refugees on grounds of national security or public order[588]. A state does have a legitimate power and indeed duty to protect itself from threats; it must however clearly identify same and justify measures taken as a proportionate response.

(ii) Irrationality

A lack of rational justification of state measures of migration control has been accompanied by increasing evidence of a positive irrationality or incoherence between measures of migration control and other state obligations and policies[589]. Chapter 4 went to considerable detail in setting out forces which have gradually come to limit the measures states can take to control migration, which fall into two broad categories of fundamental rights and economic interest.

First, the fundamental rights forces generally relate to obligations voluntarily adopted by states under international law to protect a number of rights ranging from those under international protection instruments to the right to liberty and security of the person, the right to respect for family and private life, to fair procedures in criminal law and to the right to privacy. Although states have taken it upon themselves to protect such rights, conflicts between their protection and the adoption and enforcement of measures of migration control have led to a dilution of the content of the former. A widening gap between theory and practice in the protection of many of these fundamental rights which to a large degree stems from this underlying conflict was identified in the previous chapter: efforts by states to restrain the ambit of international protection, the arbitrary or disproportionate detention of migrants, the expulsion, deportation or refusal of entry of migrants in violation of their rights to respect for family and private life, the double punishment of migrants in criminal proceedings and the insufficiently controlled use of personal and biometric data in migration control measures in violation of migrants' right to privacy.

Benhabib states plainly that "there is not only a tension, but often an outright contradiction, between human rights declarations and states' sovereign claims to control their borders as well as

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[587] See the Citizenship Directive 2004/54/EC, article 28; Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, article 12.
[588] Refugee Convention 1951, article 32.
[589] For an argument tracing this irrationality back to the very notion of the state itself, see Cole, "Beyond reason: the philosophy and politics of immigration", *Critical Review of International Social and Political Philosophy* (2014), Vol. 17(5), pp. 503-520.

to monitor the quality and quantity of admittees[590]". Portes and de Wind describe this phenomenon in the following manner:

> By and large, the wealthy receiving nations are also democracies where human rights legislation applies to all those within their borders, not just citizens, preventing state attempts to deal summarily with unwelcome newcomers. Religious groups, philanthropic organisations and associations of settled migrants stand ready to mobilise the judiciary against the executive branch in the name of migrants' human rights. This gives rise to the 'liberal paradox' in which the most powerful nations in the world are prevented by their own laws from effectively controlling or suppressing unwanted immigration[591].

Second, the economic interest forces fall into two categories: those relating to obligations taken on by states under international law in the context of regional migration regimes and those stimulated by private actors and globalisation, which are to some extent beyond the control of states. The former category reveals a curious incoherence in state policy between on the one hand, recognising that it is economically beneficial for the state to enter into international agreements providing for the free movement of people across territorial borders and on the other, continuing efforts to control such movement beyond the precise remit of such agreements in the name of the common good. The second category will be considered in greater detail in the next chapter which proceeds on the assumption that it is possible for the state to rationally justify measures of migration control but highlights that they face a range of obstacles in seeking to do so.

a) Evidence of irrationality at EU level

The internal conflicts that riddle immigration policy both as regards human rights and economics at national level come to a sharper aspect at EU level. Several prominent examples are noteworthy. First, in the human rights field, Guild identifies an early but deep incoherence between migration policies at this level and measures to combat discrimination[592]. Early anti-discrimination provisions were drafted with a view to facilitating free movement within the territory of the EU; only two forms of discrimination were initially prohibited: that based on nationality and based on sex. However, nationality discrimination only applied to nationality of a member state (not that of third countries) and within the scope of the Treaty. Discrimination on the grounds of race was not to be

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[590] Benhabib, *The Rights of others: aliens, residents and citizens*, Cambridge University Press, Cambridge, 2004, at p. 2.
[591] Portes and deWind (ed.s), *Rethinking Migration: New Theoretical and Empirical Perspectives*, Berghahn Books, New York, Oxford, 2007, at p.7.
[592] Guild and Napley (ed.s), *The Legal Elements of European Identity: EU Citizenship and Migration Law*, *op. cit.*, see chapter 11 'Race Discrimination and EU identity'.

tackled until the adoption of a Directive in 2000[593]. Yet member states were successful in ensuring that discrimination on the basis of nationality from third countries would not be affected with the insertion of article 3(2) stating that:

> This directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of member states and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned[594].

In this way, member state control of immigration from third countries was protected to the detriment of a general protection against discrimination on the grounds of nationality.

A second deep incoherence in EU policy is that between migration policies in the context of the internal market and measures of international protection. Individuals granted international protection in a member state of the EU have at all times been excluded from rights of free movement within the territory of the EU. It is only with the recent Directive 2011/51/EU extending the provisions of the Long Term Residents Directive[595] to beneficiaries of international protection that such individuals may now be granted long term residency status with corollary free movement rights. Thus it is only now being realised that the former situation was fundamentally contradictory to the free movement logic of the internal market. Peers draws attention to the fact that this incoherence remains as regards individuals who are still in the process of applying for various forms of international protection:

> It is striking that although the initial model of an exclusive focus on asylum responsibility criteria[596] was discarded in favour of a broader harmonisation agenda[597], nevertheless the rationale of 'preventing secondary movements' (i.e. the movement of asylum-seekers between member states) remained at least one rationale for the adoption of the harmonisation measures, based on the assumption that one factor driving secondary movements was disparate treatment of asylum seekers as regards substantive law, reception conditions and procedural rules. The underlying logic of the

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[593] Council Directive 2000/43/EC of 29th June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[594] Council Directive 2000/43/EC, article 3(2). Guild further offers an interesting comparison between the ways in which race discrimination has been tackled by both the EU and the ECHR: Guild and Napley (ed.s), *The Legal Elements of European Identity: EU Citizenship and Migration Law*, *op. cit.*, see chapter 11 'Race Discrimination and EU identity'.

[595] Directive 2003/109.

[596] This was the objective of the Dublin II Regulations (343/2003 and 1560/2003) and the Eurodac Regulations (2725/2000 and 407/2002).

[597] Harmonisation measures include the Reception Conditions Directive 2003/9, the Qualification Directive 2004/83 (and recast QD 2011/95), the Procedures Directive 2005/85 and the Returns Directive 2008/115.

> policy development was therefore still connected to *movement between member states*, albeit the objective was to *deter or reduce* such movement, rather than *facilitate* it, as is the case with the visa and borders policies and the EU internal market generally[598].

Peers identifies a third incoherence in EU policy between efforts to raise the standards of protection in asylum legislation and opt-out clauses offered to member states unwilling to go so far. He found it striking to note that "by use of their opt-out, the UK and Ireland, having opted in to all or most of the first-phase legislation [widely criticised for setting low standards], opted out of all the substantive second-phase proposals [with significantly higher standards], except for those relating to asylum responsibility[599],,[600].

A fourth fundamental incoherence is that identified by Guild between EU policies in the field of migration and those in relation to international relations with foreign states. She notes that:

> the prime task of the European Community: the completion of the internal market through the abolition of controls on the free movement of persons incorporates a model of immigration. This is one where controls on the free movement of persons itself is *prima facie* inadmissible. The state must justify any control on movement of persons as an exception to the principle ... The EEC Treaty (1958) established a foundation for immigration based on three principles: nationality, economic activity and the right of the individual to choose to move or not[601].

Thus, from the outset this default position of *prima facie* free movement was both perceived as a means to improving the economy of this region through the achievement of the internal market and as a fundamental individual right. She contrasts this position with that in place in the context of the international relations of the EU with foreign states:

> The schengen paradox is that the abolition of border controls on persons moving within the territory of the member states (other than the two that opted out) has resulted in a reinforced external frontier based on the principle of exclusion unless the individual can justify admission. The starting point that all individuals are suspect and they only lose that characteristic when they prove themselves individually not to be a

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[598] Peers, "EU Justice and Home Affairs Law (Non-Civil)", in Craig and de Búrca (ed.s), *The Evolution of EU Law* (2nd ed.), Oxford University Press, Oxford, New York, 2011 at p. 285.
[599] Namely the proposals on Dublin III (COM (2008) 820) and on Eurodac (COM (2009) 342).
[600] Peers, "EU Justice and Home Affairs Law (Non-Civil)", *op. cit.*, at p. 286. See also Peers, *The UK opt-out from Justice and Home Affairs law: the other Member states finally lose patience*, Statewatch Analysis, 26th March 2014; Peers, "In a world of their own? Justice and Home Affairs opt-outs and the Treaty of Lisbon", *Cambridge Yearbook of European Legal Studies* (2007-2008), Vol. 10, pp. 383-412.
[601] Guild and Napley (ed.s), *The Legal Elements of European Identity: EU Citizenship and Migration Law*, *op. cit.*, p. 189.

> threat, leads to blocked borders, affront and offence to individuals, the frustration of good trading and cultural relations and a placing at risk of asylum seekers and refugees[602].

This paradox runs deeper when viewed in light of certain special relations of the EU with foreign states. The former internal market logic of *prima facie* free movement is inherent in both enlargement policies of the Union and its neighbourhood policies with certain states in relation to which accession is not envisaged. These foreign relations policies will be further discussed in chapter 7. For present purposes, it suffices to note that, on the one hand as regards nationals of the enlarging territory of the EU and those of certain neighbourhood countries, the assumption is that "free movement of persons is among the elements which foster political stability, economic development and the reduction of poverty"[603]. On the other hand, as regards nationals from all other third countries, their unauthorised movement renders them 'illegal migrants' subject to economic, social and political exclusion who are sought after for the purposes of forced removal from the territory of the EU. This is perhaps the greatest incoherence of all.

These are simply examples of the incoherencies that arise between migration policies and other policies at the level of the EU as observed by prominent academics in the field of EU migration policy. The fact that they arise and are allowed to remain stems from the constant interplay between the intergovernmental arms of the Union voicing member state interests and the supranational arms which tend to voice more global concerns common to the Union as a whole, such as the protection of individual rights and economic development. The next section will elaborate on the forces behind this interplay in practice.

b) Intergovernmental arms v supranational arms of the EU

Chapter 3 set out the trajectory of increasing and enhanced state controls of immigration; it observed that in the context of the EU, member states gradually came to work together on an intergovernmental basis in the developing frameworks of Justice and Home Affairs (JHA)[604]. A full transition to supranational decision making (the community method) did not take place until the Treaty of Lisbon in 2009. Whereas the last section of chapter 3 sets out the measures of state control adopted to a great extent in an intergovernmental framework, an examination in chapter 4 of limits of this control set by the EU tended to focus on measures and decisions of the supranational arms such as the Court of Justice and the Commission.

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[602] *Ibid.*, p. 192.
[603] *Ibid.*, p. 197.
[604] Chapter 3 sets out this development as traced by Peers from informal intergovernmentalism, to formal, modified and finally to residual intergovernmentalism, *supra* at pp. 82-83.

The division between restrictive intergovernmental measures of control and liberal supranational measures limiting this control is not as clear cut as this division between chapters would have it seem. Trends in the field of JHA were initially set by the intergovernmental arms of the Union and though efforts were made, particularly by the Commission throughout the modified and residual intergovernmental periods, to liberalise immigration policies, these were continuously restrained and even now that the community method is applicable, the supranational arms are showing signs of bending to member state wills.

Examples of the Commission's efforts to liberalise immigration policies include[605] its proposed Migration Convention in 1997[606], its subsequent proposed directive on the conditions of entry and residence of third country nationals for the purpose of paid employment and self-employment economic activities in 2001[607], its efforts to promote enlargement of the Union (and so the number of individuals with associated free movement rights), particularly approaching the considerable enlargement in 2004[608] and progressive initial drafts of many legislative measures, which were eventually adopted in a watered down form.

Member states on the other hand have, in general, made efforts to maintain restrictive policies of immigration in refusing to adopt proposals of the Commission (notably those in respect of immigration for economic purposes) or in adopting techniques which weaken the strength of the commitments contained in measures adopted "or even, in some cases, empty them more or less completely of their content"[609]. De Bruycker sets out, giving examples of each, three such techniques[610]: techniques affecting the meaning and significance of the measures with the adoption of ambiguous or even contradictory provisions[611], techniques that weaken the significance of the measure by allowing member states to maintain their internal law as stands[612] and techniques that

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[605] See such other initiatives as the green paper on labour migration, COM (2004) 811, the policy plan on legal migration, COM (2005) 669 and the proposal for a directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a member state and on a common set of rights for third-country workers legally residing in a member state, COM (2007) 638.

[606] COM (97) 387, 30th July 1997, OJ 1997, C 337/9. For an analysis of this proposed convention see Peers, "Raising minimum standards, or racing for the bottom? The Commission's proposed Migration Convention", in Guild (ed.), *The Legal Framework and Social Consequences of the Free Movement of Persons*, Martinus Nijhoff Publishers, The Netherlands, 1999.

[607] COM (2001) 386, 11th July 2001. See De Bruycker, "Legislative Harmonisation in European Immigration Policy", in Cholewinski, Perruchoud and MacDonald (ed.s), *International migration law: developing paradigms and key challenges*, T.M.C. Asser Press, The Hague, 2007, at p. 330.

[608] See Guild and Napley (ed.s), *The Legal Elements of European Identity: EU Citizenship and Migration Law*, Kluwer International Law, The Hague, Boston, 2004, Chapter 10 on "Identity in the EU Neighbourhood", notably at p. 190.

[609] De Bruycker, "Legislative Harmonisation in European Immigration Policy", *op. cit.*, at p. 333.

[610] *Ibid.*, at pp. 333-337.

[611] He gives the example of article 3(1) of Directive 2003/86 on the right to family reunification.

[612] Such as opt-out clauses, possible derogations and provisions that leave to national law the task of specifying part of their meaning.

distort the measure as a legal norm[613].

There are signs that the supranational arms of the EU began slowly to bend to member states' wills or at least to run out of steam to ambitiously pursue liberal immigration policies. In its Communication on the assessment of the Tampere program, the Commission concluded that "the original ambition was limited by institutional constraints, and sometimes also by a lack of sufficient political consensus. The step by step approach was often the only possible way of moving forward"[614]. It further stated that "the member states are sometimes reluctant to cooperate within this new European framework, and when their interests are at stake they do not hesitate to threaten to use the veto that they enjoy on account of the unanimity rule in order to lower the level of ambition of the Commission's proposals and reject Parliament's opinions"[615]. Even following the full transition to the community method with the Treaty of Lisbon however, the supranational arms have not yet shown significant signs of regaining their initial drive. Commenting on the adoption of the EU Borders Code[616], Peers finds that:

> It seems, on the basis of this first measure subject to the co-decision procedure, that, due to the requirement of having wide support in the [European Parliament] for amendments to legislation at crucial stages of the procedure, the effect of the Parliament's enhanced powers in this area will be the adoption of incremental improvements to EU policies, rather than a radical rethink of them[617].

With regard to the supranational arm of the Court of Justice, he observes that "the impact of expanding the Court's jurisdiction has also been modest in the first six months after the Treaty of Lisbon entered into force", noting that only five (non-civil law) JHA cases were referred to the court in this time[618]. This of course does not reflect an unwillingness on the part of the court to move towards more liberal immigration in the EU, but the small number of cases in this area before it does nevertheless impede its ability to do so.

There are a number of possible reasons for this decline in supranational arm drive. First, a certain path dependency may have taken hold; with the trajectory of policy in JHA firmly established at the intergovernmental stage, it is increasingly difficult to divert or reverse the direction taken. Second,

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[613] Such as the placement of key provisions in the preamble or annex of texts or the inclusion of non-binding provisions in the texts of Directives.
[614] COM (2004) 401, 2nd June 2004, at p. 5.
[615] Commission staff working paper, Annex to the Communication from the Commission COM (2004) 401, SEC (2004) 693., 2nd June 2004, at p. 9.
[616] Regulation 562/2006.
[617] Peers, "Enhancing cooperation on border controls in the European Union", in Cholewinski, Perruchoud and MacDonald (ed.s), *International migration law: developing paradigms and key challenges*, T.M.C. Asser Press, The Hague, 2007, at p. 462.
[618] Peers, "EU Justice and Home Affairs Law (Non-Civil)", in Craig and de Búrca (ed.s), *The Evolution of EU Law* (2nd ed.), Oxford University Press, Oxford, New York, 2011 at p. 278.

the very fact that immigration and asylum policy falls within the remit of the JHA council (and indeed the Home Affairs Directorate General of the Commission) means that policies in this area are constrained by the limited perspective of the interior ministers involved in their initial discussion. On this point Schain makes the following observations:

> Within the European Union, the arena of policy development was and remains relatively protected space, space chosen by ministries of the interior and justice to avoid many of the national constraints which had become evident in the 1980s. This narrowly-structured inter-governmental lobby has dominated policy-making on immigration at the EU level since the 1980s. Therefore, the emphasis on exclusion and restriction – the 'securitisation' of immigration policy at the EU level – is no accident, and directly reflects the preferences of the ministries that control the process and their ability to dominate institutional space[619].

Guild contrasts developments in the areas of enlargement of the Union and neighbourhood policies, which fall within the remit of the foreign affairs council, with those in the areas of asylum and immigration under the helm of the JHA council and comments that:

> The disassociation of the enlargement of the EU from the issue of migration was central to preventing the most important policies of the EU being sidetracked by JHA ministry concerns. The intergovernmentalist approach which one might expect to find expression in a heightening of immigration as a political issue in the enlargement negotiations in fact disappears as the actors most interested in the subject, the JHA ministries, fail to find a voice at the supranational level which is sufficiently strong to impose their perspective. Instead the voice of intergovernmentalism is expressed at the national level but because of competing interests in enlargement is not capable of pushing the item up the political agenda there either[620].

A third reason stems from the fact that due to the evolving and multi-layered decision-making arenas of the EU, civil society concerned with various human rights issues and economic lobbyists have found it increasingly difficult to penetrate these arenas in order to influence decisions being made. Schain states that "constraints on restriction at the national level have been evaded by actors through one particular strategy called 'venue shopping' in which state actors use EU level organisation to pursue national policy goals." He explains the workings of this strategy as follows:

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[619] Schain, "The State Strikes Back: Immigration Policy in the European Union", *The European Journal of International Law*, (2009) Vol.20, no.1, pp.93-109, at p. 102. See also Guiraudon, "De-nationalising control: analysing state responses to constraints on migration control", in Guiraudon and Joppke (eds.), *Controlling a new migration world*, Routledge, London and New York, 2001, pp. 31-64.

[620] Guild and Napley (ed.s), *The Legal Elements of European Identity: EU Citizenship and Migration Law*, Kluwer International Law, The Hague, Boston, 2004 at p. 191.

> Pro-immigrant NGOs that have battled for access to the decision-making framework of the EU have been forced to seek a different decision-making arena – the national arena (the courts in particular), and the Commission and the Parliament, which have been more open to the rights-orientated framework of 'social exclusion'. This framework may very well benefit migrants already in the EU, but will have little impact on immigrants into the EU. Their strongest support at the EU level comes from within the equivalent of the technocracy. However, in the case of Europe this is a technocracy without significant executive leadership capacity[621].

In this way, states, through their JHA ministries, have negotiated ways to drive forward immigration policy without having to confront the internal conflicts riddling this area and resolve them in an open and rational manner.

The fact that national interests continue to hold strong despite the fundamental incoherencies between migration policies and other policies of the EU seeking to tackle broader economic and human rights interests is cause for concern. The strength of the intergovernmental arms of the EU, the choice of the insular JHA forum for migration policy development and the avoidance of national lobbying bodies at the EU level all add to this imbalance, which essentially serves to protect member state power to control migration from third countries. A possible means to alleviate this position through the increased use of the foreign affairs council to promote more balanced migration policies will be discussed in chapter 7.

Conclusion

This chapter examined the question of the role of the state in migration control from a theoretical perspective. Although not a focus of this thesis, the related questions of the extent to which civil, social and economic rights should be afforded to immigrants by host states and in what circumstances they should be granted political membership of the state as naturalised citizens were briefly considered. Once the parameters of the thesis established, the question then posed was whether or not general and systematic state controls of the movement of people across territorial borders on a 'control unless we want you' basis were legitimate. The tests used to this end were based on two of Weber's general theories for legitimacy: tradition and rationality. Traditional legitimacy was approached from both an international and internal perspective and it was found that neither perspective was sufficient to ground such state control on the basis of tradition. Moving on to consider rational legitimacy, very little evidence was found of any attempts to justify such control on an evidential basis and furthermore, evidence was found on the contrary of irrationality

[621] Schain, "The State Strikes Back: Immigration Policy in the European Union", *op. cit.*, at p. 102.

or incoherence between such measures of control and other state obligations. Empirical evidence of such incoherence was traced up to the level of the EU as an example, where conflicts between the intergovernmental arms of the EU as proponents for greater control come into conflict with wider interests of human rights and the economy voiced by the supranational arms.

Given the problems in obtaining reliable data on international migration as outlined in the first chapter and the conflict between policies of migration control and other state policies in the fields of human rights and economic policy as identified in the fourth, states face a formidable task in trying to justify measures of control of the movement of people on an evidential basis as required by the theory of rational legitimacy. The following chapter proceeds on the assumption that states could, with more effort, legitimise their migration control measures and sets out a number of obstacles they will face in this exercise.

6. Obstacles to legitimising state control

Introduction

Chapter 5 sought to demonstrate that it is difficult to legitimise state control on either the basis of tradition or that of rationality. As regards traditional legitimacy, two key distinctions were made: first, between state control of membership of its citizenry and state control of the movement of people and second, between a 'free movement unless you pose a threat' default position with restrictions to protect such state interests as health, security and order and a 'control unless we want you' default position with free movement granted to some on such bases as family reunification or the possession of required skills. It was found that up until the quite recent turning points identified in US and European history, the state had a traditionally legitimate role in controlling the content of its citizenry but no such role in the general control of immigration from a 'control unless we want you' default position. General and systematic state control of the movement of persons only took hold after this turning point. Those who claim that this general and systematic control has since become traditionally legitimate face two obstacles which I described as the 'impractically vague' argument and the 'opposing trends' argument. The opposing trends argument contends that a state practice cannot become traditionally legitimate parallel to such a vast array of limiting forces, as identified in chapter 4 and comprised mainly of opposing obligations taken on by states themselves. This is linked to the second section on rational legitimacy, which aimed to highlight increasing evidence of a positive irrationality or incoherence between measures of migration control and other state obligations and policies.

This chapter proceeds on the supposition that even despite these theoretical difficulties, the state could legitimise its general and systematic control of migration on a rational basis. It would have to put forward arguments based on a minimal evidential grounding demonstrating why this control is in furtherance of the common good of all residents. Here, I submit that beyond theoretical difficulties in satisfying Weber's tests for legitimacy as introduced in chapter 2 and applied in the chapter 5, there are further and distinct theoretical and practical obstacles to any attempt to legitimise such state control.

The three principal obstacles impeding the legitimisation of general and systematic state control of the movement of persons relate to the technical incapacity of the state to achieve its immigration policy objectives, competing political interests of a state and competing economic interests of a state.

As regards a state's technical incapacity to achieve its immigration policy outcomes, empirical evidence will be offered to demonstrate how states varying from Australia, Germany, other

member states of the European Union and indeed the EU as a whole acting on an intergovernmental level have adopted policies in the field of immigration control with a specific objective in mind to find that on implementing same quite a different outcome was achieved. An analysis of the tangential issue of the cost-benefit ratio of such policies will also be made.

A further obstacle in the competing political interests of the state will then be explored. Much immigration policy is formulated on the basis of 'client politics' that is when those who are best organised in civil society or who possess the most financial resources to engage in lobbying obtain the principal place in public consultation by political authorities. The contrary 'public politics' by which the view of the more general population is taken on board can be engaged when a political issue becomes highly mediated and so enters the conscience of the general public. Various tactics are used to sway between these two poles. First, politicians and indeed the media tend to associate immigration with topical political problems – immigration and crime, immigration and security or immigration and economic downturn – thus creating a negative connotation with the concept in the mind of the general public. Second, political parties can use various political issues as tools in themselves to elevate their party above the opposition by demonstrating that no matter what the issue, they can deal with it in a more effective manner than the opposing party. In the field of immigration, this has led to the ever increasing use of firmer and more visible measures of control of significant symbolic importance. The interplay between client and public politics has led some academics[622] to draw attention to evidence of a hidden agenda hypothesis, this is the simultaneous use of both by states in satisfying in reality the interests of their 'clients' while taking strong symbolic measures in view of the general public which nevertheless have little effective value. This state of affairs casts doubt on whether political action is taken in response to public opinion or rather public opinion is swayed by political action.

The final category of obstacles that impede a state in justifying its policies of immigration control relate to its competing economic interests. Most developed states have passed through periods of mercantilism to liberalism to an appreciation that some form of balance is required. This however broadly relates to trade and the freedom of movement of capital and labour has for the most part been excluded from both academic discussion and international agreements relating to the global economy. Several academics[623] suggest that the reasons for this difference in treatment relate more to political than economic interests. The contention in this section is that for the global economy to work in a balanced manner, it is necessary for states to treat each of these factors of production in a similar manner, whether it is decided that this should take the form of a protectionist or liberal approach.

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[622] See *infra* at p. 176.
[623] See *infra* at pp. 184-186.

§1 Technical incapacity

The first chapter highlighted the inherent incapacity of states acting alone to gather truly reliable international migration statistics. This in turn has the effect of impeding their ability to predict the outcomes of their immigration policies. This section goes further in setting out widespread evidence to the effect that even where such outcomes are predicted, state measures adopted often fail to achieve same. As such, this section aims to emphasise the ineffectiveness of many state measures of migration control in achieving the stated objective. My point here is that even if a state could rationally ground its immigration policies using evidence-based decision making, often the objectives of these policies are not achieved for external reasons beyond the control of the state.

That this is the case on a large scale in modern industrialised democracies[624] has been demonstrated by Cornelius, Martin and Hollifield[625]; their study identified a growing gap between restrictionist policy intent and an expansionist immigration reality, a phenomenon they refer to as the "gap hypothesis"[626]. Castles provides two notable examples of this phenomenon at play: in Australia, following the introduction of the 'white Australia policy' in 1901, the government assured its public that although labour migration was necessary, the great majority of immigrants would come from Britain and for the rest, a policy of assimilation would prevent cultural change:

> However, by the 1970s, the White Australia Policy was unsustainable in the face of increasing trade with Asia. Increasing numbers of immigrants were non-European. Similarly, assimilation failed due to processes of labour market segmentation, residential segregation and ethnic community formation. Australia became one of the world's most ethnically diverse societies, and a policy of multiculturalism was introduced. Despite a backlash in the mid-1990s, the policy has been retained by successive governments[627].

His second example is that of the 'guest worker' policy in Germany between 1955 and 1973. Anxious to preserve an ethnic homogeneity, the German government only opened its doors to temporary labour migration repeating the mantra that 'the German Federal Republic is not a country of immigration'. However, by the late 1990s the government was forced to recognise the

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[624] Their comparative study includes the US, Canada, Britain, France, Germany, Belgium, Italy, Spain and Japan.

[625] Cornelius, Martin and Hollifield (eds.), *Controlling immigration: a global perspective*, Standford University Press, Stanford, 1994.

[626] *Ibid.* at p. 3.

[627] Castles, "The factors that make and unmake migration policies", in Portes and deWind (eds.), *Rethinking Migration: New theoretical and empirical perspectives*, Berghahn Books, New York, Oxford, 2008, pp. 29-61 at p. 30.

permanent nature of migration and in 2001, an official commission recognised that Germany is and indeed has always been a country of immigration[628].

Schierup, Hansen and Castles[629] provide an interesting insight into the undercover world of undocumented work across the EU, a phenomenon often alluded to as evidence of immigration policy failure in a number of member states. The ability of migrants to enter and work in a state in contravention of national immigration law is deemed to be a reflection of the state's incapacity to enforce this law. They consider two case studies: the garment industry in the UK and the Netherlands and the building industry in Spain and Portugal. In all the states studied, they found an identifiable class of exploited workers at the lower tiers of the labour market. However, a notable distinction is evident in their analysis. In states with restrictionist immigration policies, this class of exploited workers tends to be comprised of undocumented immigrants who thus fall out of the regulatory labour framework with associated rights protections. On the other end of the scale, certain states have a more flexible attitude to both labour immigration and social and health regulations and here this class of exploited workers, although in the state lawfully, have little *de facto* protection. This distinction suggests that far from failed policies, certain states may be acting either overtly or covertly with corporate entities in seeking to make the greatest profit from this low-waged and unprotected labour force. This "hidden agenda"[630] hypothesis will be considered further in the next section.

In either scenario, the creation of such a class of exploited workers, even if beneficial to the economy in general, will have inevitable adverse social consequences. Van Amersfoort observes that:

> It is contrary to [the concept of the welfare state] that immigrant groups should develop into a marginalised sub-category, into what is sometimes called an 'underclass'. Such a development would not only be to the detriment of the immigrants and their descendants, but also to the detriment of society as a whole. Because permanently marginalised groups are likely to form sources of tension and conflict[631].

Thus even if gains are being made at a short-term and superficial economic level, it is far from clear that the corollary social problems created would not in the long-term override such gains, in this way defeating the intended objective. Schindlmayr makes a broader point that states simply

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[628] *Ibid.*, at p. 30, referring to the Süssmuth Report: *Steering Migration and Fostering Integration*, Berlin, Federal Ministry of the Interior, 2001.
[629] Schierup, Hansen and Castles, *Migration, citizenship and the European welfare state: a European dilemma*, Oxford University Press, Oxford, 2006, see chapter 9.
[630] *Ibid.* at p. 261.

don't have the capacity to predict the labour requirements of the economic market. As immigration control measures are primarily taken "for reasons of political expediency, [t]his poses problems, as politics will frequently interfere in satisfying the demand for labour"[632].

Evidence of associated immigration policy failure at the level of the EU is provided by O'Leary. She draws attention to the fact that despite the central objective of the establishment of the internal market – that of encouraging movement of the factors of production, including labour, between member states – very little movement of nationals of the member states to other member states in fact came about. She further notes that "one important conclusion which did emerge from early studies of intra-Community migration patterns was that by restricting the free movement of workers to member state nationals, the recruitment of third country nationals had been rendered more attractive to employers, further contributing to low levels of intra-Community migration"[633]. In 1994, of the 369 million people living in the EU, only 5.5 million EU nationals were living in a member state other than their member state of origin, as compared to 11.7 million legally resident non-EU nationals[634].

A further frustration to the internal market objective and indeed a distinct policy failure in the field of EU international protection policy is identified by Peers. Stemming essentially from the inherent incoherence outlined in the previous chapter between the free movement logic of the internal market and the rules of the Dublin II Regulations which seek to prevent the secondary movement of asylum seekers, he identifies the following unwanted policy outcome:

> Needless to say, the objective of reducing such movements at the same time as abolishing border controls as between most member states proved relatively futile, and the statistics showed only a modest increase in the low percentage of the asylum-seekers who were subject to the Dublin rules during the first phase of the [common European asylum system][635].

Such widespread policy failure does little for public confidence in political decision-making in the area of immigration; however, there is an even greater cause for concern. Measures taken by states in an effort to control immigration come at a large financial price. As a notable example,

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[631] van Amersfoort, "International migration and civil rights: the dilemmas of migration control in an age of globalisation", in Guild (ed.), *The legal framework and social consequences of free movement of persons*, Kluwer Law International, The Hague, 1999, at p. 87.

[632] Schindlmayr, "Sovereignty, legal regimes and international migration", *International Migration* (2003), Vol. 41(2), pp. 109-123, at p. 118.

[633] O'Leary, "Free movement of persons and services" in Craig and de Búrca (ed.s), *The Evolution of EU Law* (2nd ed.), Oxford University Press, Oxford, New York, 2011 at p. 503.

[634] See Eurostat, *Statistics in Focus: population and social conditions*, 2/1996.

[635] Peers, "EU Justice and Home Affairs Law (Non-Civil)", in Craig and de Búrca (ed.s), *The Evolution of EU Law* (2nd ed.), Oxford University Press, Oxford, New York, 2011 at p. 285; see statistics set out in the Report of the Commission on the evaluation of the Dublin system, COM(2007) 299 and SEC(2007) 742.

intergovernmental measures to control the external borders of the EU have increased rapidly in recent years. Beyond the dubious effectiveness of ever enhanced physical and electronic borders[636], Schierup, Hansen and Castles paint the following picture of the costs involved in such measures:

> For the sole purpose of preventing African 'illegals' and 'bogus' asylum seekers from entering mainland Spain and the rest of the EU, the Spanish government, with support from the EU, has invested some $120 million in the building of a radar system in the Strait of Gibraltar, which is designed to serve as 'a sort of electronic wall across the strait'. Furthermore, in Ceuta, the EU has spent over $40 million erecting an eight-kilometre-long perimeter wall consisting of two parallel fences hedged by barbed wire entanglements and equipped with electronic sensors[637] ... But instead of realising one of the EU's official objectives, and thus deterring people from risking their lives *en route* to the EU, the death toll of asylum seekers and immigrants in this part of the Mediterranean just keeps climbing. Between March 2002 and July 2003 alone at least 670 died trying to reach the EU by sea[638].

In a recent pronouncement on point, the global costs for the EU as a whole of further such measures have been starkly set out by the European Parliament in its criticism of the Commission's Smart Border Proposals[639]: "the estimated costs have risen substantially from €113 million in 2008, based on a "very rough calculation" to €1,335 million (€1.3 billion) in 2010, based on the more detailed Cost Analysis"[640].

In addition to the deterrence objective of course another policy objective of such measures is to keep these individuals out, but at what cost? It is furthermore clear from their analysis of undocumented work across the EU as set out above that many third country nationals succeed in illegally entering the external borders of the EU. The fact that such policies are to a large extent

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[636] See Guiraudon and Joppke (eds.), *Controlling a new migration world*, Routledge, London and New York, 2001.

[637] Note the more recent similar construction in along the Greek/Turkish border: Nielsen, *Fortress Europe: a Greek wall close up*, EU Observer, 2012, [http://euobserver.com/fortress-eu/118565].

[638] Schierup, Hansen and Castles, *Migration, citizenship and the European welfare state: a European dilemma*, *op. cit.*, at p. 260; see also Martin, *Bordering on Control: Combating Irregular Migration in North America and Europe*, IOM Migration Research Series no. 13, IOM, Geneva, 2003; Fernandez-Kelly, "Facts and fictions of unauthorised immigration to the US", in Maloney and Korinek (eds.), *Migration in the 21st Century: Rights, Outcomes, and Policy*, Routledge, London and New York, 2011, pp. 192-202; Jones, *Smart Borders: fait accompli?*, Statewatch, Analysis, 2014; Schenker, *Mediterranean migrant deaths: a litany of largely avoidable loss*, The Guardian, 2013, [http://www.theguardian.com/world/2013/oct/03/mediterranean-migrant-deaths-avoidable-loss].

[639] European Parliament, Directorate General for internal policies, Policy department C: Citizens' rights and constitutional affairs, *The Commission's legislative proposals on smart borders: their feasibility and costs*, 2013, at p. 51.

[640] *Ibid.*, at p. 43.

doomed to failure from the outset is rendered all the more serious given the financial and human costs involved.

In addition to external factors beyond the control of the state, including political and economic factors to be discussed in subsequent sections, there may be other reasons to explain this widespread policy failure of immigration policy. The 'hidden agenda' hypothesis of overt or covert state complicity mentioned above will be considered in the next section on competing political interests. Castles suggests that inadequate foresight of policy decision-making might be another reason. He observes that the examples of the White Australia policy and German guest worker policy concerned efficient states with long traditions of active migration policy, but both governments initially saw their policies as successful "– policy failure only became obvious after many years. Thus, migration policies may fail because they are based on short-term and narrow views of the migratory process"[641]. This section has aimed to demonstrate that beyond difficulties in defining policy objectives on an evidential basis in order to ground the legitimacy of state measures of migration control, where stated objectives are not achieved, or arguably achievable, this can damage any legitimacy established.

§2 Competing political interests

A second practical difficulty impeding the legitimisation of general and systematic state control of the movement of persons relates to the competing political interests a state must endeavour to reconcile. The state by its very nature in acting for the common good is constantly forced to exercise difficult balancing exercises between competing interests. Often only those with a direct interest at stake voice their opinions on certain political issues e.g. employers unions, environmental NGOs etc. When an issue for some reason becomes so topical that it enters the domain of general public awareness, the balancing exercise becomes exponentially more complex. This is not simply because there are so many more voices to consider, but because the opinions of those who have only become interested in the issue on receiving second-hand information can sometimes be tainted with prejudice or ignorance. The state is also required to balance the will of the majority as against the rights of minorities. This section will consider the mechanics of this complex balancing exercise in the field of migration policy.

Massey explains how the formulation of immigration policy by receiving states works in practice. Labour migration policy and refugee policy both tend to be conducted on the basis of 'client politics': "labour migration policies are generally determined bureaucratically by economic interest groups (employers and workers) who interact with public officials outside the public eye …

[641] Castles, "The factors that make and unmake migration policies", *op. cit.*, at p. 30; see also Castles, "Why migration policies fail", *Ethnic and Racial Studies* (2004), Vol. 27(2), pp. 205-227.

refugee policy is likewise formulated bureaucratically outside the public arena, yielding a slightly different 'client politics of negotiation' between the executive branch and various social groups having political or humanitarian interests"[642]. The political process relating to permanent immigration is less clear cut. He submits that this is an area in which the interests of politicians, legislators and ordinary citizens weighs more heavily against those of bureaucrats and special interests, however, in general, most citizens are poorly organised and politically apathetic. It takes a down-turn in the public spirit to bring this area of policy from 'client politics' to 'public politics':

> During periods of high immigration, stagnating wages and rising inequality, however, the public becomes aroused, and some politicians inevitably draw upon this arousal to mobilise voters, thus politicising the process of immigration policy formulation and moving it from client politics to public politics[643].

This section will consider the various tactics which are used to sway between the poles of client and public politics, such as the association of immigration with topical political problems and the use of immigration policy as a tool to elevate a political party above the opposition.

(i) The association of immigration with topical political problems

As the question of immigration has increasingly come to the fore during times of depleted public spirit, it has become associated with the primary cause of the latter[644] e.g. immigration and increased crime rates[645], immigration and security threats[646], immigration and economic

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[642] Massey, "International migration at the dawn of the twenty-first century: the role of the state", *Population and Development Review*, Vol. 25, No. 2 (1999), pp. 303-322, at p. 312. See also Freeman, "Client politics or populism? Immigration reform in the United States", in Guiraudon and Joppke (eds.), *Controlling a new migration world*, Routledge, London and New York, 2001, pp. 65-96.

[643] Massey, "International migration at the dawn of the twenty-first century: the role of the state", *op. cit.*, at p. 313.

[644] See Cole, "Beyond reason: the philosophy and politics of immigration", *Critical Review of International Social and Political Philosophy* (2014), Vol. 17(5), pp. 503-520, at pp. 503-504.

[645] Miller, "Blurring the boundaries between immigration and crime control after September 11th", *Boston College Third World Law Journal* (2005), Vol. 25(1), pp. 81-123; Stumpf, "The Crimmigration crisis: immigrants, crime and sovereign power", *American University Law Review* (2006), Vol. 56(2), pp. 367-419; Legomsky, "The New Path of Immigration Law: asymmetric incorporation of criminal justice norms", *Immigration and Nationality Law Review* (2007), Vol. 28, pp. 679-738; Hagan, Levi and Dinovitzer, "The symbolic violence of the crime-immigration nexus: migrant mythologies in the Americas", *Criminology and Public Policy* (2008), Vol. 7(1), pp. 95-112; Quassoli, "Migrant as criminal: the judicial treatment of migrant criminality", in Guiraudon and Joppke (eds.), *Controlling a new migration world*, Routledge, London and New York, 2001, pp. 99-120 and 150-170.

[646] Faist, "The migration-security nexus: international migration and security before and after 9/11", in Bodemann and Yurdakul (eds.), *Migration, citizenship, ethnos*, Palgrave Macmillan, Basingstoke, 2006, pp. 103-120; Guild, "International terrorism and EU immigration, asylum and borders policy: the unexpected victims of 11 September 2001", in Carr and Massey (eds.), *Public policy and the new European agendas*, Edward Elgar, Cheltenham, Northhampton, 2006 at pp. 233-248; Karyotis, "European Migration policy in the aftermath of September 11", *Innovation* (2007), Vol. 20(1), pp. 1-17; Coleman, "A geopolitics of engagement: neoliberalism, the war on terrorism, and the reconfiguration of US immigration enforcement", *Geopolitics* (2007), Vol. 12, pp. 607-634; Huysmans and Buonfino, "Politics of exception and unease:

downturn[647]. There may well be individuals among immigrants who are connected to such problems. However, focusing on immigrants because they are immigrants rather than on certain among them because there is evidence to suggest this connection both impedes integration and delays an efficient political response to the core problems themselves, through the misdirection of public resources. For example, if more time and resources are spent on establishing criminal profiles on immigrants than on following specific trails of evidence towards a suspect, whether immigrant or citizen, there are two negative side effects: the immigrants involved are perceived as suspects and resources are drained from more direct routes to suspects.

Prominent examples of this association of immigration with such societal problems include the combination of free movement provisions with security provisions in Title V 'Area of Freedom, Security and Justice' of the Treaty on the Functioning of the EU[648], the automatic targeting of immigrants in many state anti-terrorism measures[649], the increasing use of detention against migrants in the name of national security[650] and the increasing interoperability of personal data systems in the spheres of migration and security[651].

In relation to the association of immigration with crime, Moses puts this misdirection of public resources plainly:

> The easiest way to imagine how a world with open borders might address international criminality is to think about the way in which legal jurisdictions overlap in today's federal states. There are no border controls between US states aimed at capturing criminals or monitoring criminal activities. Actually, most Americans would probably protest vehemently if such controls were put into place. Worse, it seems like a terribly

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immigration, asylum and terrorism in parliamentary debates in the UK", *Political Studies* (2008), Vol. 56, pp. 766-788.

[647] Esses, Dovidio, Jackson and Armstrong, "The Immigration Dilemma: the role of perceived group competition, ethnic prejudice and national identity", *Journal of social issues* (2001), Vol. 57(3), pp. 389-412; Quillan, "Prejudice as a response to perceives group threat: population composition and anti-immigrant and racial prejudice in Europe", *American Sociological Review* (1995), Vol. 60(4), pp. 586-611; Mayda, *Who is against immigration? A cross-country investigation of individual attitudes towards immigrants*, Institute for the Study of Labor, IZA, Bonn, Discussion Paper No. 1115, April 2004; Bauer, Loftstrom and Zimmermann, *Immigration policy, assimilation of immigrants and natives' sentiments towards immigrants: evidence from 12 OECD-countries*, Centre for comparative immigration studies, California, Working Paper No. 33, April 2001.

[648] See O'Leary, "Free Movement of Persons and Services", in Craig and de Búrca, *The Evolution of EU Law* (2nd ed.), Oxford Univeristy Press, Oxford, New York, 2011, at pp. 538-544.

[649] See Schoenholtz, "Anti-terrorism Laws and the Legal Framework for International Migration", in Cholewinski, Perruchoud, MacDonald, *International Migration Law: Developing Paradigms and Key Changes*, T.M.C. Asser Press, the Hague, 2007.

[650] See Vohra, Detention of Irregular Migrants and Asylum Seekers, in Cholewinski, Perruchoud, MacDonald, *International Migration Law: Developing Paradigms and Key Changes*, T.M.C. Asser Press, the Hague, 2007.

[651] See *supra*, section on 'Right to Privacy' in chapter 4 and Redpath, "Biometrics and International Migration", in Cholewinski, Perruchoud, MacDonald, *International Migration Law: Developing Paradigms and Key Changes*, T.M.C. Asser Press, the Hague, 2007.

> ineffective way of capturing criminals, who already have an incentive to avoid the law, and who – with limited resources – can easily penetrate otherwise porous state borders. … The ease of international transportation, communication and exchange has already increased the demand for greater international cooperation of security, intelligence and policing authorities. Indeed, a growing network of international agreements and institutions already exists, albeit in nascent form. A world without migration controls will simply facilitate its development[652].

Moses places terrorist activity under the rubric of criminal activity and suggests in the same way that "there is little reason to expect that increased human mobility will adversely affect a state's capacity to monitor and enforce its sovereign legislation"[653]. Miller furthermore contends that the fundamental tenets of criminal law have been shifted by new practices of criminal law enforcement, which, in placing increasing focus on immigration measures:

> break from traditional concerns for an individual offender—his fault or guilt, his rehabilitation, his post-confinement reintegration into society—and are instead concerned with identifying, classifying, and managing aggregates of risk. In the process, concern for prevention of criminal deviance falls by the wayside, as a certain level of criminal offending is considered inevitable. The issue instead has become simply how to manage it. Thus, the new penology, at its core, is managerial, actuarial, and statistical—concerned not with individuals, but with managing subpopulations considered dangerous or risky[654].

Schoenholtz criticises recent state measures targeted specifically at terrorism[655] and their focus on immigration and in particular the use of profiling in their implementation. He argues that many of the specific profiling programs carry social costs excessive in comparison to any law enforcement gains they might be expected to yield. He concludes that in taking such measures, states have acted in ways that run counter to two important interests:

1. By alienating the very communities in which the small number of terrorists reside,

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[652] Moses, *International Migration: Globalisation's last frontier*, Zed Books, London, 2006, at p. 190.
[653] *Ibid.*, p. 193.
[654] Miller, "Blurring the boundaries between immigration and crime control after September 11th", *op. cit.* at p. 98. See also Feeley and Simon, "The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications", *Criminology* (1992), Vol. 30, pp. 449-474, at pp. 450-455; Welch, "The Role of the Immigration and Naturalization Service in the Prison-Industrial Complex", *Social Justice* (2000), Vol. 27, pp. 73-88, at pp. 74–75.
[655] Given that the most recent efforts of the international community to draw up a comprehensive Anti-terrorism Convention have failed due to lack of consensus over the definition of terrorism, the use of this term itself is vague and excessively emotive, aggravating the problem of negative associations with immigration. See UN General Assembly Resolution 51/210 meetings 49 and 50 of the Ad-hoc Committee negotiating a comprehensive anti-terrorism convention of 8th and 12th April 2013.

states have lost the potentially valuable cooperation of their citizen and non-citizen members in efforts to prevent further terrorist attacks;

2. Excessive efforts to control international migration come with costs to the lawful and desirable movements of people across borders[656].

In a similar vein, Miller questions whether "the DHS's social control mechanisms after 9/11 – detention, racial profiling, and harsh, zero-tolerance immigration law enforcement with very narrow avenues of relief ... improve or impede counterterrorism efforts"[657]. In her view "zero-tolerance law enforcement breeds fear of the government in communities best situated to investigate and report suspicious activity sponsored by Islamic fundamentalists. Instead of cooperation, however, these policies also breed resentment in those communities that might otherwise denounce terrorism"[658].

My contention is that the state does have a legitimate function in maintaining public order and security and so can take proportionate measures to protect these interests. However, this should apply across the board to citizens and immigrants with varying civil statuses alike. Targeting the latter over the former in a systematic manner way well scupper attempts to identify the true authors of crime and terrorist activity, who may well fall into the former category.

As regards the association between immigration and economic downturn, the section on the global free market economy in chapter 4 sets out a number of different economic studies the results of which suggest a net benefit for the world economy and for many different sub-sectors of increased mobility of labour. In the short-term certain sub-sectors may be adversely affected, but the long term benefits for all are positive. This is of course if fewer controls on movement in fact lead to more movement. In the experience of the EU, fears that an uncontrollable influx of unskilled workers would cripple the economy on the removal of border controls proved unfounded. O'Leary observes that:

> The removal of obstacles to free movement in the EEC and then EC was not sufficient to offset the disincentives to migration – uncertainty and lack of information about the level of income in the host member state, problems of assimilation, cultural, social and linguistic difficulties, housing availability and cost, education, and job security – despite significant differences in living standards and social protection between some

[656] Schoenholtz, "Anti-terrorism laws and the legal framework for international migration", in Cholewinski, Perruchoud, MacDonald, *International Migration Law: Developing Paradigms and Key Changes*, T.M.C. Asser Press, the Hague, 2007.
[657] Miller, "Blurring the boundaries between immigration and crime control after September 11th", *op. cit.* at p. 106.
[658] *Ibid.*, at p. 106. See also Zakaria, "Freedom vs. Security: Delicate Balance: The Case for 'Smart Profiling' as a Weapon in the War on Terror", *Newsweek*, 8th July 2002, at p. 31.

> of the member states. The anticipated major influx of migrant workers into more northern member states following the subsequent accession of Greece, Portugal and Spain also failed to materialise and transitional arrangements seeking to stem or temper flows of workers from the latter two member states were even abandoned before schedule[659].

A similar reaction was experienced on the opening of the EU borders to ten new member states in 2004 and again with the accession of Romania and Bulgaria in 2007. Many existing member states simply decided not to avail of the transitional restriction arrangements at all and even with enlargement, free movement within the Union remains at a low level concerning less than 2% of the population[660]. This section has demonstrated how the association of immigration with such topical political problems as crime, security threats and economic recession serves to sway public opinion and bring the issue of immigration from client to public politics. By giving undue weight to the issue of immigration, this tactic essentially creates a new political problem that hasn't yet existed in its own right. The next section expands on the reasons this political course might be taken.

(ii) Immigration as a useful political tool

In the sphere of public politics, immigration can be used as a useful practical tool by political parties. Lochak[661] provides an interesting analysis of this practice in play. Political parties, she submits, have three options when faced with a societal problem: respond to the problem, ignore it or use it as a political tool in competing against rival political parties. By this third option, instead of focusing on the objective of a political measure, it is the measure itself which is of primary importance. A political party seeks to demonstrate that the measures it takes are better than those that would be taken by the opposition. She captures this practice in the following passage:

> On relèvera que l'enjeu d'une politique publique ne se confond pas avec l'objectif officiellement poursuivi. Pour illustrer cette affirmation, et en anticipant sur les analyses qui vont suivre, on peut dire que ce qui est en jeu dans la politique actuelle de l'immigration, c'est la maîtrise des flux migratoires ; mais que l'enjeu de cette politique, c'est de démontrer la capacité du gouvernement à maîtriser effectivement ces flux, à les maîtriser en tous cas mieux que son adversaire, l'opposition devant de son côté

[659] O'Leary, "Free Movement of Persons and Services", *op. cit.*, at p. 504.
[660] Traser, *Who's afraid of the EU's latest enlargement? The Impact of Bulgaria and Romania joining the Union on Free Movement of Persons*, European Citizen Action Service, Belgium, 2008. http://www.libertysecurity.org/IMG/pdf_ECAS_REPORT_free_movement_in_2007.pdf (accessed on 19th July 2013).
[661] Lochak, "L'immigration, une question trop sensible", *Questions sensibles*, Centre Universitaire de Recherches sur l'Action Publique et le Politique, Presses Universitaires de France, 1998, pp. 246-261.

> s'efforcer de convaincre qu'elle fera mieux que le gouvernement en place si elle arrive au pouvoir[662].

She contends that immigration policy is *a priori* a field particularly apt to be transformed into a political tool: it crystallises opinions, renders visible the dividing line between right and left and allows for constant remobilisation on strong ideological themes. Tracing the history of immigration policy in France, she proceeds to demonstrate how left-wing parties have struggled in their attempts to demonstrate a greater control of immigration than that of the extreme right-wing party, le Front National, in order to deny accusations of the latter that they are in some way taking a lax approach to the issue. This has resulted in increasingly right-wing measures from parties across the board[663].

Some authors suggest that the 'client politics' approach and the 'public politics' approach are in action simultaneously – the former covertly and the latter overtly. Similar to Lochak's idea of a stand-alone political tool, Massey contends that faced with political pressure to control immigration, but with the root causes of international migration beyond their control, politicians in many developed countries have turned increasingly to symbolic policy instruments to create an appearance of control:

> Repressive policies such as vigorous border enforcement, the bureaucratic harassment of aliens, and the restriction of immigrants' access to social services may or may not be effective, but they all serve an important political purpose: they are visible, concrete, and generally popular with citizen voters … Forceful restrictive actions enable otherwise encumbered public officials to appear decisive, tough, and engaged in combating the rising tide of immigration[664].

This however is against a backdrop of policy failures as discussed in the previous section, which suggests that a covert 'client politics' approach is simultaneously in action. Castles observes that strong nationalist and ethnocentric ideologies in immigration countries, in addition to anti-immigrant rhetoric used by the mass media, have made it easy to mobilise public opinion against immigration. In order to placate the general public, politicians sometimes give lip service to such rhetoric, while actually pursuing policies that lead to more immigration, because it is important for labour market and economic objectives. This brings us back to the 'hidden agenda' hypothesis:

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[662] *Ibid.*, at p. 247.

[663] See also Schain, "The extreme-right and immigration policy-making: measuring direct and indirect effects", *West European Politics* (2006), Vol. 29(2), pp. 270-289; Rydgren, "Explaining the emergence of radical right-wing populist parties: the case of Denmark", *West European Politics* (2004), Vol. 27(3), pp. 474-502.

[664] Massey, "International migration at the dawn of the twenty-first century: the role of the state", *op. cit.*, at p. 314.

> This helps explain the frequent hidden agendas in migration policies – that is, policies which purport to follow certain objectives while actually doing the opposite. The tacit acceptance of undocumented labour migration in many countries despite strong control rhetoric is an example[665].

Echoing this hypothesis, Portes and deWind argue that "common depictions of 'alien invasions' in the popular literature neglect the fact that migrants in general, and unauthorised ones in particular, come not only because they want to but because they are wanted. While the general population may oppose their presence, firms and employers in a number of sectors need and rely heavily upon this labour supply"[666]. Schierup, Hansen and Castles capture both the 'political tool' idea and the 'hidden agenda' hypothesis in explaining their coined phrase 'Europe's ('illegal') immigration addiction' as follows:

> whereas it is now officially acknowledged that immigrants have become indispensable cogs in the EU's transforming economy and indispensable replacements in the EU's shrivelling demography, immigrants have also become indispensable scapegoats for a range of social and political problems that the EU's political life no longer seems capable of remedying. This is a EU where large parts of the economy have become addicted to the exploitation of the cheap and flexible labour provided by *undocumented* migrants and refugees who lack rights. But it is also a EU where governing bodies and politicians have become addicted to a witch-hunt rhetoric that metamorphoses and criminalises the much-needed *undocumented* into the EU's most-wanted: the *illegal immigrant*[667].

The dual functioning of client and public politics is all the more concerning given that it is unclear to what extent the public is influencing policy on the one hand and policies are influencing public opinion on the other. Besides the common use in the public arena of such negative rhetoric as illegal immigrants, undocumented workers and social welfare shopping, policies themselves can affect the mind-set of the otherwise uninformed public. Closing doors to all but the most highly skilled sends out a message that those who do not fall into this category are not desirable. In this vein, Fernández-Kelly, submits that "only ignorance and fear in large segments of the American public, combined with political opportunism, can explain the present state of things [and concludes that] the United States does not have an 'immigration problem'; instead, it has an 'immigration

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[665] Castles, "The factors that make and unmake migration policies", *op. cit.*, at p. 44.
[666] Portes and deWind, "A Cross-Atlantic Dialogue", in Portes and deWind (eds.), *Rethinking Migration: New theoretical and empirical perspectives*, Berghahn Books, New York, Oxford, 2008, pp. 3-28 at p. 13.
[667] Schierup, Hansen and Castles, *Migration, citizenship and the European welfare state: a European dilemma*, *op. cit.*, at p. 259.

policy problem'"[668]. In their study of the major trends of immigration into EU member states and the US, Boeri, Hanson and McCormick highlight this issue of causality in emphasising that:

> ... even though all countries face a decline in the quality of migrants, an assimilation of immigrants to natives can be observed only in those countries that select immigrants on the basis of their labour market characteristics ... [Thus], it is difficult to separate the extent to which sentiments of the population are in line with policy or policy is in line with sentiments[669].

Competing political interests in the sphere of immigration policy have caused states to make use of tactics to sway between client politics and public politics and to temper general public opinion in the realm of public politics. Individual political parties have used immigration as a political tool to elevate themselves above the opposition. This complex balancing of political interests amounts to a considerable obstacle for states in endeavouring to legitimise their migration control policies in a transparent and evidence-based manner.

§3 The economic free market parallel

A third considerable practical difficulty impeding the legitimisation of general and systematic state control of the movement of persons concerns the competing economic interests of a state. The global free market economy section of chapter 4 set out the existing limiting forces on this state control stemming from various actors in the economic sphere: economists, economic lobbying groups and international organisations. These actors argue that the freer movement of persons will prove advantageous for the economy. Their arguments echo similar arguments that were submitted towards the end of the mercantilist period for the liberation of trade between countries. At present, international agreements are in place to promote the free movement of goods, services and capital[670], with the aim of achieving a more efficient and sustainable global economy. Labour stands as the odd one out, the only factor of production over which states insist on retaining control[671].

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[668] Fernandez-Kelly, "Facts and fictions of unauthorised immigration to the US", in Maloney and Korinek (eds.), *Migration in the 21st Century: Rights, Outcomes, and Policy*, Routledge, London and New York, 2011, pp. 192-202, at pp. 196-199.

[669] Boeri, Hanson and McCormick (eds.), *Immigration policy and the welfare system*, Oxford University Press, Oxford, 2002 at pp. 121-122.

[670] See the World Trade Organisation Agreement 1994, Annex 1A 'General Agreement on Tariffs and Trade' (GATT) and 'Agreement on Trade-Related Investment Measures' (TRIMS), Annex 1B 'General Agreement on Trade in Services' (GATS) and Annex 1C 'Agreement on Trade Related Aspect of Intellectual Property Rights' (TRIPS).

[671] Peri, "The labor market effects of immigration: a unified view of recent developments", in Maloney and Korinek (eds.), *Migration in the 21st Century: Rights, Outcomes, and Policy*, Routledge, London and New York, 2011, pp. 98-125.

(i) State control in the economy

Chapter two traced how the modern political entity of the state slowly developed from early forms of social organisation. Although essentially in place to ensure efficient societal order, its functions have evolved throughout its existence as theory and experience have determined how best to achieve this goal. The mercantilist period marked the peak of this entity's control in the economy. Stretching from the 16th to the late 18th centuries, the mercantilist system dominated Western economic thought as states sought to increase their wealth through policies restraining imports and encouraging exports[672]. LaHaye describes this system as "economic nationalism for the purpose of building a wealthy and powerful state"[673]. Attitudes changed with the first publication of Adam Smith's 'The Wealth of Nations' in 1776, a book considered to be the foundation of modern economic theory. Smith refuted the idea that the wealth of a nation is measured by the size of the treasury and made a number of important criticisms of mercantilist doctrine:

> First, he demonstrated that trade, when freely initiated, benefits both parties. Second, he argued that specialisation in production allows for economies of scale, which improves efficiency and growth. Finally, Smith argued that the collusive relationship between government and industry was harmful to the general population. While the mercantilist policies were designed to benefit the government and the commercial class, the doctrines of *laissez-faire*, or free markets, which originated with Smith, interpreted economic welfare in a far wider sense of encompassing the entire population[674].

Mercantilist theory revived after World War II as urgent intervention was required to rebuild the broken economies of the post-war West[675]. The pendulum of state control swung so far as to see socialism established at this time in Eastern European and some Asian countries. The world recession of the 1970s turned the scales once again[676]. Massive shocks such as the two oil crises and the latin-American debt crisis and noticeable political shifts to the right in many countries spurred a substantial reduction in state intervention in the economy. This period also witnessed an

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[672] LaHaye, "Mercantilism", in Henderson (ed.), *The Concise Encyclopaedia of Economics*, (2nd ed.), Liberty Fund Inc., Indiana, 2007, http://www.econlib.org/library/Enc/Mercantilism.html.

[673] *Ibid.* See the original work: Smith, Wealth of Nations, Hayes Barton Press, Raleigh, 2001; White, "Review of Essays on Adam Smith by Skinner and Wilson", *Journal of the History of Ideas* (1976), Vol. 37(4), pp. 715-720.

[674] LaHaye, "Mercantilism", *op. cit.*

[675] See Eichengreen, "Institutions and economic growth: Europe after World War II" in Crafts and Toniolo, *Economic Growth in Europe since 1945*, Cambridge University Press, Cambridge, 2002, pp. 38-72.

[676] Backhouse, "The rise of free market economics: economists and the role of the state since 1970", *History of political economy* (2005), Vol. 37, pp. 355-392.

upsurge in intellectual free market theories[677].

These free market theories stemmed from the idea that in the realm of the economy, state action raised more problems than it solved[678]. Chang[679] gives an overview of the core arguments of free market theorists[680]. First, the 'self-seeking' argument contends that a government is an organisation which is run by groups of self-seeking individuals i.e. politicians seeking re-election and bureaucrats seeking higher salaries and more power. This is linked to the attack on the public enterprise model, which is deemed to be inefficient in comparison to its private counterpart due to the lack of profit incentives, competition and financial discipline imposed by the capital market[681]. The public enterprise model is also criticised for what is deemed the 'principal-agent problem' i.e. that there is one more layer of delegation ('public – ministers – managers') in comparison to private enterprises.

Second, the 'wasted resources' argument holds that even if we can assume that a government has the intention of promoting the public interest, any attempt to do so is an inefficient use of public resources as policy design and implementation are costly[682]. Third, the 'regulatory capture' argument[683] proposes that the regulatory agencies, once they are set up, become the objects of 'capture' by interest groups, including producers, consumers and 'public interest' groups such as an environmental lobby. "The theory of regulatory capture predicts that regulatory agencies will end up promoting producer groups' interests rather than the public interest, by, say, implementing regulations which effectively set up entry barriers that deter new entrants with little positive effect on social welfare"[684]. This relates to the idea of 'client politics' referred to in the previous section, which, although not bad in itself if all stakeholders get the opportunity to present their interests, can lead to domination of the lobbying space by groups with most financial means. The problem is

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[677] For an outline of these general trends, see Chang, "The Economics and politics of regulation", *Cambridge Journal of Economics* (1997), Vol. 21, pp. 703-728.

[678] *Ibid.*, at p. 355.

[679] Chang, *Globalisation, Economic Development and the Role of the State*, Zed Books ltd., London and New York, 2003, chapter 5 "The Economics and Politics of Regulation" and Chang and Rowthorn (ed.s), *The Role of the State in Economic Change*, Oxford University Press, New York, 1995, introduction.

[680] See Liu "How to improve government performance?" *European Journal of Political Economy* (2007), Vol. 23, pp. 1198-1206; Montgomery and Bean, "Market failure, government failure, and the private supply of public goods: the case of climate-controlled walkway networks" *Public Choice* (1999), Vol. 99, pp. 403-437; Wallis and Dollery, "Wolf 's model: government failure and public sector reform in advanced industrial democracies", *Review of Policy Research* (2002), Vol. 19(1), pp. 177-203.

[681] See also Laffont and Martimort, *The Theory of Incentives: The Principal-Agent Model*, Princeton University Press, New Jersey, 2002.

[682] Chang, "The Economics and politics of regulation", *op. cit.*, at pp. 709-710.

[683] See Levine and Forrence, "Regulatory capture, public interest, and the public agenda: Toward a synthesis", *Journal of Law, Economics, & Organization* (1990), pp. 167-198; Laffont and Tirole. "The politics of government decision-making: A theory of regulatory capture", *The Quarterly Journal of Economics* (1991), pp. 1089-1127; Dal Bó, "Regulatory capture: a review", *Oxford Review of Economic Policy* (2006), Vol. 22(2), pp. 203-225; Baker, "Restraining regulatory capture? Anglo-America, crisis politics and trajectories of change in global financial governance", *International Affairs* (2010), Vol. 86(3), pp. 647-663.

[684] Chang, *Globalisation, Economic Development and the Role of the State*, *op. cit.*, p. 167.

when the state takes an active role in pursuing the interests of such dominant groups, rather than balancing the interests of all stakeholders. Less regulation is deemed to give rise to a lower likelihood of this occurring.

Fourth, and stemming from the second and third arguments, according to the 'rent-seeking' theory[685], monopolies (and the associated 'rents') are mostly, if not exclusively, created by the imposition of government regulations. Given this, it is argued, it pays for people to spend resources on influencing the government's decisions. The theory argues that such 'influence costs' which are called 'rent-seeking costs', may be a worthwhile price to pay for those who acquire the rents, but will be a net reduction to the social output (and therefore a 'waste' from the social point of view). A simple definition of rent-seeking is spending resources in order to gain by increasing one's share of existing wealth, instead of trying to create wealth e.g. by political lobbying for government benefits or subsidies.

Fifth, the 'institutional sclerosis'[686] argument contends that institutions designed to guarantee politically negotiated economic benefits to certain groups (e.g. welfare provisions, trade protection, labour laws) are bound to create rigidities which are harmful to economic development in the long run. Essentially it is claimed that societies with greater numbers of interest groups grow more slowly, accumulate less capital and experience reduced productivity growth relative to others.

Chang refers to the 'populist government' argument in the context of developing countries, however, this argument, that often governments act in order to gain popular opinion rather than on the basis of rational evidence-based decision-making, is an underlying theme of this thesis and readily applicable to politics in developed countries. He elaborates as follows:

> The so-called macro-economics of populism literature argued that the political power of organised working-class movements in some Latin American countries leads to the election of 'populist' governments which engage in unsustainable macroeconomic policies ... in the belief that this will lead to a continued expansion of the economy ... with the often disastrous results of hyperinflation and soaring budget deficits ... Many (though not all) of these theories specifically recommended deregulation as a solution

[685] See Rowley, Tollison and Tullock (eds.), *The Political Economy of Rent-Seeking*, Springer Science & Business Media, London, 1988.

[686] See Olson, "The varieties of Eurosclerosis: the rise and decline of nations since 1982", in Crafts and Toniolo (eds.), Economic Growth in Europe since 1945, Cambridge University Press, Cambridge, 2002, pp. 73-94; Murrell and Olson, "The devolution of centrally planned economies", *Journal of Comparative Economics* (1991), Vol. 15(2), pp. 239-265; Amin, *An Institutionalist perspective on regional economic development*, Blackwell Publishers, Oxford, 1999; Kirby, "Institutional rigidities and economic decline: reflections on the British experience", *Economic History Review* (1992), Vol. 45(4), pp. 637-660; Weede, "Catch-up, distributional coalitions and government as determinants of economic growth or decline in industrialised democracies", *The British Journal of Sociology* (1986), Vol. 37(2), pp. 194-220.

> ... in the belief that the best way to prevent the capture of government is to make it pointless by taking away its power to change market outcomes[687].

These persuasive arguments of the free market advocates took hold and the period from the 1970s to the late 2000s is marked by a distinct free market ideology. Although Chang is critical of some of these arguments in the context of developing countries, if they serve to limit the latter's freedom of intervention as weaker members of the global economy to promote the growth of their economies[688], he accepts that there is now widespread agreement that the management of a complex modern economy requires a market which is independent from the state to a considerable degree[689].

The free market only works, however, within a framework of rules. The state has a legitimate role in protecting private property rights, in the improvement of income distribution, in the provision of public goods and in combating immoral behaviour, fraud and abuse[690]. More controversial areas of intervention include the regulation of competition and industrial policy[691]. In these latter areas and since the gaining in influence of free market ideology, states have continuously made efforts to reduce their level of intervention through the establishment of specialist independent regulatory bodies and in the adoption of international agreements. These efforts serve to address many of the government-failure arguments set out above and endeavour to achieve a balance between individual freedom and regulation for the common good.

In the controversial areas of competition and industrial policy, these efforts are evident at the international level. The regulation of competition stepped tentatively up to this level with the Agreement Establishing the WTO, which includes a range of limited provisions on various cross-border competition issues on a sector specific basis[692]. On a regional level, the EU has an

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[687] Chang, *Globalisation, Economic Development and the Role of the State*, *op. cit.*, at p.173. See also Levy and Spiller, "Institutional Foundations of Regulatory Commitment: a comparative analysis of telecommunications regulation", *Journal of Law, Economics and Organisation* (1994), Vol. 10, pp. 201-246.

[688] Chang, *Globalisation, Economic Development and the Role of the State*, Zed Books ltd., *op. cit.*, chapter 6 "Public Enterprises in Developing Countries and Economic Efficiency: a critical examination of analytical, empirical and policy issues" and Chang and Rowthorn (ed.s), *The Role of the State in Economic Change*, *op. cit.*, introduction.

[689] Chang and Rowthorn (ed.s), *The Role of the State in Economic Change*, *op. cit.*, introduction.

[690] Chang, *Globalisation, Economic Development and the Role of the State*, Zed Books ltd., *op. cit.*, pp. 177-190.

[691] Chang defines industrial policy as "a policy aimed at particular industries (and firms as their components) to achieve the outcomes that are perceived by the State to be efficient for economy as a whole", Chang, *Globalisation, Economic Development and the Role of the State*, Zed Books ltd., *op. cit.*, at p. 112.

[692] For example, one type of trade covered by Annex 1 B, the General Agreement on Trade in Services (GATS) is the supply of services by a foreign company setting up operations in a host country, i.e. through foreign investment. The Trade-Related Investment Measures Agreement (TRIMS) provides that an investors' right to use imported goods as inputs should not depend on their export performance. Rules on monopolies and exclusive service suppliers are considerably advanced in the Annex to the GATS on telecommunications and Annex 1 C, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) recognises governments' rights to act against anti-competitive practices and to work together to limit these practices,

advanced system of competition law based on the interaction between the European Commission and a network of independent competition authorities of the member states[693]. As regards industrial policy, although the Agreement establishing the WTO contains some exceptions to the free trade rules notably for the benefit of developing countries[694], from its ratification there has been "a marked strengthening of the 'global governance' regime in the direction of greater liberalisation"[695]. Even following the global financial crisis of 2008, the major national economies of the world in the context of G20 summits have consistently assured their commitment to combatting protectionism and encouraging free trade and investment[696].

(ii) A different approach to labour

Despite the dominance of free market ideology since the 1970s and the consequent efforts to encourage free trade and capital investment, no similar developments have been seen on the international level in relation to the movement of labour. While various international conventions touch on certain aspects of the movement of labour across territorial borders[697], none are solely committed to the encouragement of such movement. Meyers notes that "in the 1980s and 1990s, GATT, GATS and other international agreements have removed barriers to international trade, but most types of inter-regional immigration have been restricted"[698]. Chang comments that "it is interesting to note that most neoliberal authors hardly mention the issue of the international flow of labour, much less the possibility of liberalising international migration"[699]. Cable is one of the few authors who does discuss, albeit in a limited manner, the movement of people in his analysis of globalisation. He affirms that "one respect in which globalisation was more advanced in earlier generations than today was in the acceptance of large numbers of migrant workers"[700]. He identifies international agreements in which there has either been a tightening of the controls of cross-border movement of people (NAFTA) or a failure to reach an agreement on the relaxation of same (the GATT services negotiations mostly excluded free trade in services that involve labour

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http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

[693] See Council Regulation 1/2003 of 16th December 2002 on the Implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[694] Chang, *Globalisation, Economic Development and the Role of the State*, Zed Books ltd., *op. cit.*, pp. 325-328.

[695] *Ibid.*, p 325.

[696] See Declarations of G20 Summits from 2008 to 2013, http://www.g20.utoronto.ca/summits/index.html, and WTO, OECD, UNCTAD, *9th Report on G20 Trade and Investment Measures* of 17th June 2013, http://www.oecd.org/daf/inv/investment-policy/9thG20report.pdf.

[697] See chapter 4, "Global free market economy"; see also Perruchoud and Tomolova (ed.s), *Compendium of International Migration Law Instruments*, T.M.C. Asser Press, The Hague, Netherlands, 2007, chapter 2 "International Labour Law".

[698] Meyers, "The causes of convergence in Western immigration control", *Review of International Studies*, Vol. 28, No. 1 (Jan. 2002), p. 139.

[699] Chang, *Globalisation, Economic Development and the Role of the State*, Zed Books ltd., *op. cit.*, p. 247, note 1.

[700] Cable, "The Diminished Nation-State: a study in the loss of economic power", *Daedalus*, Spring 1995, Vol. 124, Issue 2, pp.23-53, at p. 35.

migration). He acknowledges that in the EU there has been a liberalisation of internal migration but that it has been "matched by a commitment to clamp down on non-EU immigration"[701].

He makes two important qualifications to this increasing state control:

> First, despite severe control, some migration has taken place, which has created, legally or illegally, significant and distinctive immigrant minorities in countries where they did not previously exist (Germany, Scandinavia, France, the Gulf states – even Japan) or changed the composition of countries which, while immigrant receiving, did not have today's ethnic diversity (Australia, Canada, the United States). Second, the restrictions apply overwhelmingly to the unskilled and unqualified; those with money or useful professional qualifications are much less restricted (moreover, business travel and international tourism have created opportunities for mobility among this group that are not widely shared). What Robert Reich calls the "symbolic analysts" or "elites" are part of a globalised, increasingly denationalised environment while their fellow citizens are cut off from it. This differential behaviour is bound to have significance for the way nation-states are seen and function[702].

He contends that the reason why labour is treated differently to other factors of production as regards its international mobility is that "it provides governments in relatively high wage economies with one instrument to protect the real wages of some segments of native labour from external competition, particularly in non-traded services. It also protects their 'identity'"[703]. Cable makes a point to clarify the limits of his study adding that "arguably, immigration controls are damaging to the restricting country, but we are concerned here with political perceptions"[704] and so he leaves open the question as to whether or not states are correct in such assumptions as to the economic effects of the control of movement of people. The arguments set out in chapter 4 in the section discussing the global free market economy suggest that they are not. Cable submits that a key reason for this differential treatment is what he terms 'the politics of identity'.

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[701] *Ibid.*, p. 39.

[702] *Ibid.*, p. 36. On the favouring of skilled immigrants, see Guellec and Cervantes, "International mobility of highly skilled workers: From statistical analysis to policy formulation" in OECD, *International mobility of the highly skilled*, 2002, pp. 71-98; Kapur and McHale, *Give us your best and brightest: the global hunt for talent and its impact on the developing world*, Center for Global Development, Washington, 2005; McLaughlan and Salt, *Migration policies towards highly skilled foreign workers*, Report to the Home Office, University College London, 2002; Mahroum, "Europe and the immigration of highly skilled labour", *International Migration* (2001), Vol. 39(5), pp. 27-43.

[703] Cable, "The Diminished Nation-State: a study in the loss of economic power", *op. cit.*, p. 39. See also Kostakopoulou, *Citizenship, identity, and immigration in the European Union: between past and future*, Manchester University Press, Manchester, 2001; Luedtke, "European integration, public opinion and immigration policy", *European Union Politics* (2005), Vol. 6(1), pp. 83-112; Green and Grewcock, "The war against illegal immigration: state crime and the construction of a European Identity", *Current Issues in Criminal Justice* (2002-2003), Vol. 14(1), pp. 87-101; Doty, "Immigration and National Identity: constructing the nation", *Review of international studies* (1996), Vol. 22(3), pp. 235-255.

His argument here is of a more general nature than those proffered in the above section on 'State control of migration as a useful political tool'; he contends that political thought in general has been fundamentally altered and that the difference in treatment of the movement of people is only a symptom of this. He explains his argument that political loyalties have been reorganised on a fundamentally different basis as follows:

> For many societies, and certainly those of the Western world, the traditional political organising principle has been a dichotomy between 'left' and 'right', reflecting different views about equality and class loyalties and about the respective roles of state versus private ownership and public versus private spending. These controversies have not disappeared, but they have lost much of their intensity ... powerful new parties and movements within parties have emerged almost everywhere asserting some form of cultural identity ... These can be treated as a pastiche of different political phenomena or, alternatively, as representing one pole of a new type of political dialectic. One extreme is the expression, politically, of a unique exclusive identity; the other is a more liberal, eclectic, inclusive approach, characterised above all by what can be described as an emerging sense of 'multiple identity' ...[705]

Thus, for example in France, political concerns have steered from left-right arguments about privatisation, inequality and labour rights to EU policy, GATT and immigration. In the United States he observes that politics is "heavily influenced by nationalism (in relation to trade and migration) and by religion. There is no strong correlation with traditional left-right divisions. Protectionism is being advocated by the democratic 'left' and the republican 'right' and by Perot supporters who do not match the old classification at all"[706].

The fact that the difference in treatment between trade and the movement of capital on the one hand and the movement of labour on the other is more to do with politics than economic considerations is also suggested by Hollifield:

> Most European governments recognise that they now preside over multicultural/immigrant societies, and attempts to ostracise settled foreign populations only feed the flames of xenophobia and racism. Moreover, with stagnant or declining populations and a shortage of highly skilled workers, European governments are now

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[704] Cable, "The Diminished Nation-State: a study in the loss of economic power", *op. cit.*, p. 39.
[705] *Ibid.*, pp. 44-45. On identity politics, see Moya, *Identity politics reconsidered*, Palgrave Macmillan, New York, 2006; Dyrberg, *The circular structure of power: politics, identity, community*, Verso, London, New York, 1997; Lash and Featherstone (eds.), *Recognition and Difference: Politics, identity, multiculture*, Vol. 2. Sage, London, 2002.
[706] Cable, "The Diminished Nation-State: a study in the loss of economic power", *op. cit.*, p. 46.

> turning to new recruitment programs, seeking to emulate some aspects of American and Canadian immigration policy, and make their economies more competitive in a rapidly globalising world ... are [states] still caught between economic forces that propel them toward greater openness (to maximise material wealth and economic security) and political forces that seek a higher degree of closure (to protect the *demos*, maintain the integrity of the community, and preserve the social contract)? This is already a daunting task – for states to find the appropriate 'equilibrium' between openness and closure – but they also face the very real threat of terrorism"[707].

In this extract, Hollifield seems to suggest that given most European states now recognise that they preside over multicultural societies, it is questionable whether even political motives for closure remain convincing. Are European states really caught between the choices of on the one hand accepting their multicultural nature and being more economically competitive in reducing the controls on immigration and on the other hand maintaining controls on immigration in order to protect the *demos*, maintain the integrity of the community and preserve the social contract? His unquestioning association between immigration and terrorism is disappointing given that, as discussed in the above section on state control of migration as a useful political tool, it is not necessarily the case that immigrants are more likely than citizens to be involved in terrorist acts. The question boils down to whether a state wishes to have an *ethnos* or a *demos*, to be homogenous or heterogeneous, to have a single culture or to be multicultural, to be closed to foreign influences of trade, capital and people or to be open to same. These are the real questions that need to be asked.

(iii) *The case for similar treatment*

Mac Ewan also comments on the "significance of the neo-liberals' failure to include the free movement of labour across international boundaries as part of their platform"[708]. Although this failure is not given much attention in policy debates, he submits that this "failure to advocate unregulated movement of labour along with unregulated movement of capital and commodities is a fatal flaw in the logic of their position"[709]. He endorses Cable's suggestion that the reason why labour is treated differently to the other factors of production must be that because the movement of labour necessarily involves the movement of people it is socially disruptive and politically unacceptable. This argument he contends however is inadequate in the context of general neoliberal theory:

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[707] Hollifield, "The Emerging Migration State", in Portes and deWind (eds.), *Rethinking Migration: new theoretical and empirical perspectives*, Berghahn Books, New York, 2008 at p. 77.
[708] MacEwan, *Neo-liberalism or Democracy? Economic strategy, markets and alternatives for the 21st century*, Zed Books, London, New York, 1999 at p. 35. MacEwan does not attach negative connotations to the concept of neoliberalism, but simply considers it to be "a new incarnation of old ideas", see p. 4.
[709] *Ibid.*, at p. 35.

> Yet once social and political considerations are allowed to override the market, the whole neo-liberal position disintegrates. Isn't it true that if capital is allowed to move across national boundaries the result will often be socially disruptive, in both the communities from which capital departs and the communities in which it arrives? And what jobs lost to import competition when barriers to the movement of commodities are removed? Doesn't this often create social and political turmoil? There is no logic other than that of political opportunism by which social and political considerations can be used to justify government regulations on the movement of labour but cannot be used to justify government regulations on the free movement of capital and commodities[710].

Russell draws attention to the paradoxical differences between the EU's internal and external policies in this regard:

> If the EU's concept of the level playing field were extended to the global market, it would involve freedom of movement of labour, equally with freedom of movement of capital. It is only if that is so that there can be genuinely equal competition between them. In practice, this is not easy to achieve. Money can be moved around the world in seconds, yet labour is not nearly so easily uprooted. Even a full determination to achieve a level playing field between capital and labour in the global market would leave it very difficult to achieve. In fact there is no such determination, for the interest of each country differs from the interest of all. A level playing field between capital and labour is in the interest of all, but it is not in the interest of each. A country which shows a greater willingness to admit cheap labour from abroad than its competitors do risks becoming the victim of what is a form of social dumping ... Freedom of movement and fortress Europe sit very uneasily together, and until this paradox is resolved, global markets will not work as they should[711].

This analysis suggests that there are two reasons for the difference in treatment in the EU's external policies between the movement of capital and labour: first, that labour is less easily uprooted and second, that the member states of the EU are unwilling to accept unskilled workers or 'social dumping'. These reasons are tenuous when held to scrutiny; the first reason contends that people by their nature are connected to a particular place by family, social, cultural or financial ties, whereas capital is not so constrained. This on its face would justify reducing the controls on the movement

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[710] *Ibid.*, at p. 35. Moses identifies a related argument of relative ability to vote by exit between possessors of capital and labour: Moses, "Exit, Vote and Sovereignty: migration, states and globalisation", *Review of International Political Economy* (2005), Vol. 12(1), pp. 53-77.

[711] Russell, "Introduction to Part II: third country nationals in the European Union: coming to terms with partial rights", in Guild, *The legal framework and social consequences of free movement of persons*, *op. cit.*, at p. 60.

of people rather than the inverse – if people are uneasily uprooted, and therefore less likely to move of their own accord, why are state controls necessary?

The second reason perpetuates the problem, as identified in chapter 4, with the distinction between skilled and unskilled workers. It was highlighted that many so-called 'unskilled' immigrant workers are valued by employers for their soft skills and good work ethic. Such individuals cannot automatically be inserted into the 'social problem' category of immigrants. People can have various intellectual or manual skills, but the extent to which they have either does not necessarily mean that they will obey or disobey social rules. The acceptance of 'unskilled workers' does not necessarily equate with social dumping. Furthermore, from the discussion above on the hidden agenda hypothesis, it is not at all clear that EU member states are actually unwilling to accept unskilled workers.

Russell concludes with a suggestion that while capital and labour are treated differently, global markets will not work as they should. He is not alone in this belief and in the Report on 'Migrants in the Global Labour Market' submitted to the Global Commission on International Migration (GCIM) in 2005, labour migration was described as the "oft-lamented 'missing global flow'"[712]. Furthermore, the World Commission on the Social Dimension of Globalisation has described efforts to remove obstacles to global labour mobility as "the unfinished business of globalisation"[713].

As regards the difference in treatment between trade and labour, Abowd and Freeman suggest that any argument for the restriction of the latter but not the former based on the protection of native workers is groundless. They drew up a report on the findings of the National Bureau of Economic Research (NBER) as regards notably its project examining how immigration and trade affected the wages and employment of American workers. Their conclusion observed that:

> Perhaps the most intriguing finding of the Immigration, Trade and Labour Markets studies is the apparently different direct effect of immigration and trade on workers in the affected labour markets. Whereas immigration does not discernibly reduce the wages and employment of less-skilled native workers in immigrant-intensive localities,

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[712] Martin, "Migrants in the Global Labour Market", Paper submitted to the Global Commission on International Migration, September 2005, at p. 2. See also MacEwan, *Neo-liberalism or Democracy? Economic strategy, markets and alternatives for the 21st century*, Zed Books, London, New York, 1999; Poot and Strutt, "International trade agreements and international migration", The World Economy (2010), Vol. 33(12), pp. 1923-1954; Genc, Gheasi, Nijkamp and Poot, "The impact of immigration on international trade: a meta-analysis", in Nijkamp, Poot and Sahin (eds.), *Migration Impact Assessment: new horizons*, Edward Elgar Publishing, Cheltenham, 2012, pp. 301-337.

[713] World Commission on the Social Dimension of Globalisation, *A Fair Globalisation: Creating Opportunities for All*, Geneva, International Labour Office, 2004.

> imports reduce the pay as well as employment of workers in heavily affected industries[714].

Later however, they contend that the long-term effects of both trade and immigration converge: "in summary, while trade and immigration may have the same long-run economic effects on an economy, there are good reasons (and, more compelling empirical evidence) that they have different transitional costs for affected workers"[715].

Hollifield goes further in highlighting the symbiotic relationship between trade and migration – together both play a role in improving the economic competitiveness of a state:

> The nineteenth and twentieth centuries saw the rise of what Richard Rosecrance (1986) has labelled the trading state. The latter half of the twentieth century had given rise to the migration state. In fact, from a strategic, economic and demographic standpoint, trade and migration go hand in hand. Because the wealth, power and stability of the state is now more than ever dependent on its willingness to risk both trade and migration[716].

The above arguments are purposely on a purely economic level. The human rights aspect of the movement of people was dealt with previously in Chapter 5. There is however a distinct argument in the order of global justice that is often invoked in discussions on globalisation or the easier and greater flows of goods, capital, information and people across national borders: this is that of equal opportunity for both those who offer capital and those who offer labour. Broader global justice and ethics arguments as regards migration control are beyond the scope of this research, which has instead taken a positivist approach in inquiring as to the legitimacy of state laws on migration control. These are very important in themselves and have been the subject of much academic commentary[717]. Given its links with the above section advocating for the similar treatment of

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[714] Abowd and Freeman (eds.), *Immigration, trade and the labour market*, University of Chicago Press, Chicago, 1991, at pp. 23 and 24.

[715] *Ibid.*, at p. 25.

[716] Hollifield, "The emerging migration state", in Portes and deWind (eds.), *Rethinking Migration: New theoretical and empirical perspectives*, Berghahn Books, New York, Oxford, 2008, pp. 62-89 at p. 80.

[717] Baubock, "Global Justice, Freedom of Movement and Democratic Citizenship", European Journal of Sociology (2009), Vol. 50(1), pp. 1-31; Juss, International migration and global justice, Ashgate, London, 2006; Chang, "The Economics of International labor migration and the case for global distributive justice in liberal political theory", *Cornell International Law Journal* (2008), Vol. 41, pp. 1-25; Lenard and Straehle, "Temporary labour migration, global redistribution and democratic justice", *Politics Philosophy Economics* (2012), Vol. 11(2), pp. 206-230; Nagel, "The problem of global justice", *Philosophy and Public Affairs* (2005), Vol. 33(2), pp. 113-147; Tinnevelt and Verschraegen (eds.), *Between cosmopolitan ideals and state sovereignty: studies in global justice*, Palgrave Macmillan, Basingstoke, 2006; Moses, *International Migration*, Zed Books, London, New York, 2006, see chapter 4 'The moral argument'; Beitz, "Cosmopolitanism and global justice", *The Journal of Ethics* (2005), Vol. 9, pp. 11-27; Bader, "The Ethics of Immigration", *Constellations* (2005), Vol. 12(3), pp. 331-361.

goods, capital and labour, I will briefly discuss this narrow element of the global justice arguments relating to equality of opportunity between those who offer capital and those who offer labour.

Although not entirely unrestricted, the movement of capital faces fewer obstacles in the form of state measures of control than the movement of labour. This fact *simpliciter* affords those who offer capital greater opportunities to use and benefit from this asset than those who offer labour. In the slightly different context of citizenship laws, as opposed to entry and residence laws, Portes and DeWind highlight this argument as follows:

> The complex interplay of political forces supporting international migration is no better reflected than in the rise and growing recognition of dual nationality and dual citizenship ... Though opponents point to the patent injustice of migrants being able to play off one set of national laws against another, something that native citizens cannot do, supporters point to the equally patent justice of giving common people the same transnational reach and rights as those granted to multinational corporations and the wealthy[718].

Moses continues this argument in observing that even without restrictions, capital is by its nature easier to move and therefore owners of capital have an inherent advantage over those who offer their labour in the former's real threat of exit in the event that disadvantageous policies are adopted in respect of foreign investment. He states that "some factors of production are more mobile than others (by their nature and/or by political design); owners of these factors enjoy more influence – given their real threat of exit. Thus far, owners of financial capital have benefited the most from the liberalisation of global markets – their political influence has grown in proportion to their real threat to exit ... It would seem that many democratic states are becoming increasingly callous to voice....one reason for this may be that society's most privileged groups have captured voice or already enjoy an effective threat of exit, alienating the larger citizenry"[719].

Castles identifies another argument related to global justice as to why labour should be treated in a similar manner to trade and capital flows. He reviews several policy measures that have been taken by both the IMF and WTO to encourage global free trade which have had significant detrimental effects on developing country economies and concludes that "overall, it could be argued that Northern policies in the areas of trade, international cooperation and foreign affairs are major causes of the very migratory flows that Northern migration policies seek to control."[720]

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[718] Portes and deWind (eds.), *Rethinking Migration: New theoretical and empirical perspectives*, *op. cit.* at pp. 7, 8 and 9.
[719] Moses, *International Migration: Globalisation's last frontier*, *op. cit.*, at p. 99 and 102.
[720] Castles, "The factors that make and unmake migration policies", *op. cit.*, at p. 42.

Aside from the above very brief portrayal of this global justice sub-argument, my point here is simply that economically it makes more sense for labour to be treated in a similar manner to goods and capital as regards their freedom of movement or indeed control. My argument in this section does not go as far as that of the economists in chapter 4 who advocate for a weakening of controls on the movement of people, but simply submits that it is hard to justify on an evidential basis the difference in treatment between labour on the one hand and goods and capital on the other.

I have contended earlier that the point of departure in relation to the movement of people should be freedom, and this should only be restricted in circumstances where states can demonstrate on a minimum evidential basis that this would be for the common good. Similarly, the movement of goods and capital should also have a default position of freedom, until states can demonstrate that it would be more beneficial to the common good to restrict same. The present position is that states have entered international agreements in the context of the WTO to ensure that the movement of goods and capital *inter alia* are relatively free, but have not been able to come to a similar agreement with regard to labour. I contend that this is to misconceive the role of states – the point of departure is freedom, unless it can be shown that restrictions are for the common good. This would mean that if states were ever to reassume control of the movement of goods and capital, they would have to justify such action on an evidential basis.

Conclusion

This chapter has considered the various obstacles that stand in the way of a state's efforts to justify its policies of immigration control on an evidential basis. First, on the basis of empirical evidence, it seems that even when states adopt such policies on an evidential basis with an expected objective in mind, forces beyond their control have such influence as to render the actual outcome quite far removed from the anticipated objective. Furthermore, it is far from evident that the financial and human costs of such policies would outweigh any anticipated objective.

The competing political interests of a state amount to a further and considerable obstacle to any justification on an evidential basis. Due to the negative connotations created between immigration and such political problems as crime, security and economic recession, the general public tends to be wary of any policies which aim to weaken controls on immigration. Nevertheless most political authorities are aware of the necessity in a certain degree of immigration for both economic and demographic reasons and 'client politics' ensures that borders remain open to varying degrees. How politicians can satisfy both stakeholders in the 'client' category and the general public remains to be seen.

Finally, the competing economic interests of a state further impede its efforts to justify on an evidential basis immigration control measures when a similar approach is not taken to the movement of goods and capital. In the context of the WTO, there has been consistent political will on the part of the contracting states to remain liberal in respect of the free movement of goods, capital and increasingly other areas such as intellectual property and information. Labour remains the "oft-lamented missing global flow" and until this imbalance is rectified, global economic markets will not work as they should.

The next and final chapter looks at what, if any, steps states can take in order to overcome these obstacles and endeavour to legitimise measures of migration control. Both short and long-term options will be considered at the national, international and supranational levels.

7. Moving beyond the status quo

Introduction

Given the limits already encroaching on state control of migration as outlined in chapter 4, the weak legitimate basis of this control as exposed in chapter 5 and the obstacles that states face in attempting to legitimise this control on an evidential basis outlined in chapter 6, this chapter seeks to consider the possible steps that may be taken towards improving the legitimacy of migration control in the future. A variety of possibilities exist in this regard at national, global and regional levels, which will in turn be discussed in the coming sections. It commences with short-term options and leads to more sustainable long-term options. At the national level, in order to improve the transparency and evidential basis of the decision-making process in immigration policy, governments could work with either an independent advisory body or directly with private interested actors. The role of national courts in ensuring that governments justify migration control measures on an evidential basis is also considered.

International action is preferable as at this level the reliability of international migration data can be improved through cooperation between states. The potential of existing candidates to stand as a new global migration body of an economic nature are first considered, namely the International Organisation for Migration (IOM), the World Trade Organisation (WTO) and the International Labour Organisation (ILO). Secondly, human rights based models are considered and evaluated.

International cooperation in the field of migration tends to suffer from the same political weaknesses as national control, which is why a regional supranational approach, with its focus on a regional understanding of the common good ,is submitted as the most sustainable long-term step towards legitimate migration control. At this level, recent developments of the EU are considered, in addition to informal arrangements in other regions that can be used as a stepping stone to supranational regional control across the globe with the aim of ultimately leading to inter-regional cooperation on the basis of equality between regions. While the issue of dispute resolution at this inter-regional level is beyond the scope of this thesis, it is an issue that would remain to be addressed. It is conceivable that respectful cross-regional judicial dialogue could develop once equality between regions was achieved. An international dispute resolution body or jurisdiction could be envisaged to deal with irreconcilable differences.

§1 At the national level

(i) Independent advisory body

One means by which a state could maintain some level of control over immigration, while simultaneously acting upon credible evidence as to the economic benefits of same, is through the establishment of a specialist and independent advisory body. Thus the state would in principle maintain control while being influenced by the advice of such a body. An example of this method in practice is the Migration Advisory Committee (MAC) in the UK. The MAC's initial charge was to provide independent, evidence based advice to the UK government on specific sectors and occupations in the labour market where shortages existed which could sensibly be filled by migration. Martin and Ruhs observe that this 'sensibly be filled' aspect marks this initiative as going further than similar steps taken in Australia, Canada and Spain through its acknowledgment that even where labour shortages in certain sectors or occupations exist, immigration isn't always the optimum response[721].

From its establishment in 2007, the MAC has achieved widespread acceptance due to its transparent analysis of the data and evidence relied upon to reach its recommendations, its encouragement of such measures as the training of workers in addition to immigration and its increased remit from exclusively economic issues to both the economic and social impact of migration[722]. One of the key contributions of the establishment of such a body is to help:

> depoliticise the debate on labour needs by allowing data and evidence to replace assertions about the need for migrant workers. Careful consideration and analysis of both top-down labour market indicators and bottom-up evidence from employers, unions, and other stakeholders can raise the quality of the debate over the need for foreign workers[723].

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[721] Martin and Ruhs, "Labor shortages and US immigration reform: promises and perils of an independent commission", *International Migration Review*, Vol. 45 No. 1 (Spring 2011), pp. 174–187, at p. 182. For more information on immigration advisory commissions in various countries see Chaloff, "Evidence-based regulation of labour migration in OECD countries: setting quotas, selection criteria and shortage lists", *Migration Letters* (2014), Vol. 11(1), pp. 11-22; Martin and Ruhs, "Independent commissions and labour migration: the British MAC", *Migration Letters* (2014), Vol. 11(1), pp. 23-32; Marshall, "Viewpoint: the case for a foreign worker advisory commission", *Migration Letters* (2014), Vol. 11(1), pp. 65-78; Devitt, *Labour migration governance in contemporary Europe. The UK case*, Fieri Working Papers, April 2012.

[722] Martin and Ruhs, "Labor shortages and US immigration reform: promises and perils of an independent commission", *op. cit.* at pp. 183 and 185. See also the MAC's official website: [https://www.gov.uk/government/organisations/migration-advisory-committee].

[723] Martin and Ruhs, "Labor shortages and US immigration reform: promises and perils of an independent commission", *op. cit.*, at p. 186.

The extent to which this body can assist the government in placating any anti-immigration public sentiment in exposing the bare facts is limited by certain of its structural features however[724]. First, it can only respond to particular questions submitted by the government and cannot independently conduct analyses and make recommendations on other issues, which has proven problematic when the right questions have not been asked[725]. The structure of certain questions asked is intriguing in that they incorporate a preconceived policy direction rather than asking for assistance on which policy direction should be taken:

> At what level should limits on Tier 1 and Tier 2 of the points-based system be set for their first full year of operation in 2011/12, in order to contribute to achieving the government's aim of reducing net migration to an annual level of tens of thousands by the end of this Parliament, and taking into account social and public service impacts as well as economic impacts? [question submitted on 28th June 2010]
> How should the current shortage occupation lists for the UK and Scotland be revised to remove jobs below graduate level? [question submitted in November 2010][726].

Second, its independence from the UK government is questionable given the fact that it is "sponsored by the UK Border Agency of the Home Office"[727]. Third, although it on occasion requests information from foreign bodies[728], its research is primarily based on national data and evidence sources. Chapter 1 of this thesis set out the various ways in which national data on the transnational phenomenon that is migration can prove inadequate to obtain an accurate picture of the complexities of migratory movements.

The question mark over this committee's independence is echoed in Balch's suggestion that the MAC is being used as an instrument to create public support for decisions of the government rather than as a tool to assist in the decision-making process: "was the epistemic community used in an instrumental way to serve interests? Yes to an extent, because the narrative of managed migration satisfied a need—namely to present a competent and convincing 'story' of how the government is dealing with a traditionally difficult issue"[729].

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[724] See Chaloff, "Evidence-based regulation of labour migration in OECD countries: setting quotas, selection criteria and shortage lists", *Migration Letters* (2014), Vol. 11(1), pp. 11-22; Martin and Ruhs, "Labor shortages and US immigration reform: promises and perils of an independent commission", *op. cit.*

[725] Martin and Ruhs, "Labor shortages and US immigration reform: promises and perils of an independent commission", *op. cit.*, at p. 184.

[726] UK Border Agency website, "Migration Advisory Committee Milestones", [http://www.ukba.homeoffice.gov.uk/aboutus/workingwithus/indbodies/mac/milestones/].

[727] UK Border Agency website, "What is the Migration Advisory Committee?", [http://www.ukba.homeoffice.gov.uk/aboutus/workingwithus/indbodies/mac/aboutthemac/].

[728] For its report "Review of the transitional restrictions on access of Bulgarian and Romanian nationals to the UK labour market" of November 2011 for example, the MAC contacted certain Bulgarian and Romanian government and embassy officials (see paragraphs 1.19 and 1.20 thereof).

[729] Balch, "Labour and Epistemic Communities", *The British Journal of Politics and International Relations*, 2009, Vol. 11, at p. 615.

Martin and Ruhs warn that it is important to be clear about the limited function of the commission: "the MAC has shown that there is no single answer as to whether migrants are needed to fill vacant jobs. Deciding whether the optimal response should be additional migrants, higher wages, or some other option is an inherently political decision"[730]. Yet, earlier they claim that one of its key contributions is to help "depoliticise the debate on labour needs by allowing data and evidence to replace assertions about the need for migrant workers"[731]. They fail to explain why, unlike in the area of international trade, the choice between migration, wages adjustment or some other economic option is "an inherently political decision" and why having depoliticised the debate, decisions could not be made simply on the basis of the data and evidence obtained.

This section was a brief consideration of the option of an advisory body to the state on migration policy. It aimed to demonstrate that while in theory this option would serve to improve the transparency and evidential basis of public decision-making in this sphere, in practice, the competing political and economic interests of a state tend to dictate the direction of policy to a greater extent than any evidence submitted by the advisory body, particularly given that in the case of the MAC, the type of evidence to be collected is itself dictated by the UK Government.

(ii) Working with private actors

Another means by which a state could maintain some level of control over immigration while basing its decisions upon credible evidence is through direct consultation with the private sector on a transparent basis. In its 2005 report the GCIM made the following recommendations in the section on governance at the national level:

> 20. Consultation is also required between government and other stakeholders at the national level. Policy-making is clearly the remit of government, but the Commission has concluded that the policy-making process is more likely to be effective when it is based on widespread consultation, especially with the private sector and the diverse components of civil society. This approach echoes the definition of governance developed by the Commission on Global Governance, that it involves individuals, institutions, the public and private sectors, and that it accommodates diverse interests to achieve common goals.
>
> 21. Given the dynamic nature of international migration, it is essential for policy-making in this area to be responsive and proactive. This in turn requires effective data collection, policy analysis, research, monitoring and evaluation. It is hard to formulate

[730] Martin and Ruhs, "Labor shortages and US immigration reform: promises and perils of an independent commission", *op. cit.* at p. 186.

> and implement effective policy when it is not clear who the targets of that policy are, how many they are, where they are and what their problems are. And it is simply bad practice not to assess the efficiency, effectiveness and impact of policy.

The International Labour Organisation pin-pointed the Social Partnership Agreement (SPA)[732] in Ireland as one of 26 good practices in the area of labour migration policies and programs[733]. This is essentially a framework within which a tripartite body (the government, ICTU (the principal trade union) and IBEC (the principal employer organisation)) comes to agreements in consultation with civil society on national industrial relations issues, among which labour migration management. The seventh Social Partnership Agreement, "Towards 2016", was put in place to cover the period 2006-2015. A section within entitled 'economic migration policy' includes the only declarations regarding labour immigration policy *per se*, *i.e.* how many and what categories of immigrants the state will accept as opposed to the rights same would have on arrival:

> 24.2 The Government has agreed that the Employment Permits Bill will be enacted at the earliest possible date and that economic migration policy will ensure the following:
>
> ...
>
> · that there will be appropriate consultation with the social partners in determining included and excluded categories of staff/skills for eligibility for work permits ...

The knowledge base for this tripartite body includes research carried out by the National Economic and Social Council (NESC). In its 2006 report, it advised that one of the key policy questions that needed to be determined was "to what extent, if at all, should concerns over the potentially adverse effects of immigration on local workers limit the level of labour immigration demanded by individual employers?"[734] and yet further on in the report it observed that "to date there is little evidence to suggest that the recent sharp rise in immigration to Ireland has increased unemployment among Irish workers"[735]. Thus, while employers have been able to voice their interests, the issue of labour immigration policy still comes down to a balance between evidence-based economic interests and unfounded political fears. The latter have found the upper hand as

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[731] *Ibid.*, at p. 186.

[732] For discussions on how this agreement works in practice and the relationship between the state and the members, see Roche, "Social Partnership in Ireland and New Social Pacts", *Industrial Relations* (2007), Vol. 46(3), pp. 395-425; Baccaro and Lim, "Social pacts as coalitions of the weak and moderate: Ireland, Italy and South Korea in comparative perspective", *European Journal of Industrial Relations* (2007), Vol. 13(1), pp. 27-46.

[733] International Labour Organisation website, Labour migration branch, "Good practices database - Labour migration policies and programmes", [http://www.ilo.org/dyn/migpractice/migmain.listPractices?p_theme=4].

[734] A report by the IOM for the National Economic and Social Council, "Managing Migration in Ireland: A Social and Economic Analysis", No. 116, September 2006, at p. 98.

[735] *Ibid.*, at p. 197. For further evidence of the complementarity between Irish and immigrant workers, see Power and Szlovak, *Migrants and the Irish Economy*, Paper prepared for the Integration Centre, October 2012.

although employers were able to employ whatever third country nationals they deemed fit, once a preliminary labour market test was carried out, until April 2003, the publication of the Employment Permits Act 2003 (which facilitated access for workers from the ten EU accession countries to the Irish labour markets immediately upon EU enlargement) marked the beginning of a more interventionist work permit system.

This system was primarily based on the expectation that local employers would be able to fill most of their vacancies after 1 May 2004, from within the enlarged European Union. The NESC report notes however that the average monthly number of work permits issued from May 2004 to April 2005 was approximately the same as the average monthly number of new permits issued to workers from outside the enlarged European Union from November 2003 to April 2004. "This suggests that the opening of the labour market to accession state nationals on 1 May 2004 may have reduced, though it certainly did not eliminate, employer demand for new work permits for workers from outside the European Union"[736]. This being the case, the fact that the government proceeded to announce in August 2004 that "it would no longer consider applications for new work permits for the employment of non-EEA nationals in low-skilled and/or low-wage occupations"[737] makes it clear that rather than based on the evidence available, this decision is more firmly grounded in political fears.

Beyond the fact that it is not at all clear that this tripartite structure of direct consultation with private actors results in political decisions that have given due weight to the interests voiced, there are three further notable problems with the SPA. First, and like the MAC, the evidence on which it is based is primarily confined to national sources. Second, although NGOs representing the interests of migrants themselves may be consulted, this is on an *ad hoc* basis. Finally, the SPA has proven less than resilient in times of economic crisis. McGinty observed that Ireland's social partnership system failed when the economic crisis hit because it had an "incapacity to cope with economic shock"[738]. Leaders from the government and the social partners agreed that "the social partners' reaction to the crisis had been too slow and that interaction with the government was weak"[739].

This section has aimed to demonstrate that while state consultation with private interested actors in the sphere of migration policy should in theory help improve the transparency and evidential basis of the decisions made, in practice, consultation alone without actually acting on the evidence

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[736] National Economic and Social Council, "Managing Migration in Ireland: A Social and Economic Analysis", *op. cit.*, at p. 31.
[737] *Ibid.*, at p. 31.
[738] McGinty, Director of Industrial Relations and Human Resources with the Irish Business and Economic Confederation (IBEC), Eurofound website, "Social partnership system under the spotlight", [http://www.eurofound.europa.eu/eiro/2013/02/articles/ie1302019i.htm].
[739] Eurofound website, "Social partnership system under the spotlight",

obtained greatly reduces the capacity of this option to improve the legitimacy of state control measures.

(iii) The role of national courts

Alongside the role of the government in reassuring the public, national courts have a role in vindicating human rights, many of which are enjoyed by immigrants in receiving countries. In this way, a message can be sent out to the public that they do enjoy rights and any interference with such rights by policy decisions of the government must be justified on an evidential basis. Hollifield puts the matter succinctly: "In the end, however, it is the nature of the liberal state itself and the degree to which openness is institutionalised and (constitutionally) protected from 'the majority of the moment' that will determine whether states will continue to risk trade and migration"[740].

In a subsequent section on measures that can be taken at the regional level, the increasing concern of the Court of Justice of the European Union with evidence-based decision making is discussed[741]. This should equally be an increasing concern for national courts, not only in the EU out of a desire to avoid condemnation by that court, but by national courts more generally out of a desire to ensure that the delineation between individual freedoms and the role of the state is kept in continuous balance. The courts are there to protect individual freedoms and this increasingly includes those enjoyed by non-national residents within the territory of a state. The concept of the state is discussed at length in chapter 2 and the legitimacy of its direct and indirect control of the movement of people is considered in chapter 5. What must be remembered in all this discussion is that the state is a social construction, constructed by people in order for society to function in an efficient manner. Individual freedom remains primary and the powers of the state can only encroach upon this to the extent necessary to achieve its purpose. Courts were established as a means to ensure that the state did not usurp its powers, that it did not exercise power beyond that which was necessary. It is essential that the government justifies the measures it takes on an evidential basis in order to retain its legitimacy on a rational basis and it is up to the courts to ensure that it does so.

Submissions made by states in defending measures which amount to *prima facie* infringements of individual rights (both substantive and procedural) as a proportionate means of achieving a legitimate objective must have a minimum evidential basis. Mere assertions of the relevance of a public interest objective or grounding the argument in such simplistic generalisations as 'a

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[http://www.eurofound.europa.eu/eiro/2013/02/articles/ie1302019i.htm].

[740] Hollifield, "The Emerging migration state", in Portes and deWind (eds.), *Rethinking Migration: new theoretical and empirical perspectives*, Berghahn Books, New York, 2008 at p. 81.

[741] *Infra* at pp. 210-211.

sovereign prerogative', 'protecting the integrity of the immigration system', 'an unreasonable financial burden', 'public policy' or 'public security' should not be held to be sufficient. With well-reasoned guidance from national courts, the state will have some additional support with which to reassure its public and will find its task in conciliating economic needs with political fears somewhat less daunting.

§2 At the global level

This thesis has endeavoured to identify the problems in legitimising national control of migration. Most notably, it is impossible for a state acting alone to collect data on the transnational phenomenon of cross border migration in order to take evidence-based decisions: international cooperation for the collection of such data at the very least is vital. To this end, an international body dedicated to the issue of migration would prove a useful tool.

Although there is no global body dedicated to the general and multi-faceted issue of cross border migration in existence as of yet, there are a number of candidates out there for the job: the International Organisation for Migration (IOM), the World Trade Organisation (WTO), the International Labour Organisation (ILO) and the United Nations Human Rights Committee. The appropriateness of each of these candidates depends on which of two principal approaches would be taken, which I will label the economic approach or the human right to free movement approach. These two approaches would clearly overlap, especially given my suggestion in chapter 5 for the adoption of 'rights based economic progress' as the European common creed; however the distinction is useful for analytical purposes.

(i) An economic approach

The 2005 report of the Global Commission on International Migration (GCIM), "Migration in an interconnected world: New directions for action" made a recommendation, as regards global institutional arrangements, that in the long term, a "fundamental overhaul of the current institutional architecture relating to international migration will be required, both to bring together the disparate migration-related functions of existing UN and other agencies within a single organisation and to respond to then new and complex realities of international migration"[742]. It proposed two models for such a single global organisation: first, the fusion of voluntary and forced migration through a merger of the IOM and UNHCR and second, a global agency for economic

[742] GCIM report of October 2005, at p. 75. See also Hollifield, "Migration, trade and the nation-state: the myth of globalisation", *UCLA Journal of International Law and Foreign Affairs* (1998-1999), Vol. 3, pp. 595-636.

migration functioning within the UN system, for which role the IOM "would appear to be most suited"[743].

Very little analysis is given as to why the IOM would be the most suited for either of these roles, but notably in this section, the role of a global agency for economic migration. The report simply states that "it already assumes a number of the broadly-defined required functions: operations and logistics, technical cooperation and capacity-building, policy development and research, as well some data collection"[744]. It is then however admitted that "under its current constitution, IOM operates essentially as a service organization on behalf of its member states, which is only part of the remit that would be required of a global lead agency for economic migration"[745].

A rather less optimistic view of the IOM is taken by Georgi in his detailed historical and institutional analysis of this organisation as it stands, let alone as a candidate for a future global agency for economic migration. His historical analysis makes clear that the character, activities and political direction of the organisation have shifted several times in the course of its development in a reactionary manner and in order to safeguard its own existence. Its image remains contradictory:

> On the one hand, the organization paints a positive image of migration. It speaks the language of migrant rights and claims to work towards 'humane and orderly migration regimes' that benefit all by creating win-win-win situations. On the other hand, its actual actions seem to be much harsher, drawing continued criticism from NGOs, academics and social movements. The organization appears to serve the hegemonic forces in industrialized countries in creating the bitter reality of migration controls characterized by thousandfold deaths at Western borders, by the mass illegalization of workers, and a world of detention camps and deportations ... the differences between IOM's actions and its ideology should be understood as a contradiction between IOM's financial dependence on (mainly but not only Western) industrialized countries, primarily interested in control, and IOM as an international state apparatus and a large bureaucracy, which has its own political aims, strategic priorities and a relative autonomy from its member states[746].

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[743] GCIM report of October 2005, at p. 76.

[744] *Ibid.*, at p. 76. For further information on the institution of the IOM as a candidate, see Andrijasevic and Walters, "The International Organization for Migration and the international government of borders" *Environment and Planning* (2010), Vol. 28(6), pp. 977-999; Newland, "The Governance of International Migration: Mechanisms, Processes, and Institutions, *International Migration* (2010), Vol. 16(3), pp. 331-343; Betts, *Global Migration Governance: the emergence of a new debate*, Global Economic Governance Programme Briefing Paper, November 2010.

[745] GCIM report of October 2005, at p. 76.

[746] Georgi, "For the benefit of some: the international organisation for migration and its global migration management", in Geiger and Pécoud (eds.), *The politics of international migration management*, Palgrave Macmillan, Hampshire and New York, 2010, at p. 62. See also Andrijasevic and Walters, "The International

A morbid conclusion follows, which finds that far from for the benefit of migrants, or even receiving or sending societies, the IOM's work primarily serves its principal donor states and the institution of the IOM itself and conversely acts to the disadvantage of refugees, migrant workers and the subaltern classes of developing countries. Its funding model has led to an increasingly 'entrepreneurial and cost-effective' approach and furthermore a waning of the political voice of the organisation: "unlike many NGOs but also more 'normative' IGOs, like UNHCR or ILO, IOM never publicly criticises its member states or donors"[747].

Not only does this organisation suffer from the same weaknesses as the intergovernmental arms of the EU as identified in chapter 5, but it furthermore has this additional funding obstacle preventing it from making any strong and independent political decisions. Although the IOM might be the most suited organisation in existence, it is far from apt for the task of taking on the role of a global agency for economic migration.

The renowned economist Bhagwati has long advocated for the establishment of an entirely new 'World Migration Organisation' (WMO) analogous to the WTO[748]. In a concise yet damning paper, he highlights the inefficiency, incoherence and unfairness of the current position of migration control throughout the world, and argues on economic grounds for a more liberal approach accompanied by a new global institutional architecture:

> Some nations will grasp this reality and creatively work with migrants and migration. Others will lag behind, still seeking restrictive measures to control and cut the level of migration. The future certainly belongs to the former. But to accelerate the progress of the laggards, new institutional architecture is needed at the international level … The world badly needs enlightened immigration policies and best practices to be spread and codified. A World Migration Organization would begin to do that by juxtaposing each nation's entry, exit, and residence policies toward migrants, whether legal or illegal, economic or political, skilled or unskilled. Such a project is well worth putting at the centre of policymakers' concerns[749].

Organization for Migration and the international government of borders" *Environment and Planning* (2010), Vol. 28(6), pp. 977-999.

[747] Georgi, "For the benefit of some: the international organisation for migration and its global migration management", *op. cit.*, at p. 63.

[748] See Bhagwati, "Borders beyond control", *Foreign Affairs*, Vol. 82, No.1, Jan-Feb. 2003, pp. 98-104. On this proposition see also Lenard, "MigrationMatch.Com: Towards a World Migration Organisation", in Brooks (ed.), *New Waves in Global Justice*, Palgrave Macmillan, London, 2014, pp. 188-206; Helton, "People movement: the need for a World Migration Organisation", *Open Democracy*, 30th April 2003, [http://www.opendemocracy.net/people-migrationeurope/article_1192.jsp].

[749] Bhagwati, "Borders beyond control", *op. cit.*, at p. 104.

Using the WTO as a model for an entirely new organisation is curious to the extent that the WTO itself already has a limited jurisdiction in the movement of individuals, namely through the GATS mode 4 regime set out in the global free market economy section of chapter 4. The stunted state of development of this jurisdiction of the WTO does not bode well for use as a template for a broader economic migration model[750].

Its present parameters are very narrow: it only applies to the temporary movement of service providers. The Annex on Movement states that the GATS "shall not apply to measures affecting natural persons seeking access to the employment market of a [WTO] member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis"; it continues to make clear that the GATS does not affect national immigration provisions on entry and temporary stay. Charnovitz observes that "the WTO supervision of national regulation of the movement of people is much weaker than its supervision of goods, other services, and technology"[751].

The specific commitments undertaken by the WTO member states constrain its ambit even further. Charnovitz observes that:

> the existing Mode 4 commitments are heavily tilted toward high-skill persons ... Only about 17 percent of the commitments apply to low-skilled personnel, and these are often limited by an economic needs test that excludes the alien if it has not been shown that no qualified domestic workers are available. Even when such a "need" exists, the paperwork involved can be a significant barrier[752].

The GATS contains several core rules, including an obligation to enter into successive rounds of negotiations with a view to achieving higher liberalisation[753]. The latest round of negotiations, the Doha round, commenced in 2001. Concerning the development of mode 4, one category of proposals advocates for the expansion of mode 4 commitments to include categories of natural persons who are not linked to a mode 3 commercial presence, notably 'contractual service suppliers' and 'independent professionals'. Another category seeks the removal of restrictive market access conditions[754]. The great difficulties in negotiating this round are evident in its failure to achieve its 2005 deadline (and subsequent unofficial deadlines of the end of 2006 and early

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[750] For detail on the lack of political will to develop Mode 4, see Klein Solomon, "GATS mode 4 and the mobility of labour", in Cholewinski, Perruchoud and MacDonald (eds.), *International Migration Law: developing paradigms and key challenges*, T.M.C. Asser Press, The Hague, 2007, at p. 110.

[751] Charnovitz, "WTO Norms on International Migration", Paper presented at the IOM Workshop on Existing International Migration Law Norms of 30th April 2002, at p. 8.

[752] *Ibid.*, at pp. 10-11.

[753] GATS article XIX:1.

[754] Klein Solomon, "GATS mode 4 and the mobility of labour", in Cholewinski, Perruchoud and MacDonald (eds.), *International Migration Law: developing paradigms and key challenges*, T.M.C. Asser Press, The Hague, 2007, at pp. 119-125.

2007), the number of negotiation suspensions due to deadlock and the fact that negotiations remain ongoing in 2014[755]. Considering its negotiating history, there is not much hope for great advances on the particular aspect of mode 4 services; as Julia Nielson of the OECD has noted, "even by the modest standards of Uruguay Round liberalisation on trade in services, little was achieved on Mode 4"[756]. Even the GCIM report reveals a marked lack of faith in the potential of mode 4 to achieve greater liberalisation for the movement of natural persons:

> 41. ... the Commission also sees great value in recent efforts to promote a dialogue on GATS Mode 4, bringing together those working in the field of international migration and those who specialize in international trade. Expectations of this process must remain modest, however, given the continuing caution of many states in relation to the liberalisation of the global labour market[757].

As in the case of the IOM, at the negotiation tables of the WTO national preferences stifle any consideration of the bigger picture, a potentially mutually beneficial system of both free movement of trade and labour. This places the WTO's candidacy as a model for a new global agency for economic migration on shaky grounds.

The International Labour Organisation (ILO) is another candidate for the role. Charnovitz however makes a crucial observation on its work since its inception in 1919: "although migration has been an ILO issue for 84 years, the organisation so far has focused more on conditions of employment than on employment itself ... One might say that the Conventions are about the treatment of migrants, rather than about facilitating migration"[758]. Indeed the ILO itself confines its strategic objectives to:

1) Promote and realize standards and fundamental principles and rights at work
2) Create greater opportunities for women and men to decent employment and income
3) Enhance the coverage and effectiveness of social protection for all
4) Strengthen tripartism and social dialogue[759].

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[755] "Key stages in the Negotiations", WTO website, services negotiations, [http://www.wto.org/english/tratop_e/serv_e/key_stages_e.htm]. See also van Dijck and Faber, "How to save the Doha Round: a European perspective", *European Foreign Affairs Review* (2006), Vol. 11, pp. 291-309.

[756] Nielson, "Service Providers on the Move: A Closer Look at Labour Mobility and the GATS," OECD, Working Party of the Trade Committee, TD/TC/WTP(2001)26/FINAL at p. 5. See also Young, "Where Next for Labor Mobility Under GATS?", in Sauvé & Stern (eds.), *GATS 2000: New directions in services trade liberalization*, Brookings Institution Press, Washington D.C., 2000, at p. 187.

[757] GCIM report of October 2005, at p. 19. For harsh criticism of mode 4 from a global justice perspective, see Broude, "The WTO/GATS Mode 4, International labour migration regimes and global justice", International Law Forum of the Hebrew University of Jerusalem Law Faculty, Research Paper No. 7-07, May 2007.

[758] Charnovitz, "Assessing the ILO's efforts to develop migration law", 30 *Legal Issues of Econ. Integration* 193 (2003), at p. 199.

[759] Mission and Objectives, ILO website,

Although some of its conventions touch on the subject of migration, these have tended to be quite poorly ratified:

> The low rates of ratification for Conventions No. 97 [Revised Convention on Migration for Employment] and 143 [Convention on Migrant Workers] are even worse when it is recognised that the ratifications are largely in the traditional source states, not the receiving states. Furthermore, both conventions have failed to receive significant ratifications in the past 20 years. Perhaps this inaction implies a retreat in state acceptance of the ILO role in migration[760].

Stepping in to take the reins in 1990, following ten years of negotiation, the UN General Assembly adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which didn't come into force until July 2003 and has itself only been ratified by 47 primarily sending states. Although it seems unlikely that the ILO could transform itself into a global agency for economic migration, Charnovitz urges that any future institution of that nature adopt the tripartite structure of the ILO: "if any international organisation could be successful in catalysing new international norms on worker mobility, it would be an organisation that brings together, in transnational dialogue, the private sector [employers], civic society [employee representatives] and governments"[761].

(ii) A human right to free movement approach

In chapter 5, it was contended that international law does not as yet govern migration control, either through customary international law or through a specialised agreement. It has been argued however that "the standards of international law imply a very strong claim to freedom of movement across borders, both inwards and outwards, for everyone"[762]. This thesis does not go as far as this claim that such a right should exist, but confines itself to contending that in order for states to legitimise their measures of migration control, they must take some action and an international agreement returning the point of departure to 'freedom unless you pose a threat' on the basis of a human right to free movement is one among the other possible actions outlined in this chapter. Although elsewhere I stated that global justice arguments were beyond the scope of this research, which instead takes a positivist approach in determining the legitimacy of state measures of migration control, the authors addressed in this section do base their proposals on global justice

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[http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm].

[760] Charnovitz, "Assessing the ILO's efforts to develop migration law", *op. cit.*, at p. 198.

[761] *Ibid.*, at p. 200.

[762] Dummett and Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, *op. cit.*, at pp. 279-280.

grounds. Given that this section moves the focus from state action to international action, a brief dip into this area is warranted.

Seglow describes an uncontrolled system of open borders "as a principle of social justice, or more accurately a means to achieve it"[763]. He feels that while such a system might possibly (though he feels that this is certainly not a given) achieve greater global social justice, this would be to the significant detriment of the democratic sovereignty of states: the balance between justice and democracy would be tilted too far towards the former. Although he rejects open borders as a response to world poverty, he does argue for an increase in the numbers of migrants from poorer states who should gain admission to richer ones, but this increase must be managed, ordered and justifiable on impartial grounds. Thus Seglow advocates for a global agency for economic migration on social justice grounds, but as a more politically justifiable means than a system of open borders. The mechanics of the work of this agency would be based on a system of quotas guided by the following principle: "Every state has a *prima facie* duty to admit some migrants from other states where both (a) the numbers of migrants admitted and (b) the categories of migrants admitted are determined by fair criteria"[764]. As regards (a), the raw numbers of migrants admitted, this should be governed, he suggests, by three criteria: GDP, population density and the quality of a state's environmental infrastructure. Considering (b), he feels that if global justice is the main concern, then once their immigration quota set, richer states should discriminate in favour of migrants from poorer states, and against those from other rich states.

There are three notable problems with this approach. First, the 'political will' problem – from the analysis of the potential candidates for such an agency as discussed in the previous section, it doesn't seem that at present there is sufficient political will among states to undertake its establishment. Second, the 'migrant preference' problem – this approach smacks of paternalism; it presumes that an agency put in place no doubt with more than a little guidance and funding from developed states would have the capacity to determine what a global equal distribution of wealth would be and require for its achievement. Different people value different resources to a greater or lesser extent. If we are serious in desiring to achieve an equal distribution of wealth, then individuals must be given the liberty, to the greatest extent possible, to pursue the resources they prefer[765]. In his critique of the IOM, Georgi captures an element of this problem: "the IOM version of migration management/governance privileges the economically-defined utility of mobile people over their rights, hopes and plans[766]". In a similar vein, Moses argues that:

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[763] Seglow, "Immigration justice and borders: towards a global agreement", *Contemporary Politics*, Vol. 12, No. 3–4, (September–December 2006), at p. 236.
[764] *Ibid.*, at p. 237.
[765] See for an in depth analysis of the relationship between liberty and equality Dworkin, "Part 3: The Place of Liberty", *Iowa Law Review*, Vol. 73 (1987-1988), pp. 1-54.
[766] Georgi, "For the benefit of some: the international organisation for migration and its global migration management", *op. cit.*, at p. 65.

> It is both embarrassing and patronising of the developed world to presume that it can decide what is best for the world's poorest and most exploited: we should let potential migrants decide for themselves whether they are willing to settle in a place that offers more or less opportunity, guarantees and/or obligations[767].

Third, the 'starting point' problem – it is based on what was argued in chapter 5 to be an illegitimate starting point of 'control unless we want you' rather than 'freedom unless you pose a threat'. Furthermore, a transfer of this default position from national law to international law through the establishment and work of a global agency for economic migration would be equally illegitimate.

Marchetti advocates for a cosmopolitan human rights based approach. "In normative terms, cosmopolitanism affirms that the scope of justice should be universal as no discrimination is justified when considering the ultimate rights of every citizen to control his destiny and to equal individual self-determination"[768]. He observes that scholars on this subject often adopt the receiving country's perspective, which, according to cosmopolitanism, constitutes a prejudicial limitation of the original question: "The state-centric paradigm of national membership is rejected in favour of a global political principle of residency[769].

The problem, he maintains, is to determine how to distribute equally the scarce good of residency in any state. The response of cosmopolitanism is based on a universal right to movement embedded in an impartial global weighting mechanism. However, in his view, universal availability of this good (i.e., the right of residency) is only possible through its division into temporally distributed parts:

> temporally limited permissions of free movement and residency become the goods of this new migratory policy—goods widely available and complemented by limited extensions concerning the right to settlement and definitive change of primary state citizenship. Hence, a system of fair circulatory migration would result from temporary limited admissions[770].

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[767] Moses, *International Migration*, Zed Books, New York, 2006, at p. 70.
[768] Marchetti, "Toward a World Migratory Regime", *Indiana Journal of Global Legal Studies* (2008), Vol. 15(2), pp. 471-487, at p. 478. See also Marchetti "Global Citizenship: The Case of Migrants and Residents", *Refugee Watch: A South Asian Journal on Forced Migration* (2009), Vol. 34, pp. 56-68; Bader, "Moral, ethical, and realist dilemmas of transnational governance of migration" *American Behavioral Scientist* (2012), Vol. 56(9), pp 1165-1182 and for a precursor human rights based approach, Jordan and Düvell, *The boundaries of equality and justice*, Polity, Cambridge, 2003.
[769] Marchetti, "Toward a World Migratory Regime", *op. cit.*, at p. 479.
[770] *Ibid.*, at p. 484.

He suggests that a system of burden and benefit-sharing through national quotas should be agreed to set the quantitative criteria for receiving countries and that such quotas should be tradable.

Although professing itself to take a human rights based approach, the human right it envisages is markedly restricted to temporary migration. Although this might well create more political will among states than Seglow's proposal, it fails to take into account in a meaningful manner the preferences of the migrants themselves, who may or may not wish to be confined to a circular migration pattern. Insufficient detail is provided on what criteria might be included in the "impartial weighting mechanism between the claims of migrants and those of local citizens" and so it is impossible to assess this proposal on the 'point of departure' problem. Furthermore, his inclusion of such working principles as the 'most favoured nation' clause suggests that this proposal would be to a certain extent based on the practical functioning of the WTO and the experience of the latter in relation to the movement of persons does not bode well for the successful functioning of the former.

A similar proposal for a global system based on tradable immigration quotas (TIQ) is put forward by Moraga and Rapoport. They confirm that their proposal "may equally apply to temporary, humanitarian or permanent economic migration"[771]. Interestingly, in initially distributing quotas among participating states, the costs to such states are left out of the model. However, the model "can satisfy participation constraints through the manipulation of initial quotas; this requires knowledge about the net cost of migration for all the countries involved, an information which is unknown *ex-ante* (but can be revealed over time through the market)". The tradable aspect of their proposed system is crucial as the aim is to acquire data on the true cost/benefit of migration through the functioning of a market in quotas.

As opposed to Marchetti's proposal however, although the quantitative calculation would be based on a quota system, the qualitative aspect, i.e. the characteristics of the migrants involved, would be determined in accordance with the preferences of the migrants themselves. The system would work in an analogous manner to allocating tenants to houses – the preferences of the receiving state would not be taken into consideration. One of the reasons for this is that given the types of immigration they consider as possible applications for a TIQs system (political refugees, climate change refugees, low-skill immigrants from poor countries), heterogeneity in skills is unlikely to be an issue[772].

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[771] Moraga and Rapoport, "Tradable Immigration Quotas", The Institute for the Study of Labor (IZA), Bonn, Discussion Paper No. 5765 (June 2011), at p. 8.

[772] This approach contrasts with that of Betts, who urges for an approach of "coherent plurilateralism" based on the recognition that one size does not fit all, i.e. that different categories of migrants should be dealt with through different institutions. His approach however fails to afford adequate weight to the preferences of migrants themselves. See Betts (ed), *Global Migration Governance*, Oxford University Press, Oxford, 2011.

Given that the primary function of this proposal is to calculate the real cost/benefit of immigration for each receiving state, this proposal could prove both economically attractive and politically feasible. On a quantitative level, states could use up as much of their quotas as was economically, socially and politically beneficial and trade any remaining quotas. On a qualitative level, migrant's preferences would take precedence. Given that a state could only restrict entry on a quantitative basis and would have to either use or trade its quotas, the starting point would be closer to 'freedom unless you pose a threat', the threat being the surpassing of the capacity of the state to absorb the migrant, demonstrated by trial and error through the manipulation of the quota distribution.

Despite the potential economic gains this system could have for participating receiving states and the flexibility of the manipulated quota distribution and tradable quota systems, political will remains a problem. Furthermore, although closer to a 'freedom unless you pose a threat' starting point, the manipulation of the quota distributions might give participating states sufficient freedom to restrict immigration to a level below the national economic optimum for purely political reasons. The following section suggests that development at the regional level may be more advantageous and practicable.

§3 At the regional level

As an extension of national control, intergovernmental control suffers from the same problems of legitimacy as the former. Supranational control of the cross border movement of people has the primary advantage of an objective view point untainted by national interests. Hollifield captures the advantage of regional supranational control of migration over national control in the following observations:

> the EU, by creating a regional migration regime and a kind of supranational authority to deal with migration and refugee issues, allows the member states to finesse, if not escape, the liberal paradox … In the end, however, it is the nature of the liberal state itself and the degree to which openness is institutionalised and (constitutionally) protected from the "majority of the moment" that will determine whether states will continue to risk trade and migration.
>
> Regional integration reinforces the trading state and acts as a midwife for the migration state[773].

A further advantage of regional over national control relates to the complex but fundamentally transnational nature of the concept of migration itself as found in chapter 1. In order to achieve

[773] Hollifield, "The emerging migration state", in Portes and deWind (eds.), *Rethinking migration: new theoretical and empirical perspectives*, Berghahn Books, New York, 2008 at pp. 80 and 81.

evidence-based decision making and so legitimise migration decisions taken, the grounding evidence itself must be of a transnational nature. Some degree of cooperation between states is thus crucial and regional control of migration can in this way facilitate the systematic gathering and use of cross-border migration data.

(i) The advantages of regional control in the example of the European Union

The EU, as an example of regional control, has several advantages over the national or international measures discussed in the previous sections. First, it has shown signs in recent years of taking the need to obtain cross border migration data increasingly seriously. A number of legislative measures have been adopted recently with a view to improving information gathering and sharing between member states in various areas within the field of migration policy[774].

Alongside legislative measures the CJEU has also demonstrated an increasing concern with evidence-based decision making. In a detailed analysis of recent free movement caselaw of the CJEU, Nic Shuibhne and Maci observe that "the relevance of proof has clearly acquired enhanced significance"[775] most particularly as regards public interest objectives submitted by member states to justify a measure amounting to a *prima facie* obstacle to free movement. The court has held that merely asserting the relevance of a public interest objective or grounding the argument in generalisations will not be enough to meet the required standard of proof[776] and that the evidence submitted to substantiate arguments must be precise[777]. Nic Shuibhne and Maci comment that "the empirical capital of evidence is increasingly invoked to perform a decisive role" in distinguishing between "bald protectionism and sound public interest choices"[778]. A recent opinion of Advocate

[774] Council Decision 2005/267/EC establishing a secure web-based Information and coordination network for the exchange of information on irregular migration, illegal entry and immigration and the return of illegal residents; Council Decision 2006/688/EC establishing a mutual information mechanism concerning measures in the areas of asylum and immigration; Regulation EC 862/2007 on Community statistics on migration and international protection; Council Decision 2008/381/EC establishing the European Migration Network (EMN).

[775] Nic Shuibhne and Maci, "Proving public interest: the growing impact of evidence in free movement case law", *CML Rev.* 50 (2013) 965-1006, at p. 1004.

[776] See for example *Commission v. Portugal*, C-543/08, [2010] ECR I-11241; *Commission v. Poland*, C-165/08, [2009] ECR I-6843; *Commission v. Italy*, C-110/05, [2009] ECR I-519.

[777] See for example *Commission v. Spain*, C-400/08, [2011] ECR I-1915; *Commission v. Italy*, *op. cit.*, *Commission v. Netherlands*, C-542/09; Lindman, C-42/02, [2003] ECR I-13519; *Commission v. Belgium*, C-254/05, [2007] ECR I-10671, *Commission v. Austria*, C-147/03, [2005] ECR I-5969; *Commission v. Luxembourg*, C-319/06, [2008] ECR I-4323; *Criminal proceedings against Greenham and Abel*, C-95/01, [2004] ECR I-1333; *Commission v. Germany*, C-463/01, [2004] ECR I-11705; *Criminal proceedings against Zoni*, C-90/86, [1988] ECR 4285; *Josemans v. Burgemeester van Maastricht*, C-137/09, [2010] ECR I-13019; *Bressol*, C-73/08, [2010] ECR I-2735.

[778] Nic Shuibhne and Maci, "Proving public interest: the growing impact of evidence in free movement case law", *op. cit.*, at pp. 1001-1002.

General Sharpston, later followed by the court[779], makes clear that furthermore there must be a clear causal link between the evidence submitted and the measure adopted:

> Whilst I see no basis for doubting the accuracy of those figures, they obviously say nothing about the existence of an actual or potential risk of an unreasonable financial burden. It is doubtful whether all Germans residing elsewhere in the EU, from babes in arms to old-age pensioners, intend to pursue further studies (and in particular outside Germany). Nor is it evident that those who do intend to be students will all apply to the German authorities for funding. The German Government confirmed at the hearing that it did not have further, more detailed material to put before the Court[780].

A second advantage of the EU as an example of regional control is in its proven track history of trusted cooperation between the member states leading to its present advanced state of development in the field of migration. Chapters 3 and 4 went into some detail in setting out the relevant legislation and caselaw, demonstrating the great strides that have been made in this region. If this progress was still in train, there would be little cause to doubt that European borders would eventually, even if very gradually, open up to all. It would furthermore be hoped that other regions would follow suit laying the foundations for freedom of movement on an inter-regional basis. However, EU member states have in recent times retaliated against this trajectory. Guild observes that:

> by the time of the Seville Council meeting in June 2002 the temperature of the times had changed substantially. In just over two years, the reality of a Community policy on immigration began to conflict with the very different national legislation ... This rush of national legislative activity might be considered somewhat surprising when the Member States had just agreed to communitarise the field and to adopt binding common EU measures instead of national ones ... The addition of the post-11 September 2001 security issues as "immigration related" provided an opportunity for some JHA ministries to put a brake on progress towards the objective of equality at the EU level in favour of exclusion and discrimination in the name of national security[781].

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[779] *Prinz and Seeberger*, Joined cases 523 and 585/11, Judgment of the Court (Third Chamber) of 18th July 2013.

[780] Opinion of Advocate General Sharpston in *Prinz and Seeberger*, *op. cit.*, at paras. 55-56.

[781] Guild, *The legal elements of European identity: EU citizenship and migration law*, Kluwer Law International, The Hague, Boston, 2004 at p. 170. See also Peers, "EU Justice and Home Affairs Law (Non-Civil)", in Craig and de Búrca (ed.s), *The Evolution of EU Law* (2nd ed.), Oxford University Press, Oxford,

She anticipates a continuing struggle between the supranational and intergovernmental elements of the EU in years to come as regards control of immigration and asylum policy: "The struggle for control of the exception in the field of immigration and asylum will be played out at the EU level over the next 15 years. The role of the ECJ will be decisive in determining whether the EU in fact has a consistent immigration and asylum law which provides the same results across the Union or whether nation state sovereignty in the form of exceptionalism in the treatment of foreigners will manage to survive as the rule itself."[782]

It must be clarified here that a state, as discussed in chapter 2, does have a legitimate function in the preservation of security and order within its territory. Measures of force are at its disposal to secure same. Passport controls, security checks, international cooperation in criminal affairs may all be used to gather evidence on individuals who constitute a real threat to security and order and where such evidence exists, a state has a legitimate corollary power to restrict the entry and residence of such individuals into and within its territory. Furthermore, where the sheer volume of potential immigrants is demonstrated by clear evidence to exceed that which a state could realistically absorb, this could amount to a significant threat to security and order and for the same reason, a state could take measures to restrict such flows. An approach which would presume that individuals will not constitute a threat to the security and order of the receiving state would still allow for a rebuttal of this presumption on an evidential basis.

Guild warns that departing from the point that "all individuals are suspect and they only lose that characteristic when they prove themselves individually not to be a threat, leads to blocked borders, affront and offence to individuals, the frustration of good trading and cultural relations and a placing at risk of asylum seekers and refugees"[783]. Internal free movement within the EU has the opposite point of departure whereby a member state must justify any control on movement of persons as an exception to the free movement rule.

A third notable advantage of the EU as an example of regional control is its creative capacity to circumvent the retrogressive forces of the intergovernmental elements as regards the promotion of free movement of people. This is evident in three key mechanisms: enlargement[784] of the EU and, where this has not been possible, neighbourhood policies and other third country agreements[785]. As

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New York, 2011; Schain, "The State Strikes Back: Immigration Policy in the European Union", *The European Journal of International Law*, (2009) Vol.20, no.1, pp.93-109.

[782] Guild, *The legal elements of European identity: EU citizenship and migration law*, *op. cit.*, at p. 184.

[783] *Ibid.* at p. 192.

[784] For more on the effects of enlargement on migration policy see, Moravcsik and Vachudova, "National Interests, State Power, and EU Enlargement", *Perspectives* (2002 – 2003), Vol. 19, pp. 21-31; Favell and Hansen, "Markets against politics: Migration, EU enlargement and the idea of Europe", *Journal of Ethnic and Migration Studies* (2002), Vol. 28(4), pp. 581-601; Sandra Lavenex, "Shifting up and out: The foreign policy of European immigration control", *Western European Politics* (2006), Vol. 29(2), pp. 329-350.

[785] See Dannreuther, "Developing the Alternative to Enlargement: The European Neighbourhood Policy", *European Foreign Affairs Review* (2006), Vol. 11(2), pp. 183–201; Ferrero-Waldner, "Guest Editorial: The

highlighted in chapter 5, this has been possible by reason of the fact that these areas fall within the remit of the foreign affairs ministry, as compared with the areas of asylum and immigration which fall within the mandate of the justice and home affairs ministry. Through these mechanisms, the free movement point of departure has been applied to an increasing number of persons with relative ease, due to the lack of justice and home affairs or nationalist objection:

> Once the concerns of JHA ministries about security have been limited to the very small percent of cases where there is even a potential risk, the vast majority can exercise rights of movement, residence and economic activity without the obstacles and hindrances which have been at the heart of the Schengen system ... The assumption that free movement of persons is among the elements which foster political stability, economic development and the reduction of poverty has proven correct in the EU's enlargements[786].

The next three sections will address how the EU foreign policy tools of enlargement, the neighbourhood policy and other third country agreements have facilitated the increasing application of the 'freedom unless you pose a threat' premise in migration control[787].

(ii) Enlargement

The prime task of the European Community was the completion of the internal market through the abolition of controls on the free movement of goods, services, capital and persons. Internal free movement of persons incorporates a model of immigration under which controls on this movement are *prima facie* inadmissible. Enlargement has been the principal means by which the application of this model has been expanded to cover an increasing number of persons. What is now the EU commenced with six member states in 1957; through seven waves of enlargements[788], the EU now has twenty-eight member states, with a population of approximately 506.8 million people[789]. At each wave, there were concerns in some member states of large-scale immigration from new members, with related anxieties about cheap labour threatening jobs or depressing wages, and

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European Neighbourhood Policy: The EU's Newest Foreign Policy Instrument", *European Foreign Affairs Review* (2006), Vol. 11(2), pp. 139–142.

[786] Guild, *The legal elements of European identity: EU citizenship and migration law*, *op. cit.*, at pp. 192 and 197.

[787] Dummett and Nicol tentatively suggested the adoption of the EC internal market model at the international level (see Dummett and Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law*, *op. cit.*, at p. 280); I advocate here for a more gradual approach to inter-regional, as opposed to international, agreement.

[788] In 1973, Denmark, Ireland and the United Kingdom; in 1981, Greece; in 1986, Spain and Portugal; in 1995, Austria, Finland and Sweden; in 2004, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia; in 2007, Romania and Bulgaria and in 2013, Croatia.

[789] Eurostat, *News Release: EU enlargement on 1 July 2013, Croatia within the EU in figures*, STAT/13/100, 25th June 2013,
[http://europa.eu/rapid/press-release_STAT-13-100_en.htm].

about increased demands on health and social services, or even fears that racial tensions could jeopardise social stability. However, as observed in chapter 6, such fears proved unfounded and many transitional arrangements seeking to stem or temper flows of workers from the new member states were either abandoned before schedule or eventually deemed unnecessary[790].

The supranational body of the EU Commission has continuously made efforts to allay such nationalist fears arguing for example in 2001 that "mass migration is a result of instability — and EU enlargement is a factor for increased stability. It will reduce, not boost, the tendency to largescale population movements.[791]" There are currently five candidate countries for EU accession: Iceland, the Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey[792]. Of these countries, Iceland already has an advanced relationship with the EU in terms of the free movement of persons by virtue of the European Economic Area (EEA) Agreement of 2nd May 1992. This agreement essentially provides for the extension of all policy areas of the single market to Iceland, Liechtenstein and Norway, notably provisions and caselaw relating to the free movement of goods, services, persons and capital[793].

Turkey has also had a privileged status since the signing of the Ankara Agreement on 12th September, 1963 and the Additional Protocol of 31st December, 1977. The resulting Decision No. 1/80 of the Association Council of 19th September, 1980 notably provides at article 6 that a Turkish worker duly registered as belonging to the labour force of a member state is entitled to renewal of his work permit and general access to the labour market of that state after specified periods of time. This right, in addition to the priority clause of article 8, the right to non-discrimination in working conditions of article 10 and the rights of family members of articles 7 and 9 are interpreted expansively by the Court of Justice[794]. This is in line with the fundamental principle set out in article 12 of the Ankara Agreement:

> The contracting parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them.

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[790] O'Leary, "Free movement of persons and services" in Craig and de Búrca (ed.s), *The Evolution of EU Law* (2nd ed.), Oxford University Press, Oxford, New York, 2011 at p. 504.
[791] European Commission, *The European Union: Still Enlarging*, 'Europe on the move' series, Luxembourg: Office for Official Publications on the European Communities, 2001 p. 18.
[792] European Commission, *Economic and Financial Affairs: Acceding and candidate countries*, August, 2013,
[http://ec.europa.eu/economy_finance/international/non_eu/candidate/index_en.htm].
[793] Website of the European Economic Area Agreement,
[http://www.efta.int/eea].
[794] See cases *Birden* (C-1/97) [1998] E.C.R. I-7747, *Nazli* (C-340/97) [2000] E.C.R. I-00957, *Payir* (C-294/06) [2008] I-00203.

This reflects the principle of the progressive achievement of free movement underlying the progress in this sphere achieved to date within what is now the EU. This was set out expressly in article 49 TEC: "as soon as this Treaty enters into force, the Council shall ... issue directives or make regulations setting out the measures required to bring about, by progressive stages, freedom of movement for workers, as defined in Article 48 ...". Following this progressive model, it is likely that continuous development towards greater freedom of movement for workers between the EU and Turkey will be pursued.

(iii) Third country agreements: the European Neighbourhood Policy (ENP)

Beyond special arrangements for candidate countries, agreements with third countries are also drawn up in the context of the European Neighbourhood Policy (ENP). The ENP, developed in 2004, is currently proposed to sixteen of the EU's closest neighbours[795]. While the underlying principles and objectives of the ENP apply to all partners, the EU's relationship with each one of its partners is unique, and the instruments of the ENP are tailored to serve each of those relationships. Association agreements generally set out the fundamental principles of freedom of movement of goods, services and capital. Although not set out as a fundamental principle in itself, the free movement of persons is addressed in various provisions of certain agreements.

A common provision concerning the free movement of persons requires the third state to reaffirm its commitments under the GATS, including, where opted into, those relating to the movement of natural persons in the context of the free movement of services[796]. The right to non-discrimination in employment conditions[797], visa facilitation clauses[798] and readmission of the third state's nationals clauses[799] are also common. Readmission clauses embody the concerns of the security-driven intergovernmental elements of the EU and take away from the otherwise positive impetus of these association agreements towards greater freedom of movement in respect of all four fundamental freedoms. They provide for the expulsion of the nationals of agreeing third countries in simplified procedures. Yet the spirit of such agreements, to be drawn from such phrases as "desirous of facilitating the movement of persons between them"[800] and "with a view to defining

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[795] Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine. See European Union External Action, *European Neighbourhood Policy Overview*, [http://eeas.europa.eu/enp].

[796] See e.g. EU-Algeria Association Agreement 2002, article 33; EU-Egypt Association Agreement 2001, article 29; EU-Israel Association Agreement 1995, article 29 and EU-Lebanon Association Agreement 2002, article 30.

[797] See e.g. article 67 of the EU-Algeria Association Agreement 2002.

[798] *Ibid.*, article 83.

[799] *Ibid.*, article 84.

[800] EU-Algeria Association Agreement 2002, article 83.

areas of mutual interest concerning policies on immigration"[801] suggests a concern for progress towards the greater movement of persons between the EU and such third countries.

The various degrees of advancement with regard to the movement of persons evident in such association agreements reflect the progressive early stages of advancement of the rules of intra-community cross border movement of workers of nationals of the member states. Given the economic advantages of the free movement of persons as outlined in chapter 4 and the political and social stability this has engendered within the EU, a gradual movement towards greater cooperation in the area of legal migration between the EU and third countries would benefit all involved, both member states and individuals. If these association agreements are used as a stepping stone towards this end, there is hope for greater stability in economic markets, with the gradual addition of 'the oft-lamented missing global flow' of labour migration, and political and social affairs. The risk remains however that associations between migration and security concerns and nationalist agendas will stifle this movement and indeed result in a retrogressive movement towards protectionism and intolerance.

(iv) Third country agreements beyond the ENP: bilateralism v. multilateralism

The ENP itself is primarily a bilateral policy between the EU and each partner country. It is complemented by such multilateral cooperation initiatives as the Eastern Partnership[802], the Euro-Mediterranean Partnership (EUROMED, formerly known as the Barcelona Process)[803] and the Black Sea Synergy[804]. Beyond the ENP, the EU has entered a range of bilateral[805] and multilateral

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[801] EU-Israel Association Agreement 1995, article 57.

[802] European Union External Action, Eastern Partnership, initiated in 2009 with Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.
[http://eeas.europa.eu/eastern/index_en.htm].

[803] European Union External Action Service, EUROMED or Union for the Mediterranean (UfM), re-launched in 2008 with 16 Southern Mediterranean, African and Middle Eastern countries: Albania, Algeria, Bosnia and Herzegovina, Croatia, Egypt, Israel, Jordan, Lebanon, Mauritania, Monaco, Montenegro, Morocco, the Palestinian Authority, Syria, Tunisia and Turkey.
[http://www.eeas.europa.eu/euromed/index_en.htm].

[804] European External Action Service, Black Sea Synergy, initiated in 2008 with Moldova, Ukraine, Russia, Georgia, Armenia, Azerbaijan and Turkey
[http://eeas.europa.eu/blacksea/].

[805] Customs cooperation and mutual assistance agreements with the USA (1997 and 2004), India (2004) and Canada (1997).
Readmission agreements with Pakistan (2009), Moldova (2007), Bosnia and Herzegovina, the Republic of Montenegro, Serbia, the Former Yugoslav Republic of Macedonia (2007), Ukraine (2007), the Russian Federation (2006), Albania (2005), the Democratic Socialist Republic of Sri Lanka (2004), the Macao Special Administrative Region of the People's Republic of China (2003) and the Government of the Hong Kong Special Administrative Region of the People's Republic of China (2002).
Facilitation of the issuance of visa agreements with the Federative Republic of Brazil (2010), Georgia (2010), Antigua and Barbuda, Barbados, the Commonwealth of the Bahamas, the Federation of Saint Kitts and Nevis, the Republic of Mauritius, the Republic of Seychelles (2009), Moldova (2007), Bosnia and Herzegovina, the Republic of Montenegro, the Republic of Serbia, the Former Yugoslav Republic of Macedonia (2007), Ukraine (2007), the Russian Federation (May 2006), the Republic of Albania (2007).

agreements[806] with third countries, which touch or have the potential to touch upon aspects of the movement of persons.

Colombo and Abdelkhaliq analyse the EU's migration policy in respect of third countries in the Mediterranean and find that for reasons of fundamental internal disagreements within the EU member states on which policies to take, there has been only limited success in attempts to establish multilateral agreements relating to this subject. Where internal agreement has been reached, this has primarily been of a restrictive nature:

> the success of the multilateral aspirations of the EU for tackling migration depends on the kinds of policies and the level at which these are pursued. Member states are more amenable to pursuing multilateral initiatives both internally and externally on restrictive measures, and more likely to cooperate with one another. The Commission, on the other hand, seems keen to pursue multilateral initiatives at both levels and on both kinds of policies [restrictive and positive migration management]. This mismatch in priorities and visions translates into a mixed implementation picture with the Mediterranean ... patchy arrangements whereby migration concerns are tackled through bilateral initiatives, and in conjunction with a range of organisations[807].

This analysis makes reference to the argument made in the first section of this chapter that there is a distinctive difference between the often regressive approach of intergovernmental elements of the EU and that of the supranational elements, here the Commission, which has the advantage of an objective view of such issues as migration, untainted by national interests.

A review of Europe's migration agreements on a broader scale with the main migrant-sending countries of the global south is offered by Adepoju, van Noorloos and Zoomers[808]. They trace a number of negative aspects of such agreements from the externalisation of asylum procedures, to a lack of transparency, to cherry picking on legal migration to a disproportionate emphasis on control and readmission measures and state:

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[806] Interim Agreement with a view to an Economic Partnership Agreement (EPA) with certain SADC members (2009); EPA with certain CARIFORUM states (2008); Political Dialogue and Cooperation Agreement (PDCA) with the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama (2003); PDCA with the Andean Community (2003); Interregional Framework Cooperation Agreement with Mercosur (1995); Cooperation Agreement with the countries parties to the Charter of the Cooperation Council for the Arab States of the Gulf (1988); Cooperation Agreement with ASEAN (1980).

[807] Colombo and Abdelkhaliq, *The European Union and Multilateralism in the Mediterranean: Energy and Migration Policy*, Mercury, E-paper No. 18, January 2012, at p. 23.

[808] Adepoju, van Noorloos and Zoomers, "Europe's Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review", International Migration, Vol. 48(3) 2010, pp. 42-75.

> Whereas migration agreements have simultaneously become more collaborative and inclusive or ''global'', we also conclude that most migration agreements continue, primarily, to reflect the agenda of the EU and that they serve mainly to control and preferably limit migration. Benefits of these agreements to the southern partners, such as increased levels of development aid seldom reflect a fundamental interest to eradicate poverty, but rather serve to legitimise the implementation of policy measures that constrain migration. Hence migration-related agreements that would truly serve the interests of both the southern and northern partners are called for. In such agreements, countries of the South, especially African countries, may need to form a common agenda of interests to offset the agenda of the EU[809].

An example of how the interests of EU member states override those of third countries is the use of corresponding readmission – visa agreements. If the list of bilateral agreements between the EU and third countries is analysed, it can be seen that a great number of these corresponding agreements exist. The incentive to third countries to enter into readmission agreements was primarily the promise that they would only be taken off the mandatory visa list if they did so. While this might seem on its face like a fair compromise, Guild observes that only third countries located some distance from the EU are happy to enter readmission agreements as the expense of putting them to use is a sufficient safeguard against overuse. "The neighbours, however, seem much less keen to enter into these agreements as the temptation for the EU Member States to use them as dumping grounds for unwanted third country nationals is clearly substantial[810]. Measures as regards the control of the common border appear to be linked specifically with the perspective of illegal immigration and the control of third country nationals in light of this threat"[811].

Movements, however slow, towards the construction of a common agenda among countries of the South are identified by Adepoju, van Noorloos and Zoomers. Agreements formed with the EU can however scupper opportunities to achieve regional consensus on shared interests:

> Many regional southern economic communities or other kinds of regional integration programmes are developing policies for the free movement of their citizens within these communities. However, in view of the conflicting interests and difficult decision-making processes which accompany the formation of these communities, it is not surprising that a true free movement has not yet materialised in most of them … On the other hand, European initiatives and agreements which aim at controlling

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[809] *Ibid.*, p. 67.

[810] This is also apparent in the proposal by the UK Government in May 2002 to move asylum seekers from the UK to camps in countries neighbouring the EU for processing of their asylum claims.

[811] Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law*, The Hague, Boston: Kluwer International Law, 2004, at p. 197.

> African borders are impeding free circulation and good bilateral relations between those countries[812].

Moving forward, Adepoju, van Noorloos and Zoomers urge southern countries to join together on a regional basis, decide upon their collective interests and build up their negotiating leverage against the at present dominant power of the EU. They emphasise however that this will call "for a strong commitment of the governments of neighbouring countries to forsake possibly conflicting national interests for the benefit of the entire region"[813]. Examples of southern country specific interests that are not yet sufficiently covered in migration agreements include the socio-economic rights of irregular migrants[814] and provisions to amend currently unfair trade regimes. Furthermore, they argue that if a division between development aid and migration control is not made:

> patron-client relationships will arise between the EU and specific countries of the global South based on the threat of migrant numbers rather than on common goals to achieve sustainable, profitable economic relationships. Indeed, relationships may be achieved at the expense of those developing countries which are poorest and most vulnerable yet do not pose a migration ''threat'' to the EU[815].

The various stages of development of regional regimes with a free movement aspect were examined in chapter 4. Although those regimes comprised mainly of developing countries face considerable obstacles in the form of systemic weaknesses and lack of political will, it is believed that the attraction of the facilitation of greater participation in the global economy will ensure their continued development. Furthermore, an increasing focus on the social dimension of integration processes alongside that of a pure economic approach gives rise to a more solid foundation for economic development for reasons set out in the chapter 5 discussion of the concept of "rights based economic progress". It is vital that developing countries continue to develop their regimes in this manner in order to have their own interests protected and to be able to approach negotiations for inter-regional cooperation on an equal playing field.

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[812] Adepoju, van Noorloos and Zoomers, "Europe's Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review", *op. cit.*, at p. 66.
[813] *Ibid.*, p. 69.
[814] Calls have already been made by international organisations for the inclusion of provisions protecting the specific interests of sending countries in migration agreements, see for example Organisation for Security and Co-operation in Europe, International Organisation for Migration, International Labour Office, *Handbook on establishing effective labour migration policies, Mediterranean edition*, 2007 at p. 135, notably on the importance of post admission policies.
[815] Adepoju, van Noorloos and Zoomers, "Europe's Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review", *op. cit.*, at p. 69.

(v) Distinguishing EU foreign policy from immigration policy per se

It must be reiterated that the above developments in enlargement, the neighbourhood policy and third country agreements belong to the domain of EU foreign policy, directed by the foreign ministries of the member states. In this sphere, the potential advantages for both sending and receiving countries are voiced to a greater degree through diplomatic negotiations than in the comparatively closed sphere of the justice and home affairs immigration policies. Developments in the latter sphere as regards the movement within the territory of the EU of third country nationals were traced in chapters 3 and 4.

These developments in the internal immigration policy of the EU can be criticised for their almost exclusive focus on skilled as opposed to unskilled workers, given the blurred lines between these adjectives and the patent need for the latter in the economies of developed countries as discussed in the global free market economy section of chapter 4. This is apart from the Directive on seasonal workers, which instead has the downfall of confining itself to circular migration. There is however cause for optimism for the future, if the Commission can manage to sway the intergovernmentalist elements of the EU. The liberal views of the Commission are succinctly captured in the following extract of its communication on a wider Europe:

> As is clear from the EU's own enlargement, the most effective way to deal with illegal immigration is to provide those individuals who might become illegal immigrants in search of their personal or family needs with the possibilities in law to be legal migrants ... The widening of the legal content of the term illegal migration only has the effect of pushing more people into that category. The narrowing of the category has the opposite effect. Emphasising a large scope for the concept of illegal migrant is de-stabilising for legal migrants who fear they may suddenly find themselves re-categorised as illegal. Promoting and encouraging expulsion of individuals as illegal migrants is humiliating for the citizens and their home states. These are not policies which lead to stability and security in any region[816].

Touching on this distinction between foreign policy and immigration policy *per se*, Guild is of the view that "the future of EU immigration law seems as much bound up in the external policies of the EU as with the policies being pursued in the context of justice and home affairs"[817]. If a supranational basis is to be preferred to an intergovernmental one for the reasons discussed above, so too is inter-regional cooperation in the sphere of external policy to be preferred over the comparatively closed and restrictive views of the internal justice and home affairs immigration

[816] European Commission Communication COM (2003) 104 final, at p. 197.

policies. Guild's conclusion is telling in how it captures the constant interplay between these two sets of powers:

> Even where the Commission proposes legislation which would enhance the position of third country nationals lawfully in the Union, the negotiations in the Council result in a lowering of standards which is then justified on the ground that these are just minimum standards thus maintaining the space for higher standards at the national level ... The JHA Council's insistence on expulsion and readmission agreements has knock-on effects on policy fields dominated by an integrationalist vision of the EU. In the neighbourhood policy it undermines objectives of expanding integration by indicating to surrounding countries that they are not really part of the project. Instead, they are responsible for illegal immigration, rather than on the way to free movement of persons[818].

From the perspective of the EU, in order to achieve a balanced migration policy, taking into account the interests of both sending and receiving countries, and therefore one with a solid foundation, the foreign policy ministry should take the lead. Not only is this service more exposed to the needs of third countries and the advantages they have to offer to the EU, it also has the benefit of the support of a mixed international / supranational composition European External Action Service (EEAS)[819].

(vi) Moving towards greater inter-regional cooperation

In order to move towards true inter-regional cooperation, third countries themselves must step up to the mark and must not be hindered in their efforts to do so. The creation of regional entities is promising in this respect and inter-regional agreements as opposed to bilateral EU-single third country agreements[820] would facilitate each side in coming to the table with equal bargaining power.

The emergence of regional consultative processes (RCPs) on migration in the mid to late 1990s has led to some positive developments in this regard[821]. These are inter-state informal gatherings for

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[817] Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law*, *op. cit.*, see the introduction to chapter 10.
[818] *Ibid.*, at p. 199.
[819] This new service was established by the Lisbon Treaty and the merger of the Commission and Council foreign policy departments came into effect on the 1st January 2011. Although it can propose and implement policy, it cannot legislate as this role remains with the Foreign Affairs Council.
[820] For criticism of unequal practices in the drafting of bilateral migration agreements, see GCIM Report 2005, at paras. 25 and 26.
[821] For a detailed analysis of the development of RCPs, see Nielsen, "Cooperation Mechanisms", in Cholewinski, Perruchoud and MacDonald (eds.), *International Migration Law: developing paradigms and key challenges*, T.M.C. Asser Press, the Hague, 2007.

addressing migration-related issues, which have three main characteristics distinguishing them from classic regional or international institutions: "(1) informality – they are a process, not an institution, meaning that working toward an eventual goal is an important aspect of the process; (2) openness – since agreement on all issues is not required all options can be explored openly, thus increasing the number of possible solutions to issues; (3) efficiency – since there is a minimum administration, direct communication is easily possible between high level officials and experts in regional consultative processes".[822] The shared language that has developed[823], and the recognition that today most states are simultaneously countries of origin, transit and destination to varying degrees, has helped pave the way for subsequent successful global fora for migration talks, most ambitiously the Berne Initiative, 2001-2005, the Global Commission on International Migration (GCIM), 2003-2005 and by the Global Forum on Migration and Development (GFMD) first hosted in 2006 by the UN General Assembly.

In 2010, the IOM commissioned an assessment report on the principal RCPs on migration[824]. This report examined the experience of fourteen RCPs[825] and observed that the main advantages of these processes were the building of trust between state participants through informal, regular and confidential meetings, the establishment of a greater understanding of the concept of migration through data gathering and publication, the establishment of common regional positions through the breaking down of both national and departmental divides and capacity building.

These informal arrangements have had significant input into the more formal processes of migration policy cooperation in existence. Hansen gives two notable examples: first, meetings of the IGC, which ran parallel to and were attended by many of the same states that participated in the EU's efforts to harmonize asylum policies and practices in 1986, facilitated the coordination of EU asylum policy; second, the Budapest Process contributed to the signature and ratification by its members of the UN Convention against Transnational Organized Crime and the Palermo Protocols

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[822] Klekowski von Koppenfels, *The Role of Regional Consultative Processes in Managing International Migration*, IOM Migration Research Series 3, Geneva, 2001, at p. 9.

[823] Through the use of such tools as common glossaries, data collection methods and migration databases.

[824] Randall Hansen, *An assessment of principal regional consultative processes on migration*, IOM Migration research series no. 38, 2010.

[825] The Budapest Process (1991-93), the Cross-Border Cooperation Process (Söderköping Process, 2001), the Regional Conference on Migration (RCM, Puebla Process, 1996), the South American Conference on Migration (SACM, Lima Process, 1999), the Regional Ministerial Conference on Migration in the Western Mediterranean (5 + 5 Dialogue, 1990), the Mediterranean Transit Migration Dialogue (MTM, 2002), the Migration Dialogue for West Africa (MIDWA, 2001), the Migration Dialogue for Southern Africa (MIDSA, 2000), the Intergovernmental Authority on Development Regional Consultative Process on Migration (IGAD-RCP, 2008), the Intergovernmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC, 1996), the Ministerial Consultations on Overseas Employment and Contractual Labour for Countries of Origin in Asia (Colombo Process, 2003), the Ministerial Consultations on Overseas Employment and Contractual Labour for Countries of Origin and Destination in Asia (Abu Dhabi Dialogue, 2008), the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process, 2002) and the Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC, 1984).

on Trafficking in Human Beings and Smuggling of Migrants[826]. The continuing symbiotic relationship between formal and informal fora relating to migration policy is suggested in his expectation that "the results of the Ministerial Conference 'Building Migration Partnerships' organized by the Czech Republic during its EU presidency will have an important impact on the work of the Budapest Process"[827]. If developing countries can build up their formal regional structures by using these informal arrangements as a stepping stone, formal inter-regionalism based on equality between regions may yet prove itself to be within the realm of the possible for the future.

Despite the advantages and advances made by RCPs, certain significant weaknesses are identified in the 2010 report. These suggest that a move to a more formal structure in the future would be preferable[828]. The report notes that initially, restrictive migration control tended to be their main concern. While more recently there has been an increased focus on human rights, this is more notable in RCPs with a primarily developing country composition. Developed countries are entirely absent from the examples provided, perhaps because their focus on human rights takes a more formal footing or perhaps simply because they remain focused on restrictive measures. The report becomes more explicit about the weaknesses of RCPs in the following passage:

> RCPs are, of course, not without their problems. Although their focus has expanded, as argued, well beyond an exclusive interest in border control, they have generally found it easier to agree on enforcement issues than others. This might possibly be because controlling borders is the activity that produces the most "natural" contact and interaction between states. By contrast, many other aspects of migration (those touching on labour markets or integration, for instance), are considered to be internal matters. States may not regard these areas as appropriate or even necessary subjects for bilateral, much less regional, international exchanges. It might also be that there is a tension between the goals of keeping the RCP small (in order to build trust, break down barriers, and build consensus) and ensuring that more voices, including critical ones, are heard. Relatively few RCPs involve NGOs, and those that do generally restrict their access[829].

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[826] Randall Hansen, *An assessment of principal regional consultative processes on migration*, *op. cit.*, at p. 29.

[827] *Ibid.*, at p. 75. For the further problem of blind convergence between old and newer RCPs, see Thouez and Channac, "Shaping international migration policy: the role of regional consultative processes", *West European Politics*, (2006), Vol. 29(2), pp. 370-387.

[828] Betts argues that while 'informal network governance' is not desirable, 'formal multilateral governance' is unlikely. Thus, he suggests a third possibility, the evolution of global migration governance toward what he calls 'coherent plurilateralism'. This however fails to appreciate the potential value of the use of informal arrangements as a stepping stone to more formal structures. See Betts (ed), *Global Migration Governance*, Oxford University Press, Oxford, 2011 at p. 321.

[829] Randall Hansen, *An assessment of principal regional consultative processes on migration*, *op. cit.*, at p. 44.

Thus national interests[830], even in this informal arena, are curtailing meaningful and inclusive discussions on important issues such as labour migration and migrant rights, which this thesis submits are fundamentally transnational issues. Again nationalist and intergovernmental perspectives are impeding advances that may well prove advantageous for all participating states, both sending and receiving. Some cause for optimism can be seen in the current priorities of the Budapest Process. Since Turkey took over the Chair in 2006, the stated priorities include, in addition to the traditional areas of interest for the Budapest Process (return and readmission, border management and asylum), an increased focus on areas of particular interest to sending countries such as legal migration and mobility, the integration of migrants and counteracting phenomena of discrimination, racism and xenophobia and strengthening the positive impact of migration on development, both in countries of origin and of destination[831].

The IOM facilitates periodic global meetings between RCPs. Most recently, the Fourth Global RCP Meeting, hosted by the Government of Peru took place in Lima from 22-24 May 2013[832]. The meeting focused on the theme of "Defining the Place of RCPs in a Changing International Migration Landscape" and drew participation from more than sixty representatives of chairing governments and secretariats of RCPs. Ideally, this could act as a stepping stone towards more formal inter-regional cooperation.

Conclusion

Following from the submission in chapter 5 that the present level of state migration controls on a 'control unless we want you' basis is illegitimate and from the many obstacles a state faces in endeavouring to legitimise this control as outlined in chapter 6, this chapter has considered possible options in moving forward towards greater legitimacy in migration control. The chapter progressed from measures at the national level, to measures of an international nature at the global level to supranational measures at a regional level, suggesting that the latter options would be most advantageous in the long-term.

At the national level, it was suggested that the state could improve its knowledge base by using the findings of an independent advisory body or working directly with interested private actors in

[830] Düvell argues that it is furthermore the national interests of the more dominant developed states that tend to be addressed in RCPs: Düvell, "Irregular migration", in Betts (ed), Global Migration Governance, Oxford University Press, Oxford, 2011, pp. 78-108, at p. 87.
[831] See the *Istanbul Ministerial Declaration on a Silk Routes Partnership for Migration*, Budapest Process, 5th Ministerial Conference, 19th April 2013,
[https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Istanbul-Ministerial-Declaration-on-A-Silk-Routes-Partnership-for-Migration-en.pdf].
[832] IOM website, "2013 Global RCP meeting",
[http://www.iom.int/cms/2013-global-rcp-meeting].

formulating and implementing migration policy. This would have to be done on a transparent basis and the migration control measures taken justified in light of the evidence obtained in order for the legitimacy of such measures to be improved. However, previous experience has demonstrated that the conflicting political and economic interests of the state tend to override such efforts at legitimisation and for this reason a move beyond the individual state is necessary. There also remains the problem at the national level of incomplete data confined to a national perspective on the inherently cross-border phenomenon of international migration. Finally, the role of national courts in ensuring that states legitimise their migration control measures on an evidential basis was emphasised.

Two possible, albeit interlinked, approaches were suggested for international measures at the global level: an economic approach and a human rights based approach. Three existing organisations were assessed as candidates for the role of global agency for economic migration. The IOM was found to be ill-suited for the role given Georgi's insights into the functioning of this organisation. Primarily due to the mechanics by which it is funded, it has come to be very much at the helm of hegemonic forces and the concrete measures it takes tend to be in the interests of funding states rather than migrants themselves, receiving or sending states. Bhagwati's proposal for a WMO based on the functioning of the WTO was also assessed. On closer examination of the latter however, it was clear that an impasse had been reached in international negotiations on the development of Mode 4 of the GATS towards freer movement of natural persons for the provision of services. A lack of political will on the part of developed countries to agree to amendments of Mode 4 in the interests of developing states in order to achieve greater equality in international trade remains. There are furthermore no signs that this is going to change in the near future, which renders movement towards a WMO all the more unlikely. The ILO is also briefly mentioned as a candidate, but Charnovitz observes that this organisation focuses less on the international movement of workers than on their treatment once residing in the host state and for that reason is ill-adapted to act as a global agency for economic migration.

A discussion on a human rights based approach commenced with Seglow's proposal for an international system of migration control as a means to achieve social justice. This would entail a system of quotas of which the quantitative and qualitative limitations would be determined by fair criteria. The principal problem with this approach is that it denies migrants the right to pursue their own migration choices and allows states retain general control on a 'control unless we want you' basis. Marchetti takes a cosmopolitan approach setting out how a human right to movement could be assured. Given that this would entail the distribution of the scarce good of residence, his proposal is that this would be by way of temporally distributed parts. In other words, migrants would in reality only have the right to temporary migration, with possibilities of extending this as states saw fit. This again fails to afford migrants the right to make their own migration decisions

and it is not clear whether or not it would entail a move to the 'freedom unless you pose a threat' point of departure. The final proposal discussed was that of Moraga and Rapoport for a global system based on tradable immigration quotas. The aim of this system would be to acquire data on the true cost/benefit of migration through the functioning of a market in quotas. Although the quantitative calculation would be based on a quota system, the qualitative aspect would be determined in accordance with the preferences of the migrants themselves. As such this proposal was deemed to be superior to the former two in taking into account migrant preferences. A lack of political will among states to pursue such a course led to the conclusion that a supranational route at the regional level would prove the most advantageous in the long-term.

The EU was considered as a particularly advanced example of regional control. Several aspects of this entity serve to address the problem of a lack of legitimacy in state migration control measures: first, the movement towards requiring transnational migration data in order to justify state migration control measures, second, its proven track history of trusted cooperation between its member states leading to its present advanced state of development in the field of migration and third, the creative capacity of its supranational elements in circumventing the retrogressive forces of the intergovernmental elements as regards the promotion of free movement of people. The EU has used three principal means to broaden the personal scope of the 'freedom unless you pose a threat' point of departure, a fundamental principle of its internal market: first, through enlargement of the EU itself, second, through the ENP and third, through bilateral and multilateral agreements with third countries beyond the ENP.

Given the advanced nature of the EU, it is very difficult for third countries to negotiate terms of migration agreements in their own interest. This is why it was concluded that multilateral agreements between the EU and other regions are preferable to bilateral agreements between the EU and individual third countries as the former facilitate developing countries in coming together as a region in order to protect their collective interests with a view to coming to the negotiating table on an equal playing field with the EU. It was further contended that the foreign policy ministry of the EU is better suited to working towards a balanced migration policy, taking into account the interests of both sending and receiving countries, than its justice and home affairs counterpart. The final section looked into how countries in various regions, notably developing countries, are endeavouring to establish regional cooperation through the use of informal RCPs. Inter-regional meetings between RCPs are currently being facilitated by the IOM. In order to move towards inter-regional cooperation on a more formal and equal basis, third countries themselves must step up to the mark and crucially must not be hindered in their efforts to do so.

Conclusion

"The proposition that states have an absolute right to deny territorial access to all aliens has unusual resilience and resonance, but little historical or jurisprudential foundation"[833].

The basic premise that states have an absolute discretion to control migration across their territorial borders has become ossified to such an extent as to render its questioning controversial. Yet the more one delves into the theory of the state and the relatively recent history of state migration control measures, the more the foundations of this premise seem to give way. This has been the primary exercise of this thesis. Three principal research questions were posed: first, can early state measures of migration control support the legitimacy of current such measures of a more general and systematic nature on a traditional basis? Secondly, can current state migration control measures of a general and systematic nature be legitimised on a rational-legal basis? Thirdly, are there any steps states could take with a view to improving the legitimacy of migration control measures?

Before addressing these questions, foundations were laid in examining the role of the state on a general level. It was recalled that the state is a social construct established for the general role of ensuring efficient societal order. Relying on Weber's theories of traditional and rational-legal legitimacy[834], it was demonstrated that the state has a traditionally legitimate function in controlling the membership of its citizenry and in protecting its population from threats to public security, order and health. Beyond this, the state must legitimise any measures it takes as legitimate on a rational-legal basis, that is in demonstrating on a minimum evidential basis that the measure in question is in furtherance of the common good.

Moving on to consider the role of the state in migration control, it was found that a key distinction between the control of membership of the state through citizenship and naturalisation laws and the control of movement of people across territorial borders is often conflated. The former was a function of the state dating from approximately the 13th century. The latter however had only been used until very recently on a transient and reactive basis in order to protect the legitimate interests of the state of public security, order and health. The initial point of departure in migration control was thus 'freedom unless you pose a threat'. The turning point to general and systematic state control of migration is of much more recent origin dating from the end of the 19th century and departs from the premise of 'control unless we want you'[835].

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[833] Nafziger, "The general admission of aliens under international law", *American Journal of International Law* (1983), Vol. 77, pp. 804-847, at p. 845.
[834] Weber, *Economy and Society: An Outline of Interpretive Sociology*, Roth and Wittich (ed.s), University of California Press, Los Angeles and London, 1978.
[835] The turning points are captured in the British Aliens Act 1905 and the *Chinese Exclusion* case of the U.S. Supreme Court of 13th May 1889. See generally chapter 3.

With very little contemporaneous or indeed subsequent academic analysis as to the legitimacy of this turning point, it was demonstrated that given the very recent origins of this approach which was in part influenced by racial theory, there is little foundation to grounding its legitimacy on a traditional basis. A circularity in the arguments for traditional legitimacy between international and national law was also identified: international publicists have resigned migration control to the sphere of domestic jurisdiction, whereas national and regional courts often base the legitimacy of state control of migration on the fact that it is 'a matter of well-established international law'. At present, customary international law does not govern migration and so cannot be used as a basis for the legitimacy of migration control measures.

Given this misplaced reliance on international law as a basis for the traditional legitimacy of state migration control measures, there is very little evidence of any attempts to justify such control on a rational-legal basis. It was demonstrated that for two principal reasons this control cannot at present be justified on this basis. First, although efforts have been made to promote interdisciplinary research in the field of migration[836] and, parallel to this, to improve the reliability of international migration data[837], much remains to be done to improve our understanding of this concept. In light of its fundamentally cross-border nature, whether our understanding can be pushed further depends on the extent to which states are willing to cooperate in the collection and processing of migration data on the basis of common definitions and methods. Given that reliable data is crucial to the capacity of states to be able to justify migration control measures on an evidential basis, such cooperation is preliminary to any efforts to improve the legitimacy of migration control measures on a rational-legal basis.

Secondly, the incoherence between policies of migration control and other state policies in the fields of human rights and economic policy renders the former far from rational, but in fact irrational. Empirical evidence of such incoherence was traced up to the level of the EU as an example, where conflicts between the intergovernmental arms of the EU as proponents for greater control come into conflict with wider interests of human rights and the economy voiced by the supranational arms[838].

The thesis then demonstrated that even on the assumption that states could, with more effort, legitimise their migration control measures on a rational-legal basis, they face a number of obstacles in pursuing this exercise. First, a number of examples were set out of migration policies

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[836] Brettell and Hollifield (eds.), Migration Theory: Talking across disciplines (2nd ed.), Routledge, New York, 2008; Maloney and Korinek (eds.), Migration in the 21st Century: Rights, Outcomes, and Policy, Routledge, London and New York, 2011; Arcarazo and Wiesbrock (eds.), *Global Migration: Old assumptions, new dynamics*, Praeger, Santa Barbara, 2015.

[837] See the efforts of the UN Statistics Division, the ILO, the World Bank and the OECD as set out in chapter 1.

[838] See chapter 5 §3(ii) on irrationality.

failing to achieve the intended objective, which suggest that by reason of forces beyond their control, states lack the capacity to effectively control the movement of people. Furthermore, it was found to be far from evident that the financial and human costs of such policies outweigh the anticipated objectives[839].

Secondly, the competing political interests that states must balance constitutes a considerable obstacle to any exercise of legitimisation[840]. Due to the negative connotations created by associations between immigration and such political problems as crime, security and economic recession, the general public tends to be wary of any policies which aim to weaken controls on immigration. States are however aware of the necessity in maintaining a certain degree of immigration for both economic and demographic reasons and the process of 'client politics'[841] tends to ensure that borders remain open to varying degrees. How politicians can satisfy both stakeholders in the 'client' category and the general public is perhaps the greatest obstacle the state must face.

Thirdly, the competing economic interests of a state further impede efforts to justify migration control measures on an evidential basis[842]. There has been consistent political will on the part of the international community to remain liberal in respect of the free movement of goods, capital and increasingly other areas such as intellectual property and information. Labour remains the 'oft-lamented missing global flow'[843] and until this imbalance is rectified, global economic markets will not work as they should.

The final research question as to what steps states could take with a view to improving the legitimacy of migration control measures was addressed in the final instance. Measures at the national, international and regional levels were considered, with a suggestion that the latter would be the most advantageous in the long-term. At the national level[844], it was suggested that the state could improve its knowledge base by using the findings of an independent advisory body or working directly with interested private actors in formulating and implementing migration policy. The role of national courts in ensuring that states legitimise their migration control measures on an evidential basis were also considered. The advantages and disadvantages of such steps were set out, but ultimately because of the inherently cross-border nature of international migration, it was

[839] See chapter 6 §1 on technical incapacity.
[840] See chapter 6 §2 on competing political interests.
[841] Massey, "International migration at the dawn of the twenty-first century: the role of the state", *Population and Development Review*, Vol. 25, No. 2 (1999), pp. 303-322, at p. 312. See also Freeman, "Client politics or populism? Immigration reform in the United States", in Guiraudon and Joppke (eds.), *Controlling a new migration world*, Routledge, London and New York, 2001, pp. 65-96.
[842] See chapter 6 §3 on the economic free market parallel.
[843] Martin, "Migrants in the Global Labour Market", Paper submitted to the Global Commission on International Migration, September 2005, at p. 2.
[844] See chapter 7 §1.

contended that steps at the international level were to be preferred.

At the international level[845], two possible, albeit interlinked, approaches were suggested: an economic approach and a human rights based approach. First, three existing organisations were assessed as candidates for the role of global agency for economic migration, the IOM, a WMO based on the functioning of the WTO and the ILO. Due to problems of sources of funding and power relations within these organisations it was ultimately determined that insufficient political will in the international community existed to transform any of the candidates into a veritable global agency for economic migration. Secondly, three different proposals for a human rights based system for international migration control were considered: Seglow's system of quotas based on fair criteria[846], Marchetti's cosmopolitan approach based on the fair distribution of the good of residence[847] and Moraga and Rapoport's system of tradable immigration quotas comprising migrant preferences[848]. Although the latter was deemed superior to the other proposals, once more a lack of political will among states to pursue such a course led to the conclusion that a supranational route at the regional level would prove the most advantageous in the long-term.

At the regional level[849], the EU was considered as a particularly advanced example of regional migration control and several of its characteristics were identified as particularly effective in addressing the lack of legitimacy of state migration control measures. Most notably, the EU has used three principal means to broaden the personal scope of the 'freedom unless you pose a threat' point of departure, a fundamental principle of its internal market: through enlargement of the EU itself, through the ENP and through bilateral and multilateral agreements with third countries beyond the ENP. As regards this third mechanism, although of significant merit, given the powerful position of the EU, it is very difficult for third countries to negotiate terms of migration agreements in their own interest. For this reason, it was concluded that multilateral agreements between the EU and other regions acting together in their collective interest are preferable to bilateral agreements between the EU and individual third countries. Given its direct negotiating position with third countries and generally broader outlook, it was contended that the foreign policy ministry of the EU is better suited to working towards a balanced migration policy, taking into account the interests of both sending and receiving countries, than its justice and home affairs counterpart. As a stepping stone towards more formal inter-regional cooperation, the widespread use of informal RCPs was found to be an encouraging development. Ultimately, in order to move towards formal inter-regional cooperation on the basis of equality between regions, third countries themselves must

[845] See chapter 7 §2.
[846] Seglow, "Immigration justice and borders: towards a global agreement", *Contemporary Politics*, Vol. 12, No. 3–4, (September–December 2006).
[847] Marchetti, "Toward a World Migratory Regime", *Indiana Journal of Global Legal Studies* (2008), Vol. 15(2), pp. 471-487.
[848] Moraga and Rapoport, "Tradable Immigration Quotas", The Institute for the Study of Labor (IZA), Bonn, Discussion Paper No. 5765 (June 2011).

step up to the mark and crucially must not be hindered in their efforts to do so. It is conceivable that this equality would lend itself to respectful cross-regional judicial dialogue, but envisaged that an international dispute resolution body or jurisdiction could assist in resolving irreconcilable differences on inter-regional agreements.

This thesis does not deny that a state has the legitimate function of protecting such interests as security, order and health within its territory. Border controls and data collection may be used to gather evidence on individuals who pose a real threat to these interests and where such evidence exists, a state has a legitimate corollary power to restrict the entry and residence of such individuals into and within its territory. A threat to such interests could take the form of large-scale immigration where it is demonstrated by clear evidence that the anticipated volume of immigrants would exceed that which a state could realistically absorb. Starting from the premise that immigrants would not constitute such a threat would still allow for a rebuttal of this presumption on an evidential basis. Furthermore, this thesis does not go so far as to claim that a human right to free movement should be recognised. It confines itself to contending that in order for states to legitimise their measures of migration control, they must take some action towards improving their evidential base on the concept of migration or returning the point of departure to 'freedom unless you pose a threat'.

Although beyond the scope of this thesis, some tangential issues to the above research questions merited comment. Global justice and ethics arguments as regards migration control are important and merit in depth consideration in their own right. In taking a legal positivist approach inquiring as to the legitimacy of state laws on migration control, this thesis removes itself from the direct confines of such issues. They are however briefly considered in the context of discussions on the global free economic market and proposals for a human rights based approach to international cooperation on migration control. Furthermore, focus is placed on the control of the movement of people across territorial borders and as such the associated yet distinct question of the state's role in determining the membership of its citizenry falls beyond its scope. The questions of the extent to which civil, social and economic rights should be afforded to immigrants by host states and in what circumstances they should be granted political membership of the state as naturalised citizens are however briefly considered.

The proposition that states have an absolute discretion to control migration across territorial borders, although abstract and to a great degree weakened by obligations taken on by states to allow entry of such categories of persons as refugees, family members of resident and highly skilled persons, remains instrumental in tainting our perceptions of both migrants and the role of the state in this field. Starting from the premise of 'control unless we want you' places migrants in

[849] See chapter 7 §3.

the *prima facie* undesirable category of 'the other' before the question of their permitted movement is even examined. The role of the state on the other hand has moved great strides beyond the protection of the order, security and health of its population to determining what people are best to have as part of this population according to the government's own ideals and crucially without the legitimacy of a transparent and evidential basis. It is hoped that this thesis will serve to simply trigger a questioning of this now entrenched proposition, as this is the first hurdle that must be overcome before any veritable steps can be taken towards a more balanced global migration system in the interests of all concerned.

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