The Evolving Area of Freedom, Security and Justice: Taking Stock and Thinking Ahead

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Hardly anything in life remains unchanging; not only do most things constantly evolve, but they also do so in increasingly variable and unpredictable environments. Evolution and altered conditions more often than not represent both an opportunity and a need for initiating observations, reflection about the past and thinking ahead and bettering what exists. Acknowledgement of this fact is not always easy. But at the same time to carry on as if nothing has happened is not only imprudent, but it is also detrimental. The same applies to the Area of Freedom, Security and Justice, that is, the institutional architecture that emerged following the partial Communitarisation of the Justice and Home Affairs pillar of the Maastricht Treaty (1993), which was agreed during the 1996 Intergovernmental Conference and which culminated in the Amsterdam Treaty (in force as of 1 May 1999). A moment of reflection is needed not only because the Area of Freedom, Security and Justice is ten years old, but also because The Hague Programme, successor to the Tampere Programme[1] that laid down the policy priorities in this domain and was agreed by the European Council in November 2004, is about to expire.[2] Preparations for its new five-year successor, the Stockholm Programme, have been made and, in

[1] The Tampere Programme was adopted by the Heads of State and Government on 15-16 October 1999. It was based on four policy priorities, namely, partnerships with migrants' countries of origin, the creation of a common European asylum system, fair treatment of third-country nationals and the management of migration flows.

[2] The Hague Programme set the objectives to be implemented in the Area of Freedom, Security and Justice for the period 2005-10.

anticipating the European Council's meeting in December 2009, the Commission published a Communication on 'An Area of Freedom, Security and Justice serving the citizen' in June 2009.[3] The Communication seeks to make the policy priorities of justice and home affairs cooperation more balanced by stating explicitly that 'the priority now has to be to put the citizen at the heart of this project'.[4]

Although the new 'citizen-oriented' approach is a welcome development in light of the restrictive and security-based focus of discourse and policy that prevailed since the adoption of The Hague Programme, the absence of references to 'Europe's Others', that is migrants, third-country national border crossers, asylum seekers and refugees is puzzling. In any case, the Communication outlines what the Commission perceives to be the major successes of Member State co-operation during the last ten years: the removal of controls at internal borders; the management of the EU's external borders in a coherent fashion; progress towards a common policy on immigration, that is, the existence of 'rules that make legal migration fairer and easier to understand'; the adoption of an EU framework on migrant integration; 'stronger action being taken against illegal immigration and human trafficking'; the establishment of partnership agreements with third countries, mainly readmission and visa facilitation agreements, designed to make 'circular migration' a reality[5]; and progress towards the establishment of a common European system of asylum and the development of a common visa policy. At the same time, the Commission recognises that ensuring the proper implementation of European Union law by the Member States remains a challenge.

It is true that the modus operandi of the AFSJ as well as the ensuing policy output have been successful, particularly if one takes into account the deficiencies of the previous intergovernmentalist institutional framework (1993-1999), namely, the ineffectiveness of policy-

[3] Commission Communication, *An Area of Freedom, Security and Justice serving the citizen: wider freedom in a safer environment*, COM (2009) 262/4, Brussels, 10 June 2009.
[4] Ibid, introduction, p. 2.
[5] Ibid, pages 2-3.

making due to the prevalence of unanimity, convention law-making and the unduly cumbersome five-tier decision-making structure, the absence of clearly defined objectives, effective Parliamentary involvement and judicial supervision and the lack of enforcement mechanisms.[6]

But it is equally true that success is not merely a measure of juridico-political output and of deepening Member State cooperation in areas which have traditionally been regarded as bastions of state sovereignty. Successful cooperation cannot be measured only by its results; it must also be tested on the merits of what has been agreed. In other words, success is also a matter of ensuring a policy's conceptual coherence with the existing normative framework as well as with other, equally important, policies, and its capacity to provide credible and effective solutions to the problems at hand. In assessing success in more substantive terms, one must identify qualitative differences between the present and the past and indicators of better regulation in the service of human needs. Measured against such an ambitious yardstick, one cannot but conclude that the alleged successes in the past ten years of the AFSJ have been relative. For instance, Frontex operations have given rise to a number of concerns about the agency's accountability and the compatibility of its actions with human rights obligations under international and EU law and the directives that have been adopted in the field of legal migration: namely, Directive 2003/86 on family reunification; Directive 2003/109 on the status of long-term residents; Directive 2004/114 on the conditions of admission of students, pupils, unremunerated trainees and volunteers; Directive 2005/71 on the admission of third-country national researchers; and Directive 2009/50 on highly skilled migrants. All these now need modification. It is widely acknowledged that - despite the advantages of securing agreement on EU-wide minimum albeit uniform standards (the UK, Ireland and Denmark have secured opt-outs) - the migration directives nevertheless contain a

[6] For a detailed discussion, see Kostakopoulou 2007.

number of restrictive clauses and fall short of the Tampere objective of 'near equality' for third-country national residents.[7]

The developing EU Framework on integration, on the other hand, which commenced with the establishment of National Contact Points on Integration in 2003[8] and the adoption of the Common Basic Principles on Integration in 2004,[9] has been shaped by the Member States in ways that accommodate not only their own migration rules and policy priorities in this area, but also national conceptions of integration and neo-national narratives seeking to preserve social cohesion and societies' 'national' values (Carrera 2009). Predominant national approaches have managed to disconnect the issue of migrant integration from the principle of equal treatment in socio-economic spheres, non-discrimination in the workplace, society and service delivery and easy access to citizenship (Kostakopoulou, Carrera and Jesse 2009).

In so doing, they have aligned integration with migration control, restrictions in the admission and settlement of third-country nationals and the preservation of the alleged homogeneity of national societies. Migrants' entry, residence, settlement and access to citizenship are now conditional on meeting integration requirements in almost all 'old migration countries' (van Oers, Erboll and Kostakopoulou forthcoming 2010). Naturalisation is premised on successful performance in civic orientation tests (Belgium and France are exceptions), and pre-existing language requirements have been tightened and reinforced. Migrants are also required to attend language and civic orientation courses and, in most cases, to sit integration tests in order to enter and/or obtain permanent residence in the Netherlands, Austria, Denmark, France, Germany, Luxembourg and the UK. Non-attendance of integration courses affects their access to social benefits in Germany, the Netherlands, Belgium, Sweden, Finland, Denmark, France and the UK. More controversially, since 2006, integration requirements and tests have 'migrated' abroad, that

[7] European Council (1999), *Presidency Conclusions Tampere 15 and 16 October 1999*, SN 200/99, Brussels, 16 October 1999.
[8] Council Meeting 2455, Luxembourg, 14-15 October 2002.
[9] Justice and Home Affairs Council Meeting 2618, 14615/04, 19 November 2004.

is, to (non-European) states of origin, as the Netherlands, France, Germany and Denmark and the UK require third-country national spouses seeking reunification to have adequate knowledge of the national language and societal values. In Austria, France, Denmark and Luxembourg integration requirements are contained in integration contracts that migrants have to sign in order to obtain a secure residence status (Van Oers et al. 2010). Finally, the notion of circular migration gives rise to fears that old guest worker programmes are being resurrected and that, despite the emphasis on migrant integration and promoting 'a Europe of rights',[10] third-country nationals are prevented from settlement and are merely submitted to utilitarian calculations and labour market needs.

In sum, one cannot overlook the fact that the EU is at a crossroads as far as migration and integration laws and policies are concerned. Further work remains to be done in designing and implementing common juridico-political frameworks that are coherent, normatively sound and effective in policy terms. At this juncture, the IDEA project is envisaged to make a timely and important contribution. It imports historical understanding and conceptual coherence into the frames of regular and irregular migration and supplies empirical rigour and policy recommendations that can be implemented. Among its recommendations is the development of 'a more innovative, flexible and pro-active migration policy and responding to the phenomenon of "fluid" migration as part of the EU *acquis communautaire*' (IDEA 2009). An innovative and pro-active migration policy would have to be based on an alternative frame for migration. For, to arrive at a new vision, one often needs to alter the ways in which an issue has been perceived. This is not simply an issue of challenging hegemonic narratives and establishing a counter-hegemony. The issue is rather one of choice, and choice is a matter of reflection upon alternatives, upon their strengths and weaknesses. As Heinz Fassmann and Ursula Regger have argued in this volume, it is perhaps time to view migration as a permanent element, and not as an exception, in a globalising world. After all, even before their transformation into homelands in

[10] Commission Communication, n 3 above, page 7.

the 19th century, lands have always been receptors of people. In the 19th century, there was an exodus of people from Europe to North and South America. And, as Marek Okolski has noted in this volume, in the second part of the 20th century, Europe witnessed considerable migration: post-war adjustment migration, migration related to labour recruitment, migration related to new globalisation, post-community migration and post-enlargement migration. Furthermore, as Southern European countries have become immigration countries and Central and Eastern European countries are in 'migration transition', migration needs to be seen as a normal issue - not a problem or a security threat to be dealt with through restrictive admissions policies and a law-enforcement approach. Acknowledgment of the 'ordinary' or 'normal' nature of migration, coupled with the abandonment of the incorrect expectation that it is controllable (see Fassmann's chapter in this volume), can lead to qualitatively different migration policies. It will certainly reduce the incoherence characterising the regulation of third-country nationals' entry into the EU using the existing category-by-category approach[11] and will simplify the administrative requirements for both migrants and their employers.[12]

It may also expose the artificial boundaries between regular and irregular ('illegal' in MS's discourses and policies) migration and prompt the readjustment of the sanctions-oriented approach pertaining to the latter. As Elspeth Guild and Sergio Carrera have recently argued, 'in the term "illegal" itself we can perhaps find an answer. What is needed is to change laws so that people do not fall into undocumented statuses. If we analyse the legal measures that lead to people being categorised as "illegal" or undocumented we may find a more helpful approach.'[13] Peixoto et al (in this volume) have also commented on Southern European states' willingness to

[11] Seee Directives 2005/71 *on the admission of third-country national researchers* ([2005] OJ L289/15) and 2009/50 *on highly skilled migrants* ([2009] OJ L155/17).
[12] See the Commission's Proposal for a Directive *on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on common set of rights for third-country workers legally residing in a Member State*, COM(2007) 638 final, 23 October 2007.
[13] Elspeth Guild and Sergio Carrera, *Towards the Next Phase of the EU's Area of Freedom, Security and Justice: The European Commission's Proposals for the Stockholm Programme*, CEPS Policy Brief, 2009, p. 8.

remove undocumented migrants from the artificially constructed domain of 'illegality' and to relax the weight that traditionally has been attributed to states' consent (or the lack of it) in favour of more pragmatic considerations and individuals' de facto social membership due to their residence and ('irregular') employment in the informal economy. However, as Peixoto et al (p. 101) observe, regularisations are 'used to "repair" the lack of an efficient migration policy'. It is true that irregular migration is a multi-variable phenomenon (Baldwin-Edwards and Arango 1999). Magdalena Lesinka (in this volume, p. 200) has succinctly noted them: the existence of a shadow economy and its generalised acceptance by the population and the state, restrictive entry and recruitment procedures, weak administrative structures and ineffective labour market controls and the lack of a transparent regularisation scheme. As she observes with respect to 'the new migration countries', 'special attention should be given to the role of the informal economy which serves as a magnet for irregular employment' (Lesinka, p. 201), as well as to other relevant institutional factors that create social realities. Understanding migration patterns better and the role of the historical links between sending and receiving societies and migrant networks (see, in particular, Drbohlav et al in this volume) will also assist us in overcoming the simplicity of push-pull explanations. Guild and Carrera have made this point convincingly. On the basis of Eurostat's statistics in December 2008, they show that although unemployment was at 2.7% in the Netherlands and 14.4% in Spain and statutory minimum wages were under 300 Euro per month in Bulgaria and about 1,570 Euro per month in Luxembourg, the respective movements of Spanish nationals to the Netherlands and Bulgarian nationals to Luxembourg were minimal.[14]

In the light of the foregoing, European migration law and policy require readjustment. There is an urgent need to rethink the existing political frames of migration and integration and to devise a coherent framework of migration governance that de-securitises migration, reflects international and European law commitments and takes sufficiently into account the specificity of migration patterns in the 'old', 'new' and 'future' migration countries. In the quest for a new

[14] Ibid, page 8.

conceptual frame, the European Union would have to promote the merits of a paradigm shift; namely, a shift away from perceiving and framing migration as a problem and/or a threat to viewing it as a resource. And it would also have to convince national electorates of the error of past approaches in this domain. To convince of error is simply to assist people not only in understanding and valuing the past and present contributions of non-national migrant labour to economic productivity, service delivery and the vibrancy, innovation and dynamism of societies, but also to recognise the 'facticity' of human mobility – both inward and outward, and the necessity of devising pragmatic, coherent and principled responses to it in the 21st century.

Similarly, migrant integration should not be seen as a matter of imposing additional conditions to entry and settlement, testing individuals' resolve and knowledge, imposing sanctions, causing hardship and placing hurdles on the path to citizenship. Instead, it should be a matter of developing partnerships, fostering mutual respect and dynamic learning among citizens, residents and newcomers, and promoting intercultural dialogue and pluralism in action.

The quest for coherence, on the other hand, might lead to the transcendence of the multiple, variegated and conflicting conceptual and legal frames with respect to intra- and extra-EU migration and integration. The contrast between the template of internal mobility for Community nationals, which is based on rights, non-discrimination and equal opportunities, on the one hand, and the migration template, which has been based on restriction, discrimination on the grounds of third-country nationality and less-than-equal opportunities, on the other, sheds ample light on the benefits of inclusiveness, equal treatment and the making of migrant EU nationals into European citizens (Kostakopoulou 2001). The basic traits of the former are rights, uniform and equal treatment irrespective of nationality and protection, while the basic traits of the latter are restriction, control, conditionality, national variations and law enforcement. The narrowing of the artificial difference between internal mobility and migration would make migration law and policy more inclusive and rights-based. Its impact on integration law and policy in the EU and the Member States would also be significant; it would require a non-

discrimination-based and citizenship-driven approach to migrant integration akin to that applying to Community nationals.

The European Commission's Communication has recognised the importance of treating existing obstacles as challenges to remaking European migration and asylum policy, setting out a clear vision in this field and promoting dialogue among all stakeholders at local, national and European levels. Promoting a more integrated society, a Europe of solidarity, features among the political priorities of the new Stockholm programme. To this end, the Commission calls for a dynamic and comprehensive migration policy which consolidates the global approach to migration and displays responsibility and solidarity.[15] 'Immigration policy must be part of a long-term vision that emphasises respect for fundamental rights and human dignity. This policy must also be designed to deal with increased mobility in a globalising world through emphasis on social, economic and cultural rights'[16]. In this respect, the Commission wishes to see the consolidation of a global approach to migration by making migration issues part of EU external policy, promoting cooperation and dialogue with third-world countries and laying the foundations for additional initiatives on migration and development as well as the development of 'an innovative and coherent framework'.[17] A skeleton of the latter has been furnished. It includes, among other things, 'a common framework in the form of a flexible admission system that will enable it to adapt to increased mobility and the needs of national labour markets'; a better analysis and assessment of migration issues (compare Lesinka's policy recommendation on page 196); establishment of a European platform for dialogue; and a 'proactive policy based on a European status for legal immigrants'.[18] With respect to the last point, the resurrection of the Tampere mandate is clear: 'to maximise the positive effects of legal immigration for the benefit of all – the countries of origin and destination, host societies and immigrants – a clear, transparent

[15] Commission Communication n 3 above, priority 5 on page 23 et seq.
[16] Ibid, p. 23.
[17] Ibid, pp. 23-24.
[18] Ibid, pp. 24-25.

and equitable approach that respects human beings is required. To do this an Immigration Code should be adopted to ensure a uniform level of rights for legal immigrants comparable with that of Community citizens'.[19] An immigration code will bring to an end the present uneven, piecemeal approach to legal migration and will be accompanied by the revision of the family reunification directive and the support of Member States' integration efforts through a joint coordination mechanism. Although, in my opinion, the latter proposed initiative does not go far enough in the direction of rethinking integration law and policy, it is nevertheless, the case that the majority of the Communication's proposals, coupled with its overall approach to migration issues, are more consistent with the Tampere agenda. As such, they represent a rupture from the restrictive, security-oriented and law-enforcement approach of The Hague Programme.

In the light of the preceding discussion, it seems to me that - given the fact that mobility is an integral part of the European integration project and the importance the EU has attributed to encouraging border crossings and transborder relations - perceiving third-country national migration in negative terms and erecting impermeable borders to discourage border crossings are counterproductive strategies. True, one cannot underestimate the political obstacles that stand in the way of reform in the migration field. However, the review of Member States' policies in this domain, as undertaken by IDEA project participants, and evidence drawn from the evolving AFSJ over the last ten years indicate that national executives' fears about uncontrollable migration and its negative impact have been greatly overblown. Such narratives have served as electoral devices for eliciting public support and as ideologically driven excuses for the maintenance of the status quo. But they have hardly offered any compelling reasons to oppose the design of 'a dynamic and fair migration policy' in the 21st century.[20] Hopefully, the Stockholm Programme will lay down firm foundations for such policy. The conundrum, of course, is how to reform migration regulations and practices in ways that treat migrants and refugees as partners and promote the

[19] Ibid, p. 25.
[20] Commission Communication n 3 above, p. 32.

positive effects of migration while working with and within national statist systems that themselves are built on the exclusion and subordination of outsiders. Fortunately, the European integration project contains the conceptual and normative resources required in order to furnish a clear vision for migration law and policy in the 21st century and to provide solutions to the conundrum. After all, it has successfully done so with respect to intra-EU mobility and the development of European Union citizenship over the last fifty years.

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