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# State-based Logic versus EU-based Logic Towards Immigrants: Evidences and Dilemmas\*

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Since the Treaty on European Union in 1992, there have been two contrasting conceptions of how one should approach the EU political union. From the EU standpoint, this process is a gain, but from the States' point of view it is a loss. There is a third logic that makes up the EU: that of third-country immigrants residing in the Member States (*Euro-immigrants*). For this population the process is neither a gain nor a loss, but simply something that is being discussed and carried out without taking them into consideration. This lack of attention shows that at present the treatment of *Euro-immigrants* is following a state fundamentalist logic and not a multicultural logic as would be historically appropriate for the EU. In the interest of fostering discussion, this paper presents relevant considerations in four sections. The first section presents the theoretical framework for the discussion; the second section discusses state fundamentalism, with a brief historical review of how the European States have treated immigrants politically; the third section sums up how the EU dealt with immigration from the Trevi Group of 1975 until the Amsterdam Treaty of 1997; and the fourth and final section, concludes with a discussion on the normative dilemmas and institutional challenges deriving from the relationship between the EU and the *Euro-immigrants*. I argue that the EU can only be politically constructed if it takes the presence of immigrant residents into account.

## *The Problem*

Since the Treaty on European Union in 1992, there have been two contrasting conceptions of how to approach the political construction of the European Union (EU). From the EU standpoint, the very process is seen as a gain, while from the

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Member States' joint of view it is seen as a loss. For example, the European Political Union provides, as a good, freedom of movement and security for Member State nationals, a position of European citizenship, and a historic opportunity to construct a political structure sensitive to the differences in identity among the Member States. Nevertheless, it involves, from the States' point of view, a loss of their traditional, legitimizing force based on their sovereignty and a linking of citizenship, state and nation (Schmitter, 1994a, b; Bader, 1997, 1999; Joppke, 1998; Zapata, 2001 d).

There is, however, a third conception that merits attention as it is also a part of the reality of the EU. It is that which finds expression when we analyze the process of political integration from the point of view of third-country immigrants residing in one of the Member States, whom I will henceforth call *Euro-immigrants* (Zapata, 1999). In contrast with the two previous conceptions, this population regards the state process neither as a loss nor a gain but simply as something that is discussed and done behind their backs. That is to say, there are thirteen to fourteen million people (a sixteenth state, one might say) who view the construction of a political entity called the EU, which engages most political managers and many citizens, but which does not take their presence, much less their political thinking, into account.

This neglect shows that, thus far, the treatment of *Euro-immigrants* follows a fundamentalist, State-based logic and not a multicultural one as would be historically appropriate for the EU. My intention is to offer elements of a reflection that would allow us to discuss the argument that indeed the States have a historical, structural justification for defending themselves against attacks which affect the difficulties they have in managing the co-existence of immigrants and citizens-state structures did not plan for this reality when they were constructed in the 17th and 18th centuries. However, unlike the States, the EU, now, cannot use this same historical justification, as it does know of the existence of immigrants within its population. To ignore their existence simply political hypocrisy.

I will break this argument into four sections. In the first section, I will introduce the theoretical framework that is focused on a specific political approach to immigration. In the second section, I will discuss state fundamentalism, with the help of a brief historical review of how the European states have treated immigrants. In the third section, I will take a historical-structural stock of the EU treatment of immigrants from the well-known Trevi Group of 1975 until the Treaty of Amsterdam of 1997. In the fourth and final section, using the Tampere Summit (1999) as a basis, I will point out the normative dilemmas and institutional challenges deriving from the relationship, between the EU and the *Euro-immigrants*.

### *A Theoretical Framework for Approaching Immigration*

While the topic of international migrations is not a new one (see, for example, Hammar, 1977; Boyle, Halfacree and Robinson, 1998; Massey and Arango, 1998; Castles and Davidson, 2000; Ghosh, 2000 and Timur, 2000), the presence of people with different systems of rights and duties is producing a "mirror effect" on our political structures and systems constructed over more than two centuries. The states are, realizing that not only do they not have the adequate instruments for managing the problems caused by the ever greater presence of immigrants, but that

the only way to respond to these challenges is to change traditional political systems. The latter could have unpredictable potential consequences considering that political structures give rise to a given type of behavior and attitude, and reflect a given way of thinking that proceeds from our modern enlightened tradition.

The theoretical framework takes this conviction as a point of departure. It centers the analysis on the relationship of immigrants with our public institutions. This space is what I will call the public sphere. This contact is important- we could sketch the biography of immigrants from the moment they arrive in our states and cities, and determine that their life expectations are directly influenced by the restrictions placed on them (but not on citizens) in their relationship with institutions. Using this approach we have all the elements necessary to determine when immigrants are integrated. My institutional definition is as follows: immigrants are integrated when in their relations with our institutions, they need not justify the conflicts on the basis of their legal position and their nationality, i.e., when these are problems which any citizen might have. As long as this is not the case, we can say that a problem of integration exists.

In terms of inclusion/exclusion, inclusion is the result of a process of integration, or its final phase. When we say that an immigrant is not integrated, what we are bringing out is that there are situations where he or she feels excluded from the mainstream of society on account of his or her legal situation and his or her nationality, on account of having to express a social and political identity given through state logic. In our terms, the immigrant's identity is not acquired through birth as is the citizen's, but in response to a certain expression of state fundamentalism, as will be described in the next section.

Similarly, we can infer that the political science focus I adopt emphasizes the fact that immigration is a structural problem. In order to integrate immigrants, we must accept that our traditional political structures need to be modified. Debates ought to take this assumption as a given and on this basis argue for the procedures affecting this accommodation. I am aware that this focus may involve numerous unwanted consequences that may lead to social instability. When we begin to reflect from this point of view, the topic generates more questions than answers. But I am also convinced this is the historical path we must follow. The "resistances" our political structures put up to the pressures that come out of a multicultural society are understandable - we know that any modification will have direct effects on our civic ways of life and our thought paradigms. But it is also true that this conservative state-fundamentalist movement is merely delaying something that by simple historical logic will have to occur (and, indeed, is already occurring in most of our public spheres): the need to include resident immigrants in the mainstream of our societies. Any persistence of "parallel worlds" will produce cleavages in society and lead to political instability, which, in turn, produces unwanted effects such as social racism, the formation of parties marked by anti-immigrant rhetoric, and the consolidation of anti-system movements to name the most extreme of possible scenarios.

In the next section, I will go more deeply into the notion of state fundamentalism, which will strengthen the details of the argument that at present the EU's logic faces a dilemma: either to adopt state orthodoxy but at a higher level, or construct

a multicultural political structure, that is, create a European political system which takes into account and includes resident immigrants, the *Euro-immigrants*.

### *State Fundamentalism: A Brief Historical Overview*

It can be inferred from the preceding section that the political science focus is concerned mainly with the immigrants' vertical relationships, and not so much the horizontal ones as would be the case under a sociological focus, which concentrates more on analyzing the effects of immigration on the structure of our society. The basic question can be formulated as follows: how does the presence of immigrants affect our liberal democratic system, our institutional structures, our political behavior in general? The notion of state fundamentalism is one of the analytical tools I use in order to analyze possible answers to the question. My argument will be divided into two sections. In the first part, I will expound on what I mean by state fundamentalism; and in the second part, I will give a brief historical overview of the state's treatment of immigrants to provide empirical support to the previous argument.

#### *State Fundamentalism: The Priority of Stability Over Justice*

Through the notion of state fundamentalism, I will attempt to channel some of the debates that, directly or indirectly, follow the "mirror effect" produced by the presence of immigrants on our way of conceiving our institutional structures ("institutional effects") and our traditional normative frameworks that guide our political action, and our ways of managing social conflicts ("normative effects") (Zapata, 2002).

An analysis of the "institutional effects" concentrates primarily on the structure of our political system. It examines how it is forced to change in order to manage the tensions generated by the presence of immigrants. This perspective is concerned with how our public sphere is structured, who decides its limits and content, and how and why. It is based on the belief that the way the public sphere is structured is directly related to a type of attitude, behavior and practice that on many occasions comes into conflict with those of immigrants.<sup>1</sup> That is why one must assume that its limits and content, the space in which the immigrant interacts with our political institutions, need to change. The problem is determining how, while keeping in mind that this will inevitably affect our traditional conception of the political system (Zapata, 2000a).

When we look into the "normative effects" we start off with the same assumptions as before, but we concentrate more on the change in the cultural traditions and value system that is taking place.<sup>2</sup> The existing literature mostly assumes that the normative challenge produced by the growing presence of immigrants forces us to

<sup>1</sup> Among an extensive number of relevant works, see Taylor (1992), Kukathas (1993), Gray (1993), Frankel Paul et al. (1994), Kymlicka (1995a, 1995b), Tully (1995), Shapiro and Kymlicka (1997), Glazer (1997), Martiniello (1997), Parekh (1998), Zapata-Barrero (2001a), Kymlicka and Norman (2000), especially the chapters by Waldron and Modood and Carens (2000).

re-examine almost all the traditional categories that have helped to describe and explain our liberal democratic tradition. The great concepts such as liberalism, democracy, justice, liberty, equality, nationality and power, to name the main pillars of our political thought paradigm, lose their solid cores when applied to the situation in which the immigrants find themselves. Most of these concepts, when seen from the immigrant's point of view, approach pure hypocrisy. The presence of immigrants has "normative effects" because it brings with it forms of coercion we thought we had done away with in our liberal democratic tradition (Weiner, 1996:172).

In the face of these two types of mirror effects (institutional and normative effects), there can be two types of responses: either a deepening or a structural paralysis. In the first case a multicultural logic and a political interest in inclusion would come to the fore, while in the second, the states would manifest a fundamentalist logic and a political interest in exclusion. The multicultural logic would find expression in the design of multicultural policies, while the state-fundamentalist logic would concentrate its efforts on assimilationist policies. On this point there are two possible orientations, stability and justice. The deepening or multicultural logic would favor justice over stability, while the state-fundamentalist logic would give priority to stability over justice. Thus, any debate over integration policy must deal with the relationship established between stability and justice. Indeed, any integration policy must seek "reflective equilibrium" between justice and stability, and the political and social reality of immigrants when they interact with public institutions.<sup>3</sup>

State fundamentalism favors stability over justice. This means that it expresses an institutional practice toward immigrants based on utilitarian principles, which raises normative problems of justice for our own liberal democratic tradition. As we know, any utilitarian principle is based on a logic of costs and benefits, and deals with the object to which the principle is applied as a means and not as an end, using as a point of reference the utility of the action for the one who is carrying it out. The democratic reflection which this institutional practice gives rise to is based on the realization that it violates the principle of equality, i.e., a distinction is made in terms of rights between immigrants and citizens. Also, it runs counter to the principle of popular control in that there is an immigrant population directly affected by political decisions.<sup>4</sup> At the same time, the liberal reflection is based on the realization

<sup>3</sup> The consequences of my line of argumentation are perhaps extreme, but analytically they will perform the function of clarifying and identifying problems that reality presents in a complex form. In this sense my argument implies that any assimilation policy is based on the interest of the state in preserving its institutional structure, while any multicultural policy is based on the assumption by the state that its institutional structures and the presence of immigrants need to accommodate each other. Therefore some cultural essentialist presuppositions must change in both policies.

<sup>4</sup> The existence of these two different orientations could explain practical difficulties. An integration policy orientated to stability could have unjust results, and an integration policy only guided by justice could provoke instability. Thus, the reflective equilibrium between stability and justice focuses on the evaluation of outcomes of any integration policy.

<sup>5</sup> I follow Beetham's analytical concept of democracy (Beetham, 1994).

that the very guiding spirit of our modern, enlightened era, based on the belief that there is a "sacred link" (let us call it **the State Holy Trinity**) between state, citizenship and nationality, is placed in doubt just as it occurred historically with such concepts as private property and gender. Such a link raises issues for liberalism in that it violates the immigrant's freedom to choose between following his or her practices and cultural identity in the private sphere, or being able to exercise it in the public sphere without having to de-link himself or herself from his or her nationality in order to be considered a citizen.

My argument is that state fundamentalism is not only unjust because of their normative effects, but also because it produces instability and promotes cleavages in society. Together with, it implies a perception of immigrants as a commodity. As such, depending on the overall situation of the moment (socio-economically, demographically, etc.), they may be regarded as a benefit or as a burden. This instrumentalist point of view has the virtue of simplicity in that anyone, from the highest party and ministerial officials to the person on the street, can understand it and apply it in his or her argumentation. Besides simplifying the discourse surrounding immigration, it also has reference, directly or indirectly, to the quality of life of citizens and the welfare state achieved by our society. State fundamentalism then tells us that the presence of immigrants is welcome if it affects our quality of life positively and helps us fulfil part of our expectations; that is, if they allow us to rescue our economic, demographic, social, etc. "problem." If, on the contrary, macro situational factors are aggravated by the presence of immigrants, the impact is considered negative. The reference used in applying this utilitarian logic is always "our living space," constructed with effort over centuries. In our terms, its initial intention is to favor stability over justice. Concretely, this living space can be understood in terms of economic, demographic, social criteria or even in terms of our system of freedoms and equalities and of our humanitarian ethic of tolerance. In all cases, the utilitarian logic is always the expression of a certain "primitive" (conservative, protectionist, parochial) reaction in the face of other people always seen as "supposed invaders." At its base, this state fundamentalism will not allow change in the political structure and will only accept it if it believes that such a modification will generate more benefits than costs over time. This logic also implies what some call cultural fundamentalism (Stolcke, 1999) in that it always rests on an essentialist distinction between an "us" and a "them" or "the others" present both institutionally (the laws on the status of foreigners themselves are based on this distinction) as well as socially (citizens feel legitimated in acting differently toward immigrants since institutions do so). Finally, the unwanted effect of this utilitarian logic is that it provides a direct basis of legitimization for racism at the very least (present both in institutions as well as in society) and for xenophobia in the most extreme case. Both practical cases operate under the same utilitarian parameters of stability.

If we examine historically and structurally how states have handled immigration, we find that, thus far, the predominant logic has been state fundamentalism. That is to say, following my guiding thread, utilitarian logic and its orientation toward stability is the response that characterizes states facing the institutional and normative effects produced by the presence of immigrants.

*State Fundamentalism: The "Vicious Circle" of Historical Practice*

An observation by the Canadian scholar J. Carens (1992:26) expresses profoundly (and not without a certain uneasiness) what others have called the "Age of Immigration" (Castles and Miller, 1993):

Consider the case for freedom of movement in light of the liberal critique of feudal practices that determined a person's life chances on the basis of his or her birth. Citizenship in the modern world is a lot like feudal status in the medieval world. It is assigned at birth; for the most part it is not subject to change by the individual's will and efforts; and it has a major impact upon that person's life chances. To be born a citizen of an affluent country like Canada is like being born into the nobility (even though many belong to the lesser nobility). To be born a citizen in a poor country like Bangladesh is (for most) like being born into the peasantry in the Middle Ages. In this context, limiting entry by top countries like Canada is a way of protecting a birthright privilege. Liberals objected to the way feudalism restricted freedom, including the freedom of individuals to move from one place to another in search of a better life. But modern practices of citizenship and state control over borders tie people to the land of their birth almost as effectively. If feudal practices were wrong, what justifies the modern ones?

I argue that the utilitarian logic, in the final analysis, in spite of its stability concerns produces racist cultural attitudes and behaviors that motivate the principal political managers to reinforce their state-fundamentalist logics. This is the vicious circle that has historically characterized state treatment of immigration and which, as we will see in the next section, also characterizes the EU. A review of the actions of the European States and the consequences of such actions (see among others, OECD, 1989, 1991-1994; Collinson, 1993; Weiner, 1995; Hargreaves and Leaman, 1995; Cesarini and Fullbrook, 1996; Geddes, 2000) provide instructive observations.

Europe started the process of economic reconstruction soon after World War II. In order to ensure its success, economic development was linked to the demand for manpower from third countries. Indeed, programs were expressly designed to promote immigration. This utilitarian priority relegated to the background regulatory issues relating to the population that arrived. Bilateral agreements were reached with the countries exporting the "human commodities" (Great Britain, Germany, France with Italy, Portugal, Spain, Turkey, Algeria, India for example). The demand was basically structural, but it was assumed that the immigrants would return to their countries. After this period of "Open Doors" (1945-1973) came the period of "Closed Doors" (1973-1990). This second phase began with the economic crisis in the welfare states in the 1970s. This crisis went hand in hand with the realization that most immigrants were staying. The "immigration problem" started to appear. Its content was, once again, utilitarian: immigration involved more social political costs than economic ones. Even the Organization for Economic Cooperation and Development (OECD) spoke out on the issue. Debates began to **arise over**

the "limit of tolerance" (mainly in France) or to what extent a country could bear the arrival of immigrants without adversely affecting the quality of life of its citizens, their freedoms, and equalities and their cultures. There debates began to produce the first political reactions. For the first time, "quota policies" were adopted with the goal of regulating the entry of immigrants based on criteria of population, nationality and market considerations. In some countries (e.g., France) there was even consideration of policies giving immigrants financial incentives to return to their countries, with disappointing results. At the end of this phase, a reorientation of priorities came about. Efforts were redirected to policies of integration while neglecting the need to restrict entry. In general, during this period, immigration became more strongly felt to be a social, economic and cultural problem.

In the 1990s and even more so now at the beginning of the twenty-first century, a new phase begins which I will call the period of "Retaining Walls." Immigration is starting to be seen as a structural problem. There is a growing awareness to make the linkage and to analyze the relationship between the level of territorial access (a debate dominated by an "open and closed borders" logic), and the level of co-existence once immigrants have been admitted (where integration policies are debated following an inclusion/exclusion logic). There is a growing recognition that immigration is not an isolated fact that affects a given state but rather a global phenomenon with an impact on most developed states. Some reports have even begun to seriously consider the need for UN action in organizing a World Congress on Immigration. Such a congress should begin its reflection on what we might call the "medieval structure" evidenced by migration trends between developing and developed countries. It must therefore be treated in terms of its particular historical meaning: we are witnessing a new type of exodus similar to the rural one that took place centuries ago and which marked the transition from the Middle Ages to the Modern Age. This new exodus at a planetary level between poor countries ("the plebeians") and the rich countries ("the new aristocracy") is showing us that we are witnessing a true change of Era (with a capital E). This phenomenon shows too that the structural problem has several dimensions in the sense that it affects all levels of public power starting with neighborhoods and cities and ending at a world-wide level.

To sum up by returning to the state level, which is where we are situated, the presence of immigrants puts ever more pressure on our traditional political institutions. In reaction, states persist in adopting their utilitarian logic. The difference is perhaps one of nuance but is of prime importance: immigration is no longer just an instrument for solving or aggravating our structural problems, but has itself become a problem for our structures. The time has come for reflection to begin: either to go

Scannapieco (1992:3) sums up the relationship between these two levels: "sans intégration, la fermeture est inexcusable; sans fermeture, l'intégration est impossible." See bibliographical references in Zapata (2000a), where I deal with debates on these two levels. Other useful references are: Dowty (1987), Gibney (1988), Dummett and Nicol (1990), Layton-Henry (1990), Balibar and Wallerstein (1991), Barry and Goodin (1992), Hollifield (1993), Miller (1994), Baldwin-Townsend and Schain (1994), Spinner (1994), the special issue of the *International Migration Review* (1996), Jacobson (1997), Joppke (1998), Bauböck, Heller and Aristide (1998), Favelli (1998), and Martiniello (2001).

on resisting or to begin a serious reflection on how to modify existing structures that, instead of including immigrants, exclude them. For the liberal democratic mind it is difficult to find arguments that justify forms of coercion we had thought our modern tradition had done away with. It is a conceptually objective fact that on the level of co-existence, the relationship of domination established by our states between immigrants and citizens goes beyond the issue of minorities and majorities. It is quite simply a medieval relationship between master and slave in that the two do not share the same system of rights and duties. The domination relationships established by this system rests precisely on this legal distinction.

To begin this reflection, I believe we must highlight the two variables that define the distinctive historical moment at which we find ourselves: on the one hand, a new differentiation of class emerges based on the categories of immigrants; on the other, there is the gradual loss of the enlightened link between citizenship and nationality. They define problems of justice for our democratic and liberal traditions, respectively. The need to take the principle of justice into account which considers immigration, must seriously begin, at least to counterbalance the dominance of the stability orientation of most integration policies.

Indeed, we can state that the presence of immigrants raises two types of problems for democracy: on the one hand, the fact that there is a non-citizen population governed by a system of rights and duties different from the one for citizens (most Alien's Laws work indeed as their Constitutional Law); on the other hand, the fact that within this non-citizen population there is a differentiation in the system of rights among different categories of immigrants: the "undocumented" immigrant (the so-called "sans papiers," who I would prefer to call the "rightless" or the "other immigrants," or even "the new lumpenproletariat"), the temporary resident immigrant, and the permanent resident immigrant or denizens (Hammar, 1985, 1990). Both problems derive from current social differentiation based on criteria of economics and nationality. In terms of rights, the "rightless" do not even enjoy the protection of human rights and therefore are at the mercy of the market and all types of abuses. Then there are "the ones who have had more luck" in that they have legal documents and therefore a certain recognition of their presence by the state, translatable into certain civil, economic and social rights (or "the new proletariat" if we focus on the function they perform in maintaining the status quo in our economies). But, there are still differences among them. There are those who are residents but only with temporary recognition, and those who have acquired permanent residence. The difference among them is one of rights. While there are variations among countries, in general, temporary residents have human rights and some civil, economic and social rights; permanent residents have practically all rights except political rights. Each of these social categories is the exclusive jurisdiction of the states in varying degrees. As social differentiation among immigrants increases, and between them and citizens, democracy suffers (Hammar, 1989:93; Balibar, 1992:1314).

Beside this problem for democracy, there is one we might classify as a problem for liberalism: the widespread belief that immigrants want to stop being immigrants, but without losing their cultural identities and practices. This means, in terms of the state, the growing tendency to reject the citizenship policies offered by the states insofar as they mean a de-naturalization. This suggests that at present, any

debate about the integration of immigrants in terms of the acquisition of nationality is an approach that is increasingly seen as traditionalist, an expression of state fundamentalism. An alternate view is the acquisition of all rights without loss of cultural identity. This also means that the (sacred) core of nationality and citizenship must be the subject of debate. We must ask whether with this linkage one can deal with the problem of what the presence of immigrants means for our liberal democratic societies or whether it would not be appropriate to consider the viability of acquiring citizenship other than the criterion of nationality.

In the next section, we will see that this state fundamentalism is what has characterized and still governs - despite the 1999 Tampere Summit (the Tampere Spirit, I would say) - the EU's institutional treatment of immigrants. This is the reason why I argue that one of the EU's main challenges (and dilemmas) is formulating the immigration issue in non-state terms, i.e., constructing a multicultural political structure and policy in which justice takes precedence over, or at least counterbalances, stability orientations.

### *A Historica! - Structural Diagnosis of the EU*

In dealing with the EU's evolution in its treatment of immigration, we can identify four phases: the beginnings of intergovernmental cooperation (1975-1986); the Single Act (1986-1992); the Maastricht Treaty and the Schengen Agreement (1992-1997); and the Amsterdam Treaty (1998-present).

#### *Beginnings of Intergovernmental Cooperation*

Starting in 1975, collaboration in the area of immigration was slowly introduced. For example, the so-called Trevi Group was formed, made up of the then nine Ministers of Home Affairs (representing Germany, Italy, France, the Benelux countries, Great Britain, Ireland, and Denmark), with the goal of coordinating anti-terrorism efforts and cooperation in legal and police matters through the creation of working subgroups. This process was strictly intergovernmental, which has a double meaning: politically, the decision-making process is based on unanimity, and the institutional structure involved is parallel to that of the EU (one speaks of cooperation rather than of European integration); legally, the legal context in which decisions are made and mechanisms for implementation remains outside the EU and relies strictly on international law. We emphasize too that in its beginnings the structural perception of immigration as a problem was strictly confined to police and security matters.

#### *The Single Act (1986-1992)*

With the Single Act an important step was taken wherein cooperation developed henceforth with little transparency even for European institutions. According to Art. 8A of the Act (and taken back up in Art. 7A of Maastricht and Art. 14 of Amsterdam), institutional recognition is given to the freedom of movement of citizens as one of the principal conditions of the Single Market, and is included as a matter subject to Community jurisdiction. Working groups created from this point

included Commission representatives as observers. Among others, an "Ad Hoc" Working Group on Immigration made up of the ministers responsible for immigration was formed in 1986. This subject, for the first time, came to be managed by the Commission with the creation of secretariats. Later on, the Council will come to concern itself mostly with cooperation in legal, penal and civil matters.

In this context, one of the Council's first reactions was linking the freedom of movement with security. In 1988 it charged the Group with proposing measures for this purpose. As a result, a working program, the Palma Document, was proposed, which recommended, among others for more coordination between justice and home affairs. The method was still intergovernmental, i.e., it was limited to working out agreements, formulating resolutions, conclusions and recommendations, measures which in fact fall under international law.

As part of this dynamic, two important agreements were arrived at in 1990: the Dublin Agreement and the Schengen Implementation Agreement (Escobar, 1993; Espada, 1994; Lasagabaster, 1996). The former establishes which state is responsible for examining a request for asylum presented in one of the Member States; the latter has its roots in the Schengen Agreement of 1985 and promotes, among others, the creation of new operating structures for ensuring cooperation in police and customs matters and thus providing security for the freedom of movement of citizens.

#### *The Maastricht Treaty and the Schengen Agreement (1992-1997)*

The Treaty on European Union or Maastricht Treaty (1992) constitutes a qualitative step of major importance since the creation of the European Community. Among the most understanding elements affecting immigration one could cite the creation of "two engines" (though still in the design phase, never having left the "plant") for each dimension of the Union's construction process: the Euro engine for the economic dimension, and the European citizenship motor for the political dimension. An EU structure built on three pillars is one of the decisive steps. The European Community pillar (the strictly Community pillar) for certain matters is characterized by, among other things, a loss by the Member States of a great portion of their sovereignty. Three basic institutions participate: the Commission, the Council and the Parliament. In contrast, the second and third pillars follow a logic of cooperation rather than integration. The second pillar (Common Foreign and Security Policy or CFSP) relates to the EU foreign policy, and the third pillar (Cooperation in Justice and Home Affairs, CJHA) to internal aspects of EU policy.

Maastricht institutionalized the cooperation initiated in 1975 in the third pillar, i.e., what was done "outside" the institutional framework "enters" to form part of the very structure of the EU. While this does not constitute an explanatory factor, this third pillar gives the states instruments for reacting against parties of the extreme right with their anti-immigrant rhetoric during the 1980s (Ugur, 1998:319).

Before commenting on the meaning of Schengen, if we take a brief stock of these years, we see that immigration constitutes one of the "hot potatoes" subjected more to a state than a strictly European logic. The norms in Title VI (relating to CJHA) are in fact traditional norms of international public law than strictly of Community law. It set out a framework for cooperation between states. As a result this third pillar was characterized by paralysis in its decisions and institutionalized a set perception of

the immigrant. Indeed, its structure only offered Community institutions partial participation without the possibility of real control over Member States' decisions. Concretely, we can point to three basic procedural problems: the Court of Justice has no mechanisms for legally controlling decisions and actions performed in the third pillar; the European Parliament is not informed about discussions; and the Commission has no right of initiative.<sup>6</sup>

As a result, and in practical terms, paralysis was the rule in that the Council could not achieve the unanimity required for adopting decisions. The perception of the immigrant is made clear in Art. KI, which establishes areas of "common interest." Immigration (access, movement, stays, undocumented status in residence and employment) is included in the list with asylum policy, norms for the crossing of borders, the fight against drug trafficking, international fraud, cooperation in customs, legal, penal and civil matters (terrorism, among others).

This stereotypic institutional construction of the immigrant as a potential criminal is likewise expressed in the Schengen Agreement. Its basic objective is linked to a basic assumption going back to when the EU began to institutionalize cooperation in home affairs: that achieving de facto freedom of movement for persons would require the gradual removal of internal border checks.<sup>7</sup>

In practical terms, this "Schengen space" (or Schengenland) means that the EU affords the signatory states the possibility of using the European institutional framework for co-operating closely in specific areas of home affairs. It is with the Amsterdam Treaty (AT) that it is explicitly incorporated into the EU framework under a "Schengen acquis" logic. A secretariat general is created in the Council. With the AT, Schengen is definitely connected to common measures on immigration (and asylum), while being preserved as a policy on the control of external borders and unauthorized immigration. That is, institutional recognition is given to the legal perception of immigration emphasizing only its negative dimension as a source of crime, criminal networks and so forth; in short as a "threat." There is no reference to integration, to coexistence between immigrants and citizens on normative terms of justice. Only stability logic prevails.

From Maastricht on, the principle of non-discrimination as a guide for establishing the freedom of movement of persons only affects citizens of Member States,

<sup>6</sup> In this context, in order to alleviate the lack of decisions, one introduced into the EU vocabulary two terms designed to define strategic frameworks, but without any binding character. On the one hand, there is the adoption of common positions, which defines the EU's focus with regard to particular issues. The first of these issues was, e.g., establishing common criteria for defining the notion of refugee. On the other hand, the adoption of common actions is used to reinforce the idea that there are certain EU objectives that can be better achieved through collective actions than through isolated actions by Member States. It is within this framework that action programs come into play.

<sup>7</sup> This gradual aspect is also expressed in the entries into this new "Schengen space." Five countries (Benelux - Germany and France) signed the agreement in June 1985. After the implementation accord of June 1990 came the signing of Italy (November 1990), Spain and Portugal (June 1991), Greece (November 1992), Austria (April 1995), and finally Finland, Sweden and Denmark (December 1996) and of non-members, Norway and Iceland. Currently the "Schengen space" includes a total of 13 countries. In accordance with the logic of "EU flexibility," Great Britain and Ireland are missing.

but not persons of other nationalities. While steering clear of too much rhetoric on the subject, the fact is that, institutionally, immigrants are not even considered people in that freedom of internal movement is only enjoyed by people as citizens of a Member State. Faced with these facts, how can one explain the fact that the EU has agreed to such liberal intra-European migration policies based on delegation of authority and at the same time insisted on strict intergovernmentalism and exclusion of immigration coming from outside the EU? The recent Amsterdam Treaty will provide us with a few clues.

#### *Amsterdam Treaty (1998-present)*

The AT's origins go back to the end of the Maastricht negotiations when it was agreed that a complete revision would be made at mid-decade. From our point of view, the new structuring of the EU introduced three novelties: integration as a common policy (first pillar) on issues related to immigration and asylum (called, wrongly as we will see, Cominunitarization of the third pillar); the incorporation of a new objective: a space of freedom, justice and security; and the confirmation of European citizenship. All these "novelties," in fact, express the logic of prudence that characterizes the EU on immigration issues, coming close to hypocrisy on some points. Before going over each of them individually, let us justify this assessment.

It is surprising that despite increasing the integration between freedom, security and justice (each serves as mediator in achieving the others), no opportunity is given to guiding principles so basic as equality and pluralism, not to be found among the Union's new objectives (Art. B). If we examine the new treaty in a detailed manner, we find that the very notion of pluralism appears just once, not in relation to culture much less to nations without a state, but to communications media (Protocol on the system of public broadcasting in the Member States). Equality only appears in relation to equality of opportunities and treatment in the labor market, specifically between men and women (new Art. 2 and 3, Art. 118 and 119). In this case there is no mention of equality between citizens and immigrants. The very word "foreigner" is absent, and the words "immigrant" and "immigration" occur among measures designed to safeguard the space of freedom, security and justice. Immigration is then perceived as an element that threatens such space under a logic of fear, protectionism or exclusion; hence the need to build a "fortress." In this sense, the modifications of the Treaty, instead of representing a qualitative change, showed a clear desire for continuity, bringing immigration closer to security matters through issues of efficiency and stability, and the provision of new legal instruments to achieve this.

It is true that there is at least one very daring dimension to Maastricht: while maintaining its leadership in decision-making, the Council no longer has hege-

<sup>8</sup> Article N provided for a meeting of the Intergovernmental Conference (IGC) in 1996, a formal mechanism for revision of the treaties which brings together the Member States' Foreign Ministers with the Commission's participation. This IGC lasted over a year (Turin, March 1996 - Amsterdam, June 1997). For immigration-related topics discussed in the IGC, see, among others, Edwards and Wiessala (1998), Blazquez (1998), Gonzalez (1998), Oreja (1998A). On the Treaty, see Martos and Gonzalez (1998), Comisión Europea (1999), and Geddes (2000).



mony. Mechanisms are created that tie together these basic institutions while preserving an asymmetrical form of power. For example, the Council will have to consult Parliament before making a decision and will only make decisions on Commission proposals. However - and this is where the hypocrisy we spoke of comes in - the Commission will be obligated to consider any request by a Member State to present a proposal to the Council. After prior consultation with Parliament, the Council will, for five years decide by unanimous vote, and after those five years, will by unanimous vote again, make the decision, whether to apply a procedure of joint decision and qualified majority for the adoption of measures in the area of home affairs.<sup>1</sup> Let us now take a closer look at the novelties alluded to above.

#### *Communitarization of the third pillar*

One of the AT's great novelties is transferring to the first pillar part of matters that thus far had been handled in the third pillar. This Communitarization applies mainly to everything related to the crossing of external borders, immigration and cooperation in civil law. The only referents made to immigration are reactive, such as the fight against racism and xenophobia (Art. 13 of the AT). In realistic political terms, the interest in designing strategies for action against racism and xenophobia revolves around maintaining social cohesion and stability. Following our argument, stability prevails over justice in approaching the social effects of the presence of immigrants. In criminal and police matters, cooperation is preserved but with a more binding legal system. Accordingly, the third pillar now comes to be called police and judicial cooperation in criminal matters. But this Communitarization, since it lends itself to misunderstandings, will for the next five years be subject to procedures typical of the logic of states, that is, unanimity. In fact this decision is without precedent in that for the first time a subject (immigration) is incorporated into a Community pillar while the decision-making procedure (unanimity) characteristic of the other two pillars is maintained (Monar, 1998:139; Geddes, 2000:110-113). This is then an example of cooperation in the first pillar that is usually distinct from the others in following a logic of integration.

#### *The European Holy Trinity: The Space of Freedom, Justice and Security*

Communitarization is based on the explicit linkage made from this point on between the freedom of movement of Euro-citizens and the need for adopting measures to guarantee the security of people in that space (Valle, 1998). The novelty is not so much establishing this linkage but rather institutionalizing it through law (justice). I refer again to the Cardiff Action Plan (December 1998) to confirm the conceptions expressed in the European Holy Trinity: freedom, security and justice. Striking for any theoretical political reading is the use of the negative notion of freedom, related to movement, living in surroundings that are respectful of the law,

<sup>1</sup> This logic of prudence is expressed in one of the Council and Commission's latest action plans regarding the best way to apply the Treaty's mechanisms for the creation of a space of freedom, security and justice (Cardiff Action Plan, December 1998). For details, see [www.ue.eu.int/jai](http://www.ue.eu.int/jai) (Document ref. 13844/98).

the protection of human rights and the respect for privacy. Security is referred to principally as a guarantee of private living space ("our living space"), and justice expresses the concern that the citizen constructs a unitary conception of law in the Union.

We might say that the EU's logic is of the first degree: allowing the free movement from one Member State to another may mean **security risks for citizens**. Unless such freedom is exercised in a space where they feel safe, they cannot fully enjoy the benefits it offers. There are offences that can easily extend across borders, taking advantage of this new space: terrorism, criminal activity, drug trafficking, fraud, racism and xenophobia. Therefore, the EU must also have the legal instruments (justice) to protect citizens from these dangers (security). Immigration is directly affected by this closed and systemic logic in that it is one of the "threats" in the minds of European political managers. In this area, the AT recommends specific measures for creating a common policy on controls and entry permits on external borders. For a period of five years, starting from the effectivity date of the AT, the following measures are contemplated: internally, a complete removal of all controls on people, whether citizens or Euro-foreigners; externally, a whole list of common norms and procedures for control, including a uniform model for visas and of third countries whose citizens are exempt from obtaining them, conditions for entry into and residence in the EU, common norms on procedures for issuing long-term residency permits, norms for fighting clandestine immigration and undocumented residency (R. Leveau et al., 2001), and also on expulsion, common rights of legal immigrants and conditions for their movement among the Member States.

#### *European citizenship*

The Treaty on European Union already established the European citizens' right to vote in local elections, de-linking for the first time the classic connection of citizenship-right to vote-nationality. In response to the debate generated over the relationship between Union citizenship and Member States citizenship the AT completes Art. 8 of Maastricht by explicitly stating that Union citizenship shall complement and not replace national (state) citizenship. In our terms, the EU's logic thus remains subject to state fundamentalism. We will next elaborate on the normative issues that this insistence raises.

#### *Final Comments: Normative Dilemmas and Institutional Challenges for the EU in Relation to Immigration*

The logic which is consolidating itself within the framework of the EU runs the risk of defeating the whole process of political integration if it only moves toward constructing a Union of States, i.e., if the EU continues to subscribe to state fundamentalism, elevating it to a higher level. The process of EU's political construction ought to include permanent resident immigrants, not exclude them as the states are doing. It ought to consider the impact of the presence of immigrants on our political structures in terms of justice and not just on efficiency and stability.

In fact, this is one of the readings that can be inferred from the Special Summit of the European Council held in the Finnish city of Tampere (Tampere Summit,

October 15-16, 1999). The belief is growing that the success or failure of the process of European political integration depends on how the issue of immigration is managed in the future (Zapata, 2001e). Tampere expresses the conviction that the goal of establishing the bases for a common asylum and immigration policy has the same vital, existential nature as the macro-project of creating a Single Market. This long-term goal presents itself as a principal means for creating a Political Union. In other words, the main message of the Tampere Summit is that there can be no Political Union without a common immigration policy. These conclusions reflect a qualitative change in relation to Maastricht in 1993 when the category of European citizenship was introduced (Meeham, 1993; Bru, 1994; Soysal, 1994; Everson and Preuss, 1995; Rosas and Antola, 1995; Lehning and Weale, 1997; Preuss and Requejo, 1998; and de Lucas (1996, 2001) while immigration was added in the Amsterdam Treaty and its reading in strategic-action terms made at the Tampere Summit. The institutional message is clear: immigration is a problem. The way this issue is managed will have direct consequences for the success or failure in achieving Political Union.<sup>10</sup>

We are now in what I would call the Tampere Sprit Phase, searching for a shared European conception of immigration, but with the restriction of not breaking the recently institutionalized European Holy Trinity (a space for freedom, justice and security). While there are still many institutional questions than answers on the EU's agenda, it is undeniable that the door began to open with Tampere. The historic momentum of the political process initiated at Maastricht must now produce a qualitative step forward to seriously consider European integration without excluding the more than 13 million *Euro-immigrants* that have been marginalized. Related to this, there are several key points which must be incorporated into political discussions, if one truly wishes to construct an institutional structure which includes extra-Community immigrants, that talks more about the integration of those who "are already here" and less about the control of external borders. The dilemma is clear: either one proceeds with a state-fundamentalist logic but at a higher level or one thinks of other mechanisms to manage and integrate these people, mechanisms which are more in line with our liberal, democratic beliefs. It is almost our very historical pride, our badge of identity that is at stake in facing the challenge of how to manage the "normative effects," or the liberal, democratic problems of immigration in the EU.

Thus, it is necessary and urgent not only to openly discuss the issue of immigration at the EU level, but also to construct an as yet non-existent notion, that of the *Euro-immigrant* (Zapata-Barrero, 1998). For the moment we have instruments that allow us to identify who is a European citizen (i.e., who is a citizen of a Member State), but we lack the criteria for identifying an EU immigrant since his or her situation is regulated in fifteen different ways, a fact which has generated debates among the Member States (European Commission, 1999).

<sup>10</sup> Besides the gradual establishment of a common asylum and immigration policy, the Tampere conclusions placed on the EU's agenda for achieving political integration three new priority topics (in order of importance): a genuine European space of justice (establishing common norms, Community law), the fight against crime, and the strengthening of Union foreign policy.

It is true that responsibility for this situation is not entirely the EU's. The states themselves with their own logics (state-fundamentalist logic) contribute in a decisive manner to this theoretical vacuum. As this is an emerging problem, there is no permanent (or consistent) state response for dealing with this phenomenon. Policies are simply being constructed "as we go along" without a historical vision of the future. This indecision in the logic of the state is due in part to the global dimension of the phenomenon, whose management goes far beyond borders and which requires discussion between states.

Despite our having spoken of an "immigration policy" at the EU level, in reality there is no common policy. There are emerging, shared perceptions, the fruit of cooperation over the decades, that become new, basic ways of structuring. But the subject, for the moment, is framed in terms of stability (of external security and control) with no interest in introducing criteria of equality and cultural pluralism, much less of integration. From the AT on, a desire was expressed to create a European statute for foreigners, but one which, instead of differing from what existed under a state logic, is nothing but a supra-state "clone." It is being constructed under the supposition of homogeneity, not multiculturalism. If we were asked at this time to find terms that, to our minds, describe the way the EU is approaching the subject, among the common descriptions would be the creation of a closed system, an exclusionary club, fear of invasion, ongoing discrimination between Euro-citizens and Euro-foreigners, a strong policy of control of external borders, and no concern for designing a policy of accommodation for permanent-resident foreigners in the Union.

The difficulty in identifying an EU logic distinct from the known logic of the states is due to the fact that for the EU to take a new path would increase already existing tensions. The unexpected effects would surely have costs in electoral terms, the formation of cleavages in society and the rise of parties with anti-immigration platforms, which derail political initiatives and innovations. But we must not adopt a "laissez-faire" attitude either since we have to face the task of constructing a Political Union. The basic issue is, once again, the sovereignty of the states, not only because the states are losing a large portion of their jurisdiction in deciding who belongs to their population and on what terms (Zapata, 2000b, 2001b), but rather because within the logic of the EU one can only construct a structure for managing the phenomenon of immigration by following the homogenizing patterns of the states but taken to a higher level.

To sum up these points, creating an institutional structure in the EU that truly sets itself off from state fundamentalism, we must very seriously consider the separation between nationality and politics, such as what occurred centuries ago with religion, when our modern, contemporary age began. States generally argue that managing multiculturalism is a problem because they did not contemplate the co-existence of different cultures and traditions. This is not legitimate justification for the EU - in contrast with states, the EU knows this reality. We know that this "disconnection" was politically and socially quite traumatic. The historical moment we are witnessing will have (and, indeed, is already having) equally profound consequences for all our thought paradigms. The EU has a historical opportunity. The very near future will reveal to us whether the Political Union will in effect be a

European Union or a Union of States. The argument I have defended is that the European Union can only be politically constructed if it takes the presence of immigrant residents into account. The European Union is simply unthinkable without *Euro-immigrants*. To think otherwise is to be a prisoner of an iron jacket called state fundamentalism, the orientation that guided political construction during the 19th and 20th centuries.

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