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Common market, normative power or super-state? Conflicting political identities in EU asylum and immigration policy

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Abstract

Drawing an analogy to the role of immigration policy in processes of state formation, this article argues that the development of common asylum/immigration policies is indicative of the normative tensions implied in the EU's transition from a regulatory polity towards a political Union. Based on an analysis of key legislative texts from the emergence of common immigration policies until today, it is shown that policy developments are torn between three competing and conflicting political identities. The EU's traditional 'market power' identity anchored in a regulatory approach focused on economic priorities has given way to an uneasy competition between aspirations at 'normative power' identity based on universal liberal values and a politically predominant 'statist' identity that addresses asylum/immigration policies as a corollary of and challenge to internal community-building and security. While these tensions are characteristic of the 'liberal paradox' of democratic states' immigration policies, they are particularly challenging in the context of an increasingly contested European integration project.

Keywords Asylum · Immigration · AFSJ · EU · Statehood

With its transition towards a political Union affecting 'core state powers' (Genschel and Jachtenfuchs 2013), the EU has relinquished its traditional image of a technocratic, apolitical 'regulatory polity' (Majone 1997). The recent crises have disclosed the redistributive impact of common monetary policies and the humanitarian shortcomings of common asylum policies. This has evoked a vivid debate about the normativity of European integration. Attention has turned towards the 'normatively problematical aspects of political order' (Joerges and Kreuder-Sonnen 2017, p. 122) eventually motivating a more interpretative turn in EU studies. The development of

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common asylum and immigration policies is a fascinating field for studying processes of political identity construction in the EU and the values involved (Saurruger and Thatcher 2019). This is for two reasons. The first is the inherent link with sovereignty. The second is the normative tensions intrinsic to (western) liberal migration and asylum policies.

European migration policies affect state sovereignty from within and from without. Internally, the abolition of internal migration policies implied by freedom of movement deprives member states of their sovereignty over the admission of EU citizens and long-term resident third-country nationals. Externally, the development of common European policies regarding third-country nationals amplifies this retreat of state sovereignty and symbolizes the EU's appropriation of quasi-statist features.

The redefinition of sovereignty in a multilevel context shifts responsibility for the political values embedded in common policies to the European level. This responsibility constitutes a challenge to EU institutions both because of the fundamental tensions underlying liberal states' asylum and immigration policies and because of the EU's own unsettled compromise between common market, normative power (Manners 2002) or super-state in the making. The tensions underlying western asylum and migration policies stem from the values of security and community on the one hand, which, deriving from the particularism of (state) sovereignty, emphasize the need to control and limit immigration, and the values of freedom and human rights on the other hand which, deriving from liberal universalism, command openness. Herewith the EU faces what scholars have coined the 'liberal paradox' (Hollifield 1992): the difficulty to satisfy the liberal quests for economic openness and humanitarianism with political demands for closure. Together with the sensitivity implied in the vertical transfer of authority and the EU's unsettled constitutional compromise between market integration, vocation to liberal values and the development of core state powers, these normative tensions put a particular strain on the development of common European policies. This manifests not only in incoherent policy outputs, but also institutional battle grounds which, as we will argue, are not conducive to the definition of a common European political identity.

The article opens with a historical and theoretical reflection on the co-constitutive relationship between migration/asylum, sovereignty and liberal values in processes of state formation. This section serves as a broader contextualization of the development of European political identity with regard to migration in analogy to the development of nation states. We then turn to the actors and processes shaping the EU's identity and values in the field of immigration policies from the beginnings of cooperation in the 1980s until today. Based on an analysis of primary documents from the EU's main decision-making institutions and echoing earlier studies (in particular Lavenex 2001; Menz 2015), three distinctive political identity constructions are distinguished, all carried by different actor constellations and political opportunity structures:

1. The 'statist' identity defended in particular on the part of the Council which, emphasizing the value of 'security', derives an EU competence in asylum and



- immigration matters from the need to protect the aspired internal ‘Area of Freedom, Security and Justice’ against external threats;
2. The ‘normative power’ identity which, articulated mainly by the Commission and the European Parliament, seeks to emulate the universalist human rights standards enshrined in ‘World society’ (Manners 2002; DiMaggio and Powell 1983);
 3. And the ‘market power’ identity (Damro 2012) expressed by Single Market-oriented directorates in the Commission which, drawing on the EU’s tradition as ‘regulatory state’ (Majone 1997), seeks to promote mobility from a primarily economic welfare-oriented perspective.

Promoted by different institutional actors within the EU framework and responding to different sets of values and political priorities, these three policy identities compete in the development of a distinct and coherent overarching EU political identity. While reflective of fundamental tensions inherent in the migration policies of western liberal states, this article concludes that the EU’s unsettled constitutional compromise privileges the first, ‘statist’ approach vis-à-vis the two more ‘liberal’ ones. This generates ideational conflicts with the EU’s traditional roots in economic openness and it tends to undermine the EU’s aspirations at political Union based on a community of values.

Political identity and immigration policy

We define political identity in a given policy field with Saurugger and Thatcher (2019, p. 30) as ‘the articulation of political values that are claimed to be fundamental..., shared... and distinct’ (idem. 2018, p. 20). In order to assess the emergence of an EU political identity in the field of immigration, we first review the evolution of migration policies in the context of European states.

As with other core areas of statehood such as military or monetary affairs, the development of immigration policies has structurally been linked to the formation of sovereign states. The more states have evolved from territorial jurisdictions towards democratic welfare states, the more their immigration policies have become complex, addressing next to questions of entry and stay also economic, social and political entitlements (Lavenex 2018a), thereby reflecting the political values of the receiving societies and states’ political identity more broadly.

The capacity to control territorial borders and the demarcation of citizenship has been conceived of as core components of modern statehood. As indicated in a well-known ruling of the US Supreme Court held in 1892: ‘It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe’. More than a century later, in 2004, the United Kingdom House of Lords confirmed that ‘the power to admit, exclude and expel aliens was among the earliest and most widely recognized powers of the sovereign State’ (Chetail 2014, p. 28). Consequently, large sections of political theory have come to



see control over aliens' entry and stay as quintessence of statehood: 'theoretically[,] sovereignty is nowhere more absolute than in matters of emigration, naturalization, nationality and expulsion' (Arendt 1973, p. 278).

States' attempt to seize control over immigration, however, started only relatively late around the turn to the twentieth century and intensified during World War I. The first step was the introduction of passports and other documentary controls on movement and identification, thereby enabling the monopolization of the legitimate means of movement (Torpey 2000). In Europe, the UK introduced first restrictions on immigration in 1905, and these were limited to Eastern European Jews. Up until then, it can be said that free movement rather than regulated migration was the norm (Chetail 2014). This development followed the advent of more exclusive forms of nationalism during the nineteenth century which were 'specifically designed to promote national distinctiveness and solidarity' (Zolberg 2000, p. 512). This included the official formulation of national histories or the promotion of the country's official language alongside the discrimination of minorities (Anderson 1991). Exclusion of aliens has been instrumental to this process of political and societal inclusion, and the state's capacity to control and select immigration has been framed as constitutive of internal security. This view is inherent to the vision of 'communitarian' political theorists like Michael Walzer (1983, pp. 38–39):

'The distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life. If this distinctiveness is a value, as most people (though some of them are global pluralists, and others only local loyalists) seem to believe, then closure must be permitted somewhere. At some level of political organization, something like the sovereign state must take shape and claim the authority to make its own admissions policy, to control and sometimes restrain the flow of immigrants. ...The restraint of entry serves to defend the liberty and welfare, the politics and culture of a group of people committed to one another and to their common life'.

As indicated by the document analysis below, the process of European community formation draws primarily on civic notions of citizenship, at the core of which is the freedom of movement within the EU. Later, this notion of citizenship has come to be complemented with social rights (Menz 2019) and more welfare-oriented discourses of 'solidarity'. Culturalist elements associated with nation-building are nearly absent from supranational discourses. While this distinguishes European integration from nineteenth-century European state formation, it should be noted that culturalist discourses have proliferated at the level of the member states and find their expression in the rise of right-wing populist parties (Hooghe and Marks 2017; Hutter et al. 2016).

Communitarian values emphasizing civic, social and cultural ties resonate with the particularist dynamics of political integration. They are, however, not uncontested. The consolidation of western states has occurred in conjuncture with the diffusion of liberal values many of which have universal aspirations. In this process, the meaning of sovereignty has come to encompass the responsibility to ensure the well-being of all individuals living within a sovereign territory and respect for their fundamental human rights (Bauböck 1994; Haddad 2003).



Three spheres of liberal rights can be distinguished that have historically been extended from citizens to migrants: the civil, economic and social rights for migrants living in a territory, the right to protection against *refoulement* for refugees and mobility rights for the economically active—later partially extended to citizens of regional integration projects. The extension of civil, economic and social rights to lawfully resident aliens and later partially also to irregular migrants have coined the notion of ‘denizenship’ in the literature (Hammar 1990), blurring the lines between citizens and non-citizens.

The principle of *non-refoulement* is at the core of the international refugee regime and involves the prohibition to remove anyone to a country where he or she faces a risk of persecution or serious violations of human rights. Similar to the granting of denizenship, the principle of *non-refoulement* reflects commitment to universal liberal values that transcend the particularism of the state system. While the principle of *non-refoulement* applies to a wider range of persons in need of protection, the more limited notion of a refugee specified in the Geneva Convention entails also far-reaching entitlements towards the host country. As Haddad (2003, p. 9) points out: ‘If we assume that the international system asks that all individuals belong to a state, the refugee regime can be seen as an attempt to make refugees into “quasi-citizens”. The specific body of refugee rights ... was created as a substitute for those citizenship rights available to individuals who follow the rules of international society and belong, as they should, to a specific state...’ (Haddad 2003, p. 9).

The third main expression of liberal values in immigration policy is linked to the process of globalization and the gradual dismantling of economic boundaries. Market economies have expressed recurrent demand for foreign labour to fill job shortages, gain skills, or sometimes also suppress the costs of labour. Usually, these demands have been met via national immigration laws and bilateral labour treaties. Some regional integration projects such as Europe’s Single Market, the Mercosur in South America or African Regional Economic Communities have enshrined multi-lateral commitments to open up for the mobility of workers and other citizens, thus effectively entailing Member States’ voluntary renouncement of sovereign control over intra-regional migration (Lavenex 2018b). With western liberal states’ transformation towards knowledge-based service economies, mobile labour has become a factor of economic competitiveness in the quest for talent and skills. Whereas—apart from regional commitments—national legislation remains predominant for economic migration, states have agreed on limited provisions on the temporary mobility of professionals in the World Trade Association’s General Agreement on Trade in Services and in bilateral free trade agreements (Lavenex and Jurje 2015).

Summing up, the development of immigration policies is a corollary of state formation. This constitutional bond is associated with an emphasis on sovereignty and the value of (internal) security. In liberal states, this process is permeated by liberal values of human rights and economic openness, which leads to a perpetual tension between particularist commitments and universalist aspirations. In the following, we retrace immigration policy discourses in the EU from their inception and explore their references to the prerogatives of state security, human rights and economic freedoms, respectively.



Contests over values and identities in EU asylum/migration policies

The EU's evolution from a 'regulatory polity' (Majone 1997) focused on market integration towards a political Union with 'core state powers' (Genschel and Jachtenfuchs 2013) has been stated. The normative dimension of this evolution, the political values and identities that are invoked, appropriated and defended by the various architects of European integration has received less attention. This disregard may flow in parts from traditional integration theories' (intergovernmentalism and neofunctionalism) primary concern with explaining European integration in terms of the conditions for 'more' or 'less' supranational competences (Kreuder-Sonnen 2016; Joerges and Kreuder-Sonnen 2017). The question 'which' Europe emerges which values and identities are expressed in the EU's evolving institutions and policies have received much less attention. While this question seems particularly pertinent for core state powers such as monetary policy (McNamara 1998) or justice and home affairs (Lavenex and Wagner 2007), European integration has never been without normative implications. Fritz Scharpf's work on Single Market integration (1999) has shown that several institutional factors genuine to the EU's internal structures have tilted common policies towards market-making (neoliberal) policies focused on removing obstacles to trade and competition—in his terms 'negative' integration—while impeding 'positive', market-correcting integration in the sense of 'the reconstruction of a system of economic regulation', including social policy (1999, p. 45). Much in analogy to Scharpf, the following analysis shows that the development of an EU identity in immigration policy has been dominated by a 'statist' frame emphasizing the communitarian values of internal freedom of movement and political community-building over cosmopolitan liberal values (Lavenex 2018c). This identity has, however, never been uncontested and competes with the EU's vocation at 'normative power' with strong commitment to universal human rights as well as with the EU's economic aspirations at 'market power'. Being promoted by different actors for different purposes, these three identities are partly in tension with one another and therefore fuel ongoing debates on the finalité and vocation of a European immigration policy—and more generally of the EU as a whole.

The statist identity: community-building and internal security

The oldest and dominant frame derives EU cooperation in asylum and immigration matters from the internal process of political consolidation including the realization of freedom of movement and the discourses on European citizenship. From this perspective, cooperation is justified as necessary for the safeguarding of internal security in the EU after the abolition of internal border controls. Internal 'freedom' is thus seen as dependent on the maintenance of 'security' and protection from external threats. A functionalist connection is drawn between the realization of an internal 'Area of Freedom, Security and Justice' (as baptized in the Amsterdam Treaty) and the collective tightening of external borders.



This framing can be traced from the beginning of the discourses on a ‘Peoples’ Europe’ in the 1970s to the Rome Declaration marking the EU’s 60 st anniversary in 2017 until today. While establishing a neofunctionalist line of justification, deriving migration policy cooperation from the prerogatives of Single Market formation, this discourse also served to affirm the EU’s political identity and relevance vis-à-vis its citizenry. This corroborates Saurugger and Thatcher (2019) who argue that in processes of political identity formation cognitive frames are not only constitutive of actors but also the outflow of intentional, strategic action.

The idea to remove controls on persons at the Community’s internal borders was first mentioned in a paper on European identity submitted by the Heads of State or Government to the Copenhagen Summit of December 1973. This suggested looking into the type of special civic and political rights which might be granted to citizens of the EU Member States in order to bring them closer to Community institutions and policies. The idea was taken up at the European Council meeting in Fontainebleau in June 1984 where the EU Heads of State or Government set up an ad hoc committee on a ‘People’s Europe’ chaired by former Italian MPE Pietro Adonnino with a view to respond ‘to the expectations of the people of Europe by adopting measures to strengthen and promote its identity and its image both for its citizens and for the rest of the world’ (European Council 1984). The Adonnino committee proposed the abolition of internal border controls alongside the expansion of internal free movement rights and the use of common symbols like the common flag and a European driver’s licence as most tangible instruments for fostering a sense of European belonging among Member States citizens. Welcoming these proposals, the Commission subsequently drew a link between internal mobility and the need to address immigration. According to the 1985 White Paper ‘Most of our citizens would regard the frontier posts as the most visible example of the continued division of the Community... Once we have removed those barriers, *and found alternative ways of dealing with other relevant problems such as public security, immigration and drug controls*, the reasons for the existence of the physical barriers will have been eliminated’ (Commission 1985, para. 11; emphasis added).

Cooperation on migration thus came onto the European agenda together with matters of internal security as compensatory measure for the safeguarding of internal security after the abolition of internal border controls. After the pioneering Schengen Agreement between five Member States in 1985, the ‘Coordinators group on the free movement of persons’ was created in 1988 to promote EU-wide cooperation in the matter. This was a subgroup of the transgovernmental network of the Member States’ interior ministries called TREVI who had been coordinating since 1976 on questions of internal security and public order. In 1989, the group issued the ‘Palma-Document’ that was to become the blueprint for the ensuing cooperation. According to its Title III, ‘The achievement of an area without internal frontiers could involve... a prior strengthening of checks at external frontiers’ and ‘determining the State responsible for examining the application for asylum’ (Coordinators Group 1999). The Preamble of the 1990 Dublin Convention marking the start of Member States’ cooperation on asylum repeated ‘the joint objective of an area without internal frontiers’.



This frame of cooperation in view of protecting the Schengen area was maintained when asylum and migration were officially embraced in the Third Pillar of the Maastricht Treaty (Art. K1 ‘For the purposes of achieving the objectives of the Union, in particular the free movement of persons’). This reasoning that derives the necessity of cooperation from the challenges immigration poses to European integration permeates policy documents adopted under the Maastricht Treaty and is well reflected in an important Commission Communication of 1994 according to which: ‘The deepening of the European integration process calls for an Integrated and coherent response, which combines realism with solidarity, to the challenges which migration pressures and the integration of legal Immigrants pose for the Union as a whole. Failure to meet those challenges would be to the detriment of attempts to promote cohesion and solidarity within the Union and could, indeed, endanger the future stability of the Union itself’ (Commission 1994, Foreword). The vocation of the European Union as a power in the protection of human rights, in particular with regard to refugee protection but also migrant rights, or the demographic and economic demand for immigration, which are at the heart of the EU’s ‘market power’ identity (see below), is absent from this and other documents of the period.¹

While the Amsterdam Treaty introduced a mandate for the development of genuine European asylum and immigration policies, and, moving these matters from the intergovernmental to the supranational first pillar, also engendered the mobilization of more normative and economic EU identities on the matter, the statist frame prioritizing internal community-building and security was preserved. This is reflected in its Title I Art. 3 which states the goal: ‘To maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime’. Notwithstanding the emergence of competing identities under these Treaties and during the deliberations at the European Convention elaborating the (later dismissed) European Constitution (see below), this statist–protectionist approach has been preserved and permeates primary law and the majority of secondary laws in the matter. Article 3 of the Amsterdam Treaty became Article 2 of the Lisbon Treaty whose Title IV laying down the more detailed mandate reads ‘Visas, Asylum, Immigration and other policies related to the free movement of persons’.

In sum, a parallel can be drawn to the Single Market project that was framed in terms of abolishing member states’ barriers to trade and not as a common system of market regulation (Scharpf 1999, p. 45): EU cooperation on migration and asylum was framed in view of protecting the EU’s internal ‘Area of Freedom, Security and Justice’ and not as genuine European migration/asylum policy following either socio-economic or human rights ambitions (Lavenex 2018c). As highlighted in the communitarian line of thinking about the relationship between state formation and immigration discussed above, this European identity has consistently been justified

¹ If there are references to human rights so mainly in view of promoting human rights in countries of origin of asylum seekers and refugees in order to reduce the root causes of forced migration (Commission 1994, p. 22ff.).



with member states citizens' concerns and expectations in their transition towards EU citizenship. The following quote from a Commission Communication in 2004 illustrates this reasoning when it praises the 'Area of Freedom, Security and Justice' as 'one of the most outstanding expressions of the transition from an economic Europe to a political Europe at the service of its citizens' (Commission 2004a, b, Annex p. 4).

This statist approach emphasizing internal security and community was iterated very clearly on the occasion of the 60th anniversary of the Rome Treaties in 2017 when the EU Heads of State or Government declared as first goal of the Union, even before prosperity and growth, 'A safe and secure Europe: a Union where all citizens feel safe and can move freely, where our external borders are secured, with an efficient, responsible and sustainable migration policy, respecting international norms; a Europe determined to fight terrorism and organised crime' (European Council 2017).

The 'normative power' identity: image in the world and universal human rights

The 'normative power' approach to asylum immigration policy emerges relatively late in the evolution of EU competences in the matter. It can be retraced to four partly parallel developments: the experience of the wars in the Western Balkans and the wave of solidarity brought towards the refugees in particular from Kosovo, the new mandate given by the Amsterdam Treaty, the process of Eastern enlargement entailing a clearer definition and the projection of core European values, and the deliberations in the European Convention centring on the norms underpinning an eventual European constitution. The main proponents of this identity have been the Commission and the European Parliament, as well as at least at the occasion of the Tampere European Summit, the EU Heads of State or Government. While the expanding human rights language in EU primary law has comforted the Commission in the endeavour to inject stronger normativity in its policy initiatives, the European Parliament has been a clear proponent of the human rights approach in the early years of JHA cooperation, but has gradually moved closer to the 'statist' position represented by the Council.

The Tampere European Council Conclusions of October 1999 are particularly representative of the vocation towards a 'normative power' identity in asylum and immigration matters. They clearly anchor these policies in the Union's attachment to universal liberal values and affirm the commitment to project these values externally to the rest of the world. Right after the introduction, under the title 'Towards a Union of Freedom, Security and Justice: the Tampere Milestones' the Council states the following:

From its very beginning European integration has been firmly rooted in a shared *commitment to freedom based on human rights, democratic institutions and the rule of law*. These common values have proved necessary for securing peace and developing prosperity in the European Union. They will also serve as a cornerstone for the enlarging Union. The European Union has already put in place for its citizens the major ingredients of a shared area of



prosperity and peace... This freedom *should not, however, be regarded as the exclusive preserve of the Union's own citizens*. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. *It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory*. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders... (European Council 1999, para. 1–3, emphasis added).

This quote not only affirms the Union's attachment to liberal values but also emphasizes their universal scope and derives EU action on asylum and immigration from the EU's traditional vocation to preserve and promote these values. In the field of asylum, this means that the 'normative power' identity emphasizes the human rights base of this policy rather than the need for coordination in order to avoid negative effects of the abolition of internal border controls as emphasized in the 'statist' identity: 'The European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement' (ibid, para. 13). Secondly, the 'normative power' identity also involves extending the privileges accorded to EU citizens as far as possible also to legally resident non-EU nationals. Under the title 'Faire Treatment of Third Country Nationals', the Tampere conclusions state that 'The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia' (ibid, para. 18). In short, 'The legal status of third country nationals should be approximated to that of Member States' nationals', including the rights associated with freedom of movement (ibid, para 21).

Perhaps the most immediate concrete policy outputs flowing from this 'normative power' approach were the Commission's proposals for directives on family reunification (1999) and on the status of long-term resident third-country nationals (2001), respectively. The directive on family reunification sought to establish common minimum standards for the right of legally resident third-country nationals to be joined by the members of their family, which is a right recognized in many international law instruments including the European Convention on Human Rights and the EU Charter on Human Rights. The normative frame reflected in the proposal met, however, stark resistance in the Council. After issuing its first proposal in 1999, the Commission had to table two amended proposals in 2000 and 2002 before a much watered-down directive was finally adopted in 2003. Dealing as little as possible with legal obligations and, where necessary, introducing minimum standards below those existing in national legislation, this directive hardly advanced the rights of third-country nationals residing in the EU. This was one of the reasons



motivating the European Parliament to take action before the European Court of Justice to strike down provisions which it considered in opposition to the protection of the family enshrined in Art. 8 of the European Convention of Human Rights (Lavenex 2006, p. 1291).

The second principal instrument proposed in the wake of the Tampere Conclusions, the Long-Term Residents Directive adopted by the Council in 2003 also marks a clear setback compared to the Commission's proposal. In particular, the Council watered down the principle of equal treatment with EU nationals by allowing the Member States to limit mobility rights for third-country nationals through national labour market preferences, the right to set numerical quotas on the admission of third-country nationals, and the requirement comply with certain 'integration' measures (Carrera 2005). This contestation of the rights-based approach by the Council is even more salient if one considers that free movement rights had de facto already been partly extended to legally resident third-country nationals by several rulings of the European Court of Justice since the mid-1980s.²

The 'normative power' identity of EU asylum and immigration policies is reflected—apart from the effort to expand the rights of legally resident third-country nationals—in an effort to create the basis for a common European asylum policy. The Amsterdam Treaty recognized the need to approximate national asylum systems as a precondition for the effective and fair application of the 1990 Dublin Convention and subsequent Regulation which introduced the principle of mutual recognition for the examination of asylum claims. The issue of asylum, however, also gained prominence with the deliberations in the European Convention preparing the ground for the European Charter of Fundamental Rights and the (dismissed) European Constitution. Generally speaking, Justice and Home Affairs, including asylum and immigration, figured prominently in the work of the Convention and many members of the Convention counted progress in these matters among Europe's most important tasks (European Convention 2002, para. 6). The right of asylum, later included in the Charter of Human Rights, took a certain stage and deliberations reflect strong orientation at international legal standards and in particular the Geneva Convention and, to a lesser extent, other more general human rights treaties. Out of thirty amendments proposed to the Presidency's draft, fourteen invoke an explicit reference to the Geneva Convention to justify their claim, three refer to the European Convention on Human Rights and four refer to the Universal Declaration of Human Rights.³ A comparison of deliberations on other, less strongly codified norms, such as minority rights and cultural diversity, also shows that asylum was not

² Drawing on the principle of non-discrimination, the Court extended free movement rights first to posted workers who were long-term resident third-country nationals employed by European firms under the freedom of services (Rulings 12/86 Demirel [1986] ECR 37/9) and then to long-term resident third-country national from countries with which the EU had signed association agreements containing relevant clauses, such as Turkey and Morocco (rulings C-192/89 Sevince [1990] ECR; I-3461, C-18/90 Kziber [1991] ECR 199).

³ Charte 4332/00, Draft Charter of Fundamental Rights of the European Union—amendments submitted by the members of the Convention regarding civil and political rights and citizens' rights, Brussels 25 May 2000.



among the contested themes at the Convention, despite its high degree of domestic politicization (Meyer and Engels 2002). If we can speak of contestation, it mainly concerned the Spanish insistence, already codified in the Amsterdam Protocol, to exclude EU citizens from this right.

Cooperation on asylum also progressed outside the Convention in EU legislative processes. As in the case of the directives on legal migration discussed above, Commission proposals faced strong resistance from the member states. A case in point is the Asylum Procedures Directive adopted after several delays more than a year beyond the deadline set by the Amsterdam Treaty in December 2005. The aim of this directive was to set common minimum procedural standards for the examination of asylum claims. Providing for several exception clauses and generally cast in weak legal language, the directive faced strong criticism by both the European Parliament and refugee organizations such as the United Nations High Commissioner for Refugees UNHCR.⁴ As in the case of the Family Reunification Directive, this dissatisfaction led the European Parliament which, at the time, had only consultative rights, to challenge the directive in front of the Court (Lavenex 2006, p. 1291).

If we look for the actor which has most consistently upheld the ‘normative power’ identity in asylum and migration matters at the EU level, this is undoubtedly the European Parliament. This stance was mirrored already in 1992 with the creation of a new standing committee entitled ‘Committee on Civil Liberties and Internal Affairs (LIBE)’ to emphasize the human rights dimension of what the Council referred to as ‘Justice and Home Affairs’. Herewith the Parliament clearly distinguished the matters relating to ‘human rights problems in the Community’ (European Parliament 1992) from the scope of the existing Committee on Legal Affairs and Citizens Rights (JURY)—thus symbolizing its detachment from the statist community-building frame of the Council, and, partly, of the Commission. This vocation to the protection of human rights inside the EU came as a surprise for some and spurred consternation among the member states (De Capitani 2010, pp. 125–126). While frequently antagonizing the Council, and in several instances challenging its agreed directives in front of the Court (see above), the ‘normative power’ approach adopted by the European Parliament also allowed it to develop an identity different from that of the other EU institutions and to therefore underline its claim for consultation and, from the Amsterdam Treaty onwards, co-decision in the legislative process (European Parliament 2008).

The Lisbon Treaty gave the ‘normative power’ identity new support by recognizing the Charter of Human Rights as legally binding and eliminating the limits imposed on the Court of Justice. Consequently the Commission engaged in a comprehensive recast exercise proposing revised and allegedly improved versions of the directives adopted under the Amsterdam Treaty. In particular, the aim was to reduce the scope of discretion left to the member states by tightening common standards.

⁴ See European Parliament, report by Wolfgang Kreissl-Dörfler on the amended proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status adopted in Plenary on 25 September 2005, A6-0222/2005 and UNHCR press release of 30 April 2004.



As detailed analyses have shown, however, the revised directives have made only limited progress compared to the first generation and the policy core—that is the policy identity of these instruments and has largely remained unaffected (Trauner 2016).

Expectations that the Court of Justice could develop a stronger role in the development of a ‘normative power’ identity in asylum and immigration have also not materialized. Analysing the Courts’ jurisprudence under the new powers awarded by the Lisbon Treaty, Grainne de Burca comes to the conclusion that ‘there has been a remarkable lack of reference on the part of the Court of Justice to other relevant sources of human rights law and jurisprudence’. Given that ‘the procedural rules of the Court of Justice make it very difficult for actors with relevant human rights experience and expertise ... to intervene or participate in proceedings ... the risk ... is a detached, autonomous and potentially insufficiently informed case law on a growing range of important human rights issues’ (De Burca 2013, p. 173f.).

The crisis of the European Asylum System of 2015 has exposed the limits of ‘normative power’ in the EU’s asylum and immigration acquis. Rather than providing a system assuring protection for persons qualifying as refugees, existing EU regulations rather deterred access to national asylum systems, spurred distributive conflicts among the member states and failed to ensure common standards for recognition practices or asylum procedures (Niemann and Zaun 2018; Lavenex 2018c).

The ‘market power’ identity: economic competitiveness and the quest for labour

The third-political identity deployed by the EU in its migration policies is the ‘market power’ approach (Damro 2012). In contrast to the ‘statist’ and ‘normative power’ identities, this approach takes a functionalist, apolitical stance and derives policy priorities from the economic needs of the Single Market in its global context. This approach was at the core of the internal free movement regime as fourth freedom of the Single Market. The economic perspective on immigration from third-country nationals, however, its importance for European labour markets, demographic development and economic growth, however, came relatively late on the EU’s agenda and remains contested. This perspective took shape in the context of the ‘Lisbon Strategy’ on economic growth based on a knowledge-based economy adopted by the European Council in Lisbon on 23/24 March in 2000 (European Council 2000), a link that intensified in the context of the economic recession starting in 2007/2008. Yet member states have hitherto opposed the idea to address economic immigration at the EU level. In the absence of a common economic immigration policy, this policy identity has materialized in a limited set of directives addressing only specific categories of temporary migrants and excluding an EU competence to determine volumes of admission (see below). Although each of these instruments was justified in terms of the ‘market power’ identity, by 2010, when the member states adopted the ‘Europe 2020’ strategy succeeding to the Lisbon strategy, reference to economic migration as an element for economic growth and competitiveness had vanished.

The onset for an EU policy on labour migration was laid with a Commission Communication in 2000 which called for a ‘new approach to immigration’ given ‘the



projected decline in population in the EU over the next few decades' and 'a growing recognition that, in this new economic and demographic context, the existing "zero" immigration policies which have dominated thinking over the past 30 years are no longer appropriate' (Commission 2000, p. 6). The following Commission proposal for a common immigration policy (Commission 2001) detailed out common provisions without engaging with justifications based on economic or demographic arguments and only makes a cursory reference to the global competition for talent (Preamble, para. 6). After member states refused to engage with this proposal, the Commission changed its strategy and engaged in a more proactive framing strategy along the tenets of the 'market power identity' in carving its way into this domain (Menz 2015). This is clearly documented in the introduction to the Commission's Green Paper on an EU Approach to Managing Economic Migration adopted at the end of 2004. Making references to the Lisbon objective, the Commission states that 'even if the Lisbon employment targets are met by 2010, overall employment levels will fall due to demographic change. Between 2010 and 2030, at current immigration flows, the decline in the EU-25's working age population will entail a fall in the number of employed people of some 20 million. Such developments will have a huge impact on overall economic growth, the functioning of the internal market and the competitiveness of EU enterprises. In this context, and while immigration in itself is not a solution to demographic ageing, more sustained immigration flows could increasingly be required to meet the needs of the EU labour market and ensure Europe's prosperity. Furthermore, immigration has an increasing impact on entrepreneurship'. This discourse is even more pronounced in the Commission's policy plan on legal migration of 2005 (Commission 2005) which in its preamble makes ample references to the Lisbon Strategy with its targets to turn the EU into 'the most competitive and dynamic knowledge-based economy in the world', to 'make the Community more attractive to ... workers from around the world and sustain its competitiveness and economic growth'. A particularity of this agenda is the participation of DG Employment and Social Affairs next to the DG Justice and Home Affairs usually in charge for migration within the Commission. Whereas a common European policy for economic migration is still lacking, the proposals realized under the Treaties of Amsterdam, Nice and Lisbon corroborate the priorities of the 2000 Lisbon Agenda concerning a knowledge-based economy and skill development. Directives were adopted for the admission of students (2004); researchers (2005); highly qualified workers (2009); and intra-corporate transferees (2014). The exception to this focus on skills is the directive on seasonal workers of 2014.

Although the demographic situation in Europe and the global competition for talent have not really changed, the 'market power' identity over immigration policy has not evolved beyond these limited initiatives. This is also evident from policy discourse which has become more cautious on this socio-economic argumentation. Thus, the follow-up document to the 2000 Lisbon Strategy, the 'Europe 2020' strategy, only makes a very weak reference to economic migration policy. 'Migration' is mentioned only once under the Commission's objective of an 'Agenda for New Skills and Jobs' (Commission 2010, p. 18) with the goal 'to promote a forward-looking and comprehensive labour migration policy which would respond in a



flexible way to the priorities and needs of labour markets'. To date, this objective has not materialized into concrete policy output.

The vanishing of this 'timid' 'market power' identity in immigration policy is also reflected in the 2017 Rome Declaration marking the 60th anniversary of the Rome Treaties. Accordingly, the EU Heads of State or Government agreed that 'In the 10 years to come we want a Union that is safe and secure, prosperous, competitive, sustainable and socially responsible, and with the will and capacity of playing a key role in the world and of shaping globalisation'. Yet the issue of immigration is only mentioned in the context of the 'statist' identity under Article one: 'A safe and secure Europe: a Union where all citizens feel safe and can move freely, where our external borders are secured, with an efficient, responsible and sustainable migration policy...', it is not mentioned in Article two proposing 'A prosperous and sustainable Europe: a Union which creates growth and jobs; a Union where a strong, connected and developing Single Market...open(s) avenues for growth, cohesion, competitiveness, innovation and exchange' (European Council 2017).

Conclusion

Drawing an analogy to the role of immigration policy in processes of state formation, this article has argued that the development of common asylum/immigration policies is indicative of the normative tensions implied in the EU's transition from a regulatory polity towards a political Union. These normative tensions have been identified in three different policy identities embedded in EU asylum/migration legislation: the 'statist' identity addressing asylum/immigration policies as a corollary of and challenge to internal community-building and security; the 'normative power' identity emphasizing the EU's external reflection in the world and vocation to universal liberal values; and the 'market power' identity anchored in the EU's traditional regulatory approach focused on economic priorities. These three identities reflect fundamental tensions inherent to liberal states' asylum/migration policies and indicate the general difficulty of defining a coherent approach to these complex matters. Whereas liberal states have over time institutionalized the three perspectives to immigration to different extents in their national constitutions, laws, political-administrative and judicial systems, thereby aiming at an (often imperfect) balance between the three, this is not yet the case at the EU level. Much like in the process of state formation, extra-European immigration has first been addressed from the territorial perspective of border management and as an issue of internal security. Coupled with the predominance of home affairs ministers in the Council of Ministers and the increasing politicization of immigration in the member states, this approach has remained predominant at the level of EU institutions and law. Both the Commission and the Parliament have advocated a 'normative power' perspective based on human rights values early on, leading to the inclusion of pertinent provisions in the EU Charter as well as in a number of directives addressing the rights of asylum seekers, refugees and migrants. This policy identity has, however, recurrently faced reluctance on the part of the Council. Member states have also not



sought European solutions to the intake of economic migrants but have preferred to maintain their national schemes.

In sum in the context of internal community-building, the process of European integration generates a functionalist emphasis on the strengthening of external borders that is typical to processes of state formation. Coupled with the politicization of immigration, the value added of EU policies for member states is perceived to lie more in measures to control undesired immigration than in forging a common policy based on human rights or economic freedoms. The recent crisis of the Common European Asylum System and the difficulties to agree on a common policy to attract ‘desired’ foreign workers document the limits of this one-sided concern with protecting the internal ‘Area of Freedom, Security and Justice’ from eventual external threats. While the historical analogy shows that the desire to demarcate the boundaries of the community is a normal step in processes of state formation, the process of European unification, in contrast to the territorial European states of the eighteenth and nineteenth centuries, occurs in the context of (more or less) consolidated liberal democracy. Also, this focus contrasts with the EU’s own foundations in economic freedom and more recent ambitions at normative leadership. It is therefore no surprise that the protectionist, ‘statist’ bias fails to satisfy normative and economic expectations to the emerging European identity—and points at the limits of political unification.

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