

THE HUMAN RIGHTS OF THIRD-COUNTRY IMMIGRANT WOMEN AND THE  
EVOLUTION OF IMMIGRATION POLICY IN THE EUROPEAN UNION

by

EFFIE SENN MacLACHLAN

A dissertation submitted to the Graduate Faculty in Political Science in partial fulfillment  
of the requirements for the degree of Doctor of Philosophy,  
The City University of New York

2007

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dissertation requirement for the degree of Doctor of Philosophy.

Professor George Andreopoulos

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Date

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Chair of Examining Committee

Professor Ruth O'Brien

---

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Date

---

Executive Officer

Professor Christa Altenstetter

---

Professor Juergen Dedring

---

Distinguished Professor Rosalind Pollack Petchesky

---

Professor Thomas G. Weiss

---

Supervisory Committee

THE CITY UNIVERSITY OF NEW YORK

## **Abstract**

### **THE HUMAN RIGHTS OF THIRD-COUNTRY IMMIGRANT WOMEN AND THE EVOLUTION OF IMMIGRATION POLICY IN THE EUROPEAN UNION**

by

Effie Senn MacLachlan

Adviser: Professor George Andreopoulos

This project explores the extent to which the international human rights discourse has influenced the formulation of a common European Union (EU) immigration policy. It examines the conditions under which international norms, defined as ideas about appropriate behavior held in common by a group of actors with a given identity, affect (supranational) institutional change. Through the analysis of EU legislation, jurisprudence, and other primary source documents, this research investigates the human rights norms that have been taken into account by EU policymakers. The processes of norm diffusion and adoption are assessed, and then the appropriateness and adequacy of the norms that inform immigration policy are interrogated using a feminist analysis. The development and codification of the Council Directive on the Right to Family Reunification (2003/86/EC) is given detailed consideration within the broader context of immigration policymaking. Through examining the legal, economic, and social obstacles confronted by third-country immigrant women in the EU and the specific case study of family reunification policy, this research explores not only the ways in which immigration legislation in Europe has been gendered to the detriment of migrant women but also the ways in which the human rights discourse itself is gendered.

For my mother,  
without whom nothing would be possible

## Acknowledgements

I owe a deep debt of gratitude to many professors, colleagues, friends, and members of my family who have provided invaluable scholarly feedback and practical assistance over the years. First, I would like to thank my supervisory committee, most especially my advisor, George Andreopoulos who was always extremely helpful and supportive; he consistently gave greater clarity to my own thinking with his vast knowledge of the fields of international relations and human rights, and with his perceptive understanding of my theoretical aims. My primary reader, Christa Altenstetter, has been an indispensable source of information and counsel since I entered graduate school. Her exacting standards and conscientious attention to detail motivated me to produce better, more lucid work. As a mentor and an employer Thomas G. Weiss always provided penetrating and insightful scholarly (and editorial) advice. I am privileged to not only have benefited from Professor Weiss's academic, professional, and personal support, but also his humor, warmth, and humanity. Rosalind Petchesky was unfailingly receptive and helpful. Her thoughtful comments on my work challenged me as a feminist theorist and scholar. Juergen Dedring was dependably responsive and accommodating, as well as being a valuable source of scholarly and applied wisdom about Europe and international organizations.

Several other professors and mentors from my undergraduate and graduate studies played important roles in my development as a scholar, and consequently in the production of this dissertation. Zillah Eisenstein and Greg DeLaurier set me on the path of feminist inquiry and the quest for social justice. Hugo Kauffman provided me with many significant research opportunities through my affiliation with the European Union

Studies Center and gave me the single most helpful piece of advice I received during a pivotal stage in my writing. I would also like to thank Sibyl Schwarzenbach, Joan Tronto, Marshall Berman, and my Masters' thesis advisor, John Gerassi for informing and supporting my theoretical pursuits and for contributing to a rewarding educational experience.

I could not have survived graduate school without my amazing feminist colleagues, the WKWAs: Dorothee Benz, Jocelyn Boryczka, Jennifer Leigh Disney, Ronni Greenwood, Susanna Jones, Tracy Steffy, and Dorinda Tetens. In particular, I would like to thank my “sister of choice,” Tracy Steffy, who not only made this dissertation possible by providing me with a space to write, but makes my entire life possible—in addition to making the world a better place. My friends and colleagues, Antoinette Pole and Ronald Nerio also deserve thanks for reading multiple drafts of my proposal and helping me refine my research methods.

I also greatly appreciate the unwavering support both material and emotional of my parents and brothers and sister during the long years of graduate school. This dissertation would not have become a reality with the love, patience, sacrifice and consideration of my husband, Christopher Leydon. His presence not only made the journey tolerable but makes the future a pleasurable prospect. I also must thank my daughters who make everything worthwhile: Delia, who was born before this dissertation was completed and precociously understood when Mommy needed to work; and my twin daughters, Matilda and Cybele, whose conception provided me with the final impetus I needed to finish.

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## Abbreviations and Acronyms

AHWGI	Ad Hoc Working Group on Immigration
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CFSP	common foreign and security policy
COE	Council of Europe
ECSC	European Coal and Steel Community
EEC	European Economic Community
EC	European Communities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECRE	European Council for Refugees and Exiles
EFTA	European Free Trade Association
EP	European Parliament
EU	European Union
EUMF	European Union Migrants' Forum
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGC	intergovernmental conference
IR	international relations
IT	information technology
JHA	justice and home affairs
MPG	Migration Policy Group
MWC	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
NGO	nongovernmental organization
OECD	Organisation for Economic Co-operation and Development
OMC	open method of coordination
QMV	qualified majority voting
SEA	Single European Act
SIC	Schengen Implementing Convention
SIS	Schengen Information System
TEC	Consolidated Treaty of the European Community
TEU	Treaty on European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
WTO	World Trade Organization

## Chapter 1

### Introduction

A number of developments are challenging the national identity and interests of Western European countries. Primary among these are the supranational integration and sovereignty sharing that is occurring between the European Union (EU) member state governments and the EU governance organs, the ongoing inward migration of peoples from the global South and East into EU countries, as well as the continued elaboration and application of human rights, which is of particular importance to potential migrants and EU residents of non-European origin. The existence of increasing migratory flows and a growing number of settled immigrant communities demands a policy response from the EU and its member states to address the situation of immigrant minorities “particularly with regards to the rights to be (or not to be) conferred upon them” (Geddes 1995:198).

Using a constructivist theoretical framework, this dissertation will explore the extent to which the international human rights discourse has influenced the formulation of a common EU immigration policy, specifically the Council Directive on the Right to Family Reunification for Third Country Nationals. It will examine the national and regional conditions under which international norms, defined as ideas about appropriate behavior held in common by a group of actors with a given identity, affect (supranational) institutional change. This project will investigate the human rights norms that have been taken into account by EU policymakers, and then, using a feminist analysis, interrogate the appropriateness and adequacy of those norms as a basis for

immigration policy. The explicit acknowledgement and the attempt to codify the rights of migrants in the European Union is an encouraging development; however, this research will explore the ways in which immigration legislation in Europe has been gendered to the detriment of migrant women and the ways in which the human rights discourse itself is gendered.

Since the Maastricht Treaty (1993), immigration has become a regular feature of the EU policy agenda, yet, as the example of the final family reunification directive demonstrates, this fact does not necessarily entail that member states are willingly relinquishing their national sovereignty to a supranational authority. This research supports the work of scholars who have developed and contributed to the “venue-shopping” approach (Guiraudon 2000, 2003; Larsen 2004). The venue-shopping model posits that member-state government elites have made a tactical choice to pursue immigration policymaking within the Council of Ministers at the supranational level in order to circumvent domestic constraints. These constraints take the form of human rights norms codified in national constitutions and the activities of advocacy groups which serve to limit the latitude that interior and justice ministers can take in devising and implementing restrictive immigration policies. A close analysis of current immigration legislation leads one to conclude that certain member-state parties have successfully exploited the EU institutional structure to further legitimize and entrench across the EU a particular security-oriented understanding of national interest in regard to immigration policy.

## **The Historical Context**

Cooperation on immigration policy is a fairly recent occurrence in Europe. In the postwar period of economic expansion and institution building, immigration policy was framed in the European Communities mainly as a question of social and economic rights and the desire to create a single market in labor. The labor importing European countries competed to acquire the “best” immigrants and set up the most beneficial labor migration agreements with exporting countries—mainly Southern European states and former colonies. In the 1970s, in response to the global recession, the traditional immigration countries suspended economic migration across the board. Although each country adopted a similar policy stance, there was little coordination or practical consideration of how the closing of borders and the cessation of labor importation might affect neighboring countries.

In recent years, immigration has become a hot button issue across Europe; many of the “problems” associated with both the waves of incoming migrants and the existing communities of long-term resident immigrants are the topic of frequent and ongoing public debate. The subject of this study is EU policy that addresses legal third-country migrants—in particular first-generation non-European women migrants, who immigrate for purposes of family reunification. This dissertation does not deal with, or touches on only very tangentially, many of the more politically charged areas of concern such as human trafficking, refugee flows, illegal immigration, urban civil unrest, cross-border crime, and terrorism.

Since the political and social upheavals in Europe in the 1980s and 90s, immigration policymaking in general has been caught up in the political controversy over

asylum. Many policymakers suspected that the upsurge in the number of asylum seekers was largely comprised of economic migrants; this governmental and media focus on “bogus” asylum seekers and illegal immigration caused the two issues to become collapsed in the public discourse and has led to more insecure conditions for all migrants residing in the EU (Freedman 2003; Joppke 1998). Immigration more generally was increasingly being viewed as a threat to the economic and “social security” of states (Waever et al. 1993). The political context has changed yet again since September 11<sup>th</sup> and the terrorist bombings in Madrid and London. Internal security concerns have risen on the agenda and “migration has been increasingly presented as a danger to public order, cultural identity, and domestic and labor market stability; it has been securitized” (Huysmans 2000:752).<sup>1</sup>

Prior to the Single European Act (SEA 1986), immigration was exclusively a state level concern. The passage of the SEA produced a renewed zeal for economic integration and member-state cooperation by setting a target date for the completion of the single market. The main goal of the single market, to be completed by the end of 1992, was to create a free market in goods, services, capital, and labor. Disagreements over the necessity of maintaining internal border checks in order to distinguish between EU citizens and third-country nationals, vied with the realization that stringent border controls were proving costly and ineffective. Nevertheless, an overriding conviction that greater freedom of movement for workers would allow for greater efficiency in the distribution of labor, led five European governments—Germany, France and the

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<sup>1</sup> Even in cases when an “immigrant’s security is not threatened by the withdrawal or limitation of formal rights, they may experience insecurity as a result of the particular social conditions within which these rights are exercised. Contemporary discourse and policies on immigration in Europe thus may be seen to be contributing to an increasing insecurity and vulnerability amongst many migrants” (Freedman 2003:7).

Benelux—to abolish their internal borders by adopting the Schengen agreement in 1985. This arrangement, however, raised security concerns. The Schengen Convention, signed in 1990, established stricter external border controls to compensate for the loss of control over internal borders deemed necessary for the completion of the internal market. The objective of a common migration policy was “limited to compensate the potential negative impact of the suppression of internal borders” (Pastore 2002:2). The Schengen agreement was hampered both by its strictly intergovernmental nature, which required unanimity in all decisions, and also by its lack of democratic legitimacy.

A protocol attached to the Treaty of Amsterdam incorporated Schengen into the European Union (EU) framework on 1 May 1999. The Treaty of Amsterdam gave the EU competence in the arena of immigration policy, whereby it was shifted from being a matter for intergovernmental coordination to one of shared competence. In Tampere, Finland, in 1999 the European Council agreed upon the parameters for a common EU immigration policy.

The Tampere Presidency Conclusions state, “the European Council acknowledges the need for approximation<sup>2</sup> of national legislations on the conditions for admission and residence of third country nationals” (1999:para 20).<sup>3</sup> Previously migration policy was framed in narrow instrumental economic and security terms, but Tampere radically expanded the agenda to include not only migration control but also the effective management of legal migration in order to strike a balance between humanitarian and

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<sup>2</sup> Approximation is a fundamental principle of European Community law. It entails an agreement on the part of member states to develop comparable and compatible policies at the national level so as to better achieve common EU goals.

<sup>3</sup> Third-country nationals as a usage pertains to all those persons who are not citizens of the member state in which they are resident, nor are they citizens of another EU member state. They are citizens of a third country and thereby are not citizens of the EU.

economic admission. As a result of the Tampere mandate, the Commission issued draft directives in three key areas: the conditions of entry and residence for third-country nationals for paid employment and self-employed activities; the right to family reunification; and the status of third-country nationals who are long-term residents. These initiatives are part of the Commission's effort to establish a uniform set of rights for migrants. In 2002 the European Commission tried to impose a standstill clause<sup>4</sup> that would have prevented member states from developing any new legislation until the European parameters were solidified. However, "on some key subjects, such as family reunification, it was the European decisionmaking process which was blocked [in the Council] in order to allow national parliaments to take their own decisions in an unrestricted way. In other words, we witnessed very clearly the functioning of domestic priorities and of a 'reverse standstill clause'"(Pastore 2002:3).

On May 1, 2004, the transition period set by the Treaty of Amsterdam ended. It appears now that only a very minimal level of communitarization<sup>5</sup> occurred. Even in issue areas where a partial form of communitarization was successfully negotiated, such as for family reunification, it was a convergence at the bottom. One of the EU's professed goals, as articulated in the Tampere Presidency Conclusions, is to strengthen the rights of third-country nationals in order to make them comparable to the rights of citizens of EU member states. One of the legal instruments formulated to achieve this goal is the directive on family reunification. While the preamble of the directive expressly states the

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<sup>4</sup> A standstill clause is written into new legislation and is designed to preserve the level of protection already afforded by existing national, supranational, and international laws in their respective spheres of application. It prevents member states from adopting measures less favorable than those on the books at the time of the adoption of the EU legislation.

<sup>5</sup> In EU terminology, when a policy issue is "communitarized" it is transferred from being a matter for intergovernmental negotiation (i.e. subject to second and third pillar decisionmaking) to one decided by the Community method (i.e. first pillar).

directive's adherence to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which protects the right to family life, closer inspection has left this in doubt.<sup>6</sup>

Four years after the family reunification directive entered into force on October 3, 2003 (the directive was scheduled for transposition into national law by October 3, 2005), the very adoption of the directive into member-state law raises further concerns as to the protection of the rights of third-country nationals. One example of policy convergence at the bottom is the more restrictive immigration law adopted in France in May 2006. Nicolas Sarkozy, then French Minister of Internal Affairs and now President, justified the changes to the law by claiming that it was fulfilling its European obligations and bringing French immigration policies more into line with that of other EU countries (Schmidt 2006). It would appear that migration control has been given precedence over migrants' rights.

### **Research Objectives**

The above historical précis aptly illustrates the main puzzle this dissertation will address. Why, despite the stated intentions of policymakers to create a common immigration policy, which observes and incorporates international human rights into EU policy, do the resultant policies often fall short of these expressed aims? The puzzle is made more complex by the existence of a silence that underlies this rhetoric/practice gap.

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<sup>6</sup> Recital 2 of the preamble of the directive reads: "Measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. This Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union."

This silence will be explored in the context of family reunification policy—a particularly salient case study because it disproportionately affects women. This research will focus on immigrant women, whose situation goes underspecified in the human rights discourse, and who are often underserved by both policy aims and outcomes. By using a feminist analysis, my research challenges the human rights norms that pertain to immigrants to become more consistent with universalist claims and thereby attempts to transform the discourse.

This dissertation sets out to test two hypotheses. The first hypothesis assesses whether human rights norms have impacted immigration policy formulation at the EU level. To test this hypothesis, I will examine the evolution of EU immigration policy in general and the Council Directive on the Right to Family Reunification for Third Country Nationals in particular. Human rights concerns and legal obligations are often front and center when EU legislation is drafted. However, there exists a demonstrable gap between the rhetorical commitment and the willingness and capacity of EU institutions to institute common policies that will expand the rights of third-country nationals, and this situation often seems to result in lowest common denominator agreements. This gap can be attributed to the tension between statist policies aimed at restricting international migration in the interest of regulating national labor markets and the liberal norms and principles which form the constitutional bedrock of the member states. The second hypothesis asserts that, to the extent that EU immigration policy does try to observe human rights norms, it does not take the human rights of immigrant women into account because both immigration policy as it has evolved in Europe and the human rights discourse itself is gendered. It is possible that many key policy players are unaware of the

arguments concerning the shortcomings of international norms. While various lobbying groups such as the European Women's Lobby continue to produce reports citing gender disparities, these arguments may have penetrated the decisionmaking processes of the various governance bodies in Brussels, e.g., the Commission, the Council of Ministers, and the European Parliament, to different degrees and in different ways.

This study acknowledges, and indeed relies upon, the fact that there are international institutions in place capable of promulgating and regulating human rights norms—an extant social structure. However, as Schmitz and Sikkink (2002) assert, “more research is needed to better understand the emergence and establishment of human rights norms on global and regional levels...Additional knowledge about the role and motivations of state actors in the process of establishing international human rights norms is necessary (525). The norm adoption model developed by Finnemore and Sikkink (1998) posits a three-stage norm “life cycle” consisting of emergence, norm cascades, and internalization; however, this model focuses exclusively on how norms are internalized at the domestic level. In contrast, this project examines how understandings of immigrants' rights are internalized by the EU bureaucracy and its supranational organs. The conventional wisdom holds that the EU institutionalizes the harmonization of politics and policy at the regional level and that any variation occurs when EU legislation is transposed into law at the domestic level. This assumption may only tell part of the story: this analysis attempts to explicate variation in the internationalization of norms within the governing bodies at the EU governance level.

## Sovereignty

This dissertation explores the conflict between the goals of human rights and the imperatives of state sovereignty in relation to immigration policy. Ruggie (1986) defines sovereignty as “the institutionalization of public authority within mutually exclusive jurisdictional domains” (143). The tensions over immigration policy epitomize the conflict between member-state governments’ desire to retain control over national borders and the definition of their sovereign interests, and the European Commission’s ambition to expand its competencies in order to realize a single market in goods, services, capital and workers across Europe.<sup>7</sup>

The multitiered nature of the EU system of governance and policymaking allows for a diffusion of power among localized domestic, member-state government, and supranational interests. Multiple power axes and the attendant vying for control over policy debates and outcomes make arriving at effective supranational solutions difficult. This “heterogeneity complicates the framing of any common community policies in the social sphere, all more so with respect to migration and freedom of movement” (Ireland 1995:241) because for most nation-states immigration and naturalization laws lie at the heart of national sovereignty. States defend the prerogative to specify who may be admitted and who may not be admitted to their territories; “indeed, the degree of control over such movements is almost a measure of the sovereignty of the nation-state” (Fielding 1993:42). As a consequence, immigration is a very contentious political issue and EU member states to resist ceding any authority in this area.

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<sup>7</sup> Caparoso (2000) writes: “The boundaries of the state have traditionally set limits to the range of rights and responsibilities with which we are familiar. Yet state-centric citizenship displays its limits as integration among countries increases. The flow of goods and factors, especially labor, across national lines, pointedly raises questions about rights regarding the market and beyond” (11).

However, some scholars contend that states are progressively losing control over international migration flows and that immigration policy is largely dictated by factors that emerge outside of the sphere of state influence. Saskia Sassen (1996) points to the external economic and human rights constraints on restrictive control policies that render them mostly symbolic. They constitute a way for national governments to appear to control transnational phenomena such as migration while they no longer effectively do. Sassen (1999) also notes that despite EU member-state resistance, they have been compelled to cede certain aspects of control over their borders and obliged to comply with court decisions that uphold the human rights of immigrants.

### **EU Institutions and the Policymaking Process**

The European Union has evolved into a fully realized system of governance which has its own set of agenda priorities, institutional capacities, and policy processes. That said, there is not one single EU policymaking process but an expanding number of what Wallace et al. (2005) refer to as policy modes through which the preferences of member-state governments, EU governance bodies, and domestic level actors are all channeled to arrive at common policies. National approaches to decisionmaking permeate EU policy processes, and the EU dimension is an ever present factor in much of member-state politics and policymaking. The EU institutions do not exist in a vacuum: most of the policymakers “are people who spend the greater part of their time as national policymakers, for whom the European dimension is an extended policy arena, not a separate activity” (Wallace et al. 2005:7).

The adoption of immigration and internal security policymaking through the inclusion of the “area of freedom security and justice” introduced by the Amsterdam Treaty represents an important systemic change in the mandate and functioning of the EU. Policy is being formulated by bypassing the classical Community method<sup>8</sup>; the Commission, EP, and the ECJ have been marginalized in favor of increased structured interactions between national actors. This is one of the most significant developments in policymaking that has evolved in recent years. The policy process in the immigration policy domain and justice and home affairs more generally is characterized by intensive collaboration and bargaining among national policy makers in intergovernmental consultative fora (Wallace et al. 2005). The EU policy process may be undergoing a systemic change: “new areas of sensitive public policy are being assigned by EU member governments to forms of collective or pooled regimes, but using institutional formats over which they retain considerable control” (Wallace 2005:89).

Despite this continued importance of member-state governments, political decisionmaking in the EU cannot be reduced to intergovernmental bargaining: “important decisions arise from bargaining which is *interinstitutional*, involving the Commission, the Council of Ministers, European Parliament (EP) and (sometimes) the European Court of Justice (ECJ)” (Peterson and Bomberg 1999:8). The EU institutions are not simply neutral arbiters of the decisionmaking process; actors and procedures in the various bodies and sectors wield influence over choices and outcomes. In some issue areas the Commission or the European Parliament set priorities and develop policy proposals as a

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<sup>8</sup> In the traditional Community mode, supranational policymaking was achieved through a centralized institutional process with the Commission at the helm, a clear transfer of powers from the member state to the EU level, and outcomes which resulted in “positive integration” (Wallace 2005).

function of competencies that are dictated by treaty. Although in other issue areas, such as in immigration policy formulation, “the characteristic style is one of intergovernmentalism—of national governments pursuing national interests, either positively or negatively in the Council” (Judge et. al. 1994:44).

As mentioned above, Wallace et al. (2005) identify five policy modes which have evolved over time as a result of the ongoing interface between EU institutions and national governments working in conjunction with subnational and nongovernmental bodies. These five modes aim to present a more nuanced picture of policymaking which avoids the pitfalls of theories which continually pit the forces of intergovernmentalism against the forces of supranationalism. The five variants of the EU policy process are: the Community method; the EU regulatory mode; the EU distributional mode; policy coordination; and intensive transgovernmentalism. In this analysis the most relevant mode is the one identified as intensive transgovernmentalism, which has emerged as the dominant policy process in the justice and home affairs domain. Intensive transgovernmentalism as a policy process is characterized by a central role played by the European Council in establishing policy direction; the existence of a forum of national ministers assembled to coordinate cooperation, led by a select group of key national policymakers; the marginalization of the Commission, EP, and the ECJ; and a lack of procedural transparency (Wallace 2005:87-88).

Wallace et al. (2005) reject the label “intergovernmental” for the type of cooperation that is occurring among EU member-state governments because the concept as commonly understood is inclusive of even the very weak forms of cooperation that are occurring in many international organizations. They prefer the concept of

transgovernmentalism to convey a sense of the greater intensity of interactions and shared practices that occur in contexts in which member-state governments “commit themselves to rather extensive engagement and disciplines, but have judged the full EU institutional framework to be inappropriate or unacceptable, or not yet ripe for adoption” (Wallace 2005:87). For the purposes of this project, however, I judge the term intergovernmental to be a more accurate way of describing the type of interactions that have occurred among political actors at the policy formulation stage when human rights ideas are most liable to influence legislative outcomes.<sup>9</sup> Intensive transgovernmentalism explains how member-state governments cooperate at the EU level and situates policymaking procedures in an evolutionary perspective, but it does not explain the factors that led member states to collaborate in this sensitive issue area in the first place. Oftentimes the cooperation among politicians, bureaucrats, and civil servants has occurred in working groups (e.g., Schengen group, Trevi group) which operate outside of both the EU framework and national democratic oversight.

Various methods of externalizing policymaking have been employed as a deliberate attempt to circumvent EU institutions and legislation. Decisions that are reached on an intergovernmental basis between member states, such as the Schengen Agreement are codified and enforced under international law. Geddes (2001, 2003) posits what he refers to as the “escape to Europe” hypothesis, of which Guiraudon’s (2000, 2003) venue-shopping model is one example. In certain issue areas member-state leaders seek out EU-level policy solutions as a way of circumventing domestic political and legal

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<sup>9</sup> This analysis is primarily looking at policy formulation at the EU level and not policy implementation or “editing” at the national level. However, it should be borne in mind that decisionmaking processes are often occurring simultaneously at the supranational and domestic levels; some scholars argue “that the processes at the European and domestic levels are mutually constitutive and that they cannot be studied as separate processes” (Mörth 2003:173).

constraints; this type of cooperative endeavor “is likely to be intergovernmental with some tendencies towards ‘lowest common denominator’ restrictive policies” (Geddes 2001:28).

Certain types of actors and persuasive tactics resonate with some decisionmaking rules and institutional structures better than others; “political actors seek policy venues where the balance of forces is tipped in their favour” (Guiraudon 2000:252). Using the example cited above, member-state law and order ministers who advocate for stricter migration control are served by pursuing their agenda in international or regional fora because they are not forced to contend with national judicial checks and opposition from other politicians, administrative agencies, or migrant advocacy groups. Much of the EU decisionmaking process is not transparent but is instead carried out through informal bargaining or among elites in closed-door committee meetings. This form of decisionmaking is difficult to investigate and is regularly overlooked by international relations scholars, who are more concerned with questions of power such as which individuals and institutions are capable of framing particular issues and placing them on the EU policy agenda (Peterson and Bomberg 1999).

This dissertation will concentrate mainly on the policies that directly address immigration regulation and alien control. These concepts are defined by Tomas Hammar (1985): “immigration regulation refers to the rules and procedures governing the selection and admission of foreign citizens. It also includes such regulations which control foreign citizens (aliens) once they visit or take residence in the receiving country, including control of their employment”(7). This area of policy also addresses naturalization qualifications and procedures. The difficulties that confront illegal aliens

and the numerous problems faced by the recent waves of refugees and asylum seekers are not within the scope of this analysis. Although there appears to have been significant changes in immigration policy over the years, especially since the “open-door” attitude of the 1950s and 60s that led up to the more restrictive policies of today, most measures that are viewed as changes in immigration policy are not so much a change in substance or principle but a change in how the law is applied or enforced (Hammar 1985).

Issues surrounding immigration bridge two distinct areas of policymaking: regulatory policy, which in the case of immigration policy attempts to control population movements across borders, and integration policy which encompasses social protection or redistributive policies that allocate resources among societal groups. While immigration policymaking technically falls within the category of regulatory policy in the sense that it seeks to regulate and manage the size and diversity of population flows, immigration policy formulation does not conform to the EU regulatory policy mode as defined by Wallace et al. (2005).<sup>10</sup> Within the European Union there has been a greater success in achieving intergovernmental policy convergence for developing policies that control the access of immigrants and refugees to the Union, while policies that attempt to address the integration of third country immigrants as well as measures that address racism and xenophobia have not been as effective.

One of the reasons why the EU policymaking process can be so opaque is that it is much more complex than the more familiar federal decisionmaking model. All policy

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<sup>10</sup> The regulatory mode is most applicable to the study of the creation of a single market and the policy mechanisms developed to eliminate the economic barriers between member states. Immigration policymaking, which as mentioned above more closely conforms to the intensive transgovernmental mode, differs from the regulatory policy process in that the Commission and the ECJ play a much smaller role. The regulatory mode also has manifold opportunities for stakeholders, primarily corporatist economic actors, to have an effect on policy outcomes; there are many fewer avenues of influence for non-state actors to influence the process in intensive transgovernmentalism.

negotiations involve a complicated combination of national, intergovernmental, and supranational participation and interaction. It goes without saying that the particular patterns of policymaking that evolve are issue dependent. Different issues attract different official actors and interest groups in addition to calling for varying levels of political dexterity or technical expertise. However, even highly sensitive issues concerning national sovereignty or “‘high politics’ can be ‘unpacked’ into more manageable issues and so be seen to be susceptible to different processes of policy-making” (Mazey and Richardson 1993). Consequently, the ways in which an issue is defined by competing voices in the policy debate, and the means by which certain norms enjoy a prominence on the policy agenda, is key to understanding how policies are developed to “solve problems.” The effort to formulate appropriate policy measures is tied to how the issue is framed. Framing the issue in terms of the need to strengthen immigrant controls, asserts that the problem is the sheer number of immigrants, and can have an (un)intended negative impact on legally resident third-country nationals and full-fledged citizens of immigrant or ethnic origin. Geddes (1995) contends that “at EU level, immigration has historically been defined as a security issue (as seen by the placing of the [Treaty on European Union’s] immigration provisions within the pillar largely dealing with crime issues); not one of, for example, economic development or human rights”(207).

In order to elucidate the ways in which norms infiltrate the policymaking process, Peterson and Bomberg’s (1999) characterization of political decisionmaking in the EU will be utilized. The *supersystemic* level is engaged in “history-making” or quasi-constitutional decisions. These decisions are usually reached at European Council summits or at Intergovernmental Conferences. For example, Article 63 of the Treaty of

Amsterdam makes immigration a competence of the EU. The *systemic* level institutes or sets policy; this occurs at the end of the EU legislative process. EU institutions bargain over policies the parameters of which have already been determined. Changing the content of a proposed policy, once it has reached the systemic stage is very difficult. Difficulties associated with shared decisionmaking often result in least-common-denominator solutions. The policy-shaping or *subsystemic* level is the crucial formulation stage in the policymaking process, when most negotiation among intergovernmental working groups and lobbying activity occurs. These policy-shaping deliberations often occur before the official legislative wheels of EU policymaking even begin to turn.

Different actors and institutions have contending priorities when it comes to EU policy and integration overall; how an issue is framed and who has control over the framing process affect outcomes (Kohler-Koch 2000). Policy networks are numerous and have a very important functional capacity; they make the complicated, detailed bargaining among member states possible. Policy networks are comprised of institutional actors and other largely professional operatives who have vested interests in the process. The EU “is a hothouse for relatively informal policy networks...[which] allow for the participation of a far larger number and wider range of different stakeholders than could ever be accommodated in formal consultative mechanisms (Peterson and Bomberg 1999:22). The *acquis communautaire* defines the powers of the various EU legislative bodies; however, treaties do not tell the whole story about institutional change and decisionmaking going on at the EU level. The competencies of the European Union institutions also expand by creative use of bureaucratic powers (Peters 1992).

### *Council of Ministers*

The Council of Ministers of the European Union is the main legislative body and is the guardian of member-state sovereignty when policy alternatives are being considered. It is composed of the heads of state or government and/or high level government ministers from each member state. Decisionmaking is highly disaggregated; member-state ministers convene according to specific policy sectors. Most policy details and compromises are hashed out in the approximately 250 working groups which form the functional core of the Council. One scholar argues: “it is precisely at this level that most European legislation is made, where most lobbying takes place and where most of the ‘national interest’ is defined and decided” (Spence 1993:50). Although in principle there is only one Council, in practice, there are actually several Councils of Ministers each with its own negotiating style. Since 2002, there have been nine official Council configurations which accord to policy domains; the one most relevant to this study is the Justice and Home Affairs (JHA) Council, which consists of all the justice, interior, and home affairs ministers from the member states.

Since the Treaty of Amsterdam, the escalation of policymaking in the JHA domain has expanded the role of the Council Secretariat considerably. The rotating Council presidency contributes to agenda setting and manages council proceedings. In areas, such as justice and home affairs, in which cooperation has mainly evolved directly between the governments rather through Commission proposals and facilitation, the Council presidencies often take a leadership role in coordinating policy activity and consensus-building. (Wallace et al. 2005). It can be argued that the Council is the most

powerful of the EU institutions, especially when it comes to immigration policy, because it has the exclusive authority to pass and veto legislation.

### *The European Commission*

The Commission is a collectivity comprised of senior officials—one commissioner appointed from each of the twenty-seven member states—that exercises formal executive-like agenda-setting powers. The EU Commission acts as the primary policy entrepreneur, visionary, and provocateur. The Commission as an institution functions as the EU civil service, and is organized into policy-specific Directorates-General (DGs). The Commission's influence varies depending on the policy domain. In some areas it exercises the sole power of initiative and drafts the legislation which must be adopted in some form by the Council and the EP. However, in other areas it is on the sidelines when member-state governments cooperate directly with each other.

Policy networks play a very important role in the functioning of the Commission; there are multiple levels of conflict and cooperation. The networks encompass interactions between the Commission and various governmental representatives and interest groups: member states in which the debate centers on issues of national interest and loss of sovereignty; individual subnational bodies that are trying to adapt to integration measures; the other European bureaucracies and institutions that all have agenda priorities and seek to influence the integration process; transnational and national advocacy and interest groups, and other international organizations such as the OECD and the World Trade Organization (WTO). There is fragmentation within the Commission itself due to the issue overlap that can occur between the Directorate

Generals; one policy issue can be divided and categorized in many ways and be a part of different portfolios (Fuchs 1994).

### *European Parliament*

The European Parliament (EP) is the first directly elected transnational legislative body working within a supranational institutional structure. In the past it was generally thought to be a body with a very limited ability to influence legislation, one that functions more as a totem to representative democracy and rarely exercises any control over the formulation or implementation of policy proposals. It is true that it is mainly empowered to amend legislation. However, under the *co-decision* procedure established in 1992, the EP shares responsibility for legislation with the Council; this has increased the importance and effectiveness of EP sectoral committees. The EP has also gained limited legislative power through the establishment of the *consultation* procedure, which essentially allows the EP to give an opinion on a Commission proposal. The Council is obliged to endeavor to accommodate the EP's position and consult with it before voting on the proposal. The EP has exercised this power of consultation mainly in politically sensitive areas of policymaking such as in matters falling within the justice and home affairs ambit. Significantly, for the purposes of this study, the EP was consulted on the passage of the Directive on the Right to Family Reunification for Third Country Nationals. Ireland (1995) claims it was the EP that "argued earliest and most strenuously for harmonized immigration and refugee policies" and "harshly criticized the Commission, and especially the Council, for foot-dragging and allowing social tensions to escalate dangerously"(243).

*European Court of Justice*

The European Court of Justice (ECJ) generates an overarching body of jurisprudence applicable to all member states. It rules over lawsuits referred by national courts and cases brought directly before it by individuals and other bodies. The juridical aspect has a significant impact on policymaking; policy advocates often refer to legal precedent to support their aims and influence policy outcomes. Therefore policymakers must be prudent in choosing the type of legislation best suited to their objectives. The EU produces several different kinds of legislation: regulations, directives, decisions, recommendations, and opinions. Among these, the binding instruments are regulations, which are directly applicable and must be given the force of law in member states as soon as they are approved at the EU level. Directives, such as the family reunification directive, require transposition into national law which gives member states some flexibility in how to achieve the stated goals of the directive.<sup>11</sup> Decisions are not generally applied, but are binding in specific circumstances or to specific individuals. The ECJ has performed a critical role in solidifying EU policy regimes, however, the ECJ has assumed a more circumspect stance in many of its judgments recently. Wallace et al. (2005) note “that in some policy domains member governments have gone to considerable lengths to keep the ECJ out of the picture. Part of the reason for the three-pillar structure of the TEU was to keep both CFSP [Common Foreign and Security Policy] and JHA well away from the reach of the European legal system” (74).

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<sup>11</sup> Article 249 of the consolidated version of the Treaty Establishing the European Community (TEC) states: “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”

The ECJ must juggle its interest in broadening its jurisdiction and expanding Community competence, while also fulfilling its treaty-based function. The little ECJ jurisprudence that addresses the legal status of third-country immigrants exists mainly in the area of freedom of movement grounded in Association Agreements dating back to the Treaty of Rome or freedom of services treaty provisions; this body of law is not based on human rights considerations (Guiraudon 1998, 2003). Although the Amsterdam Treaty has empowered the ECJ to guarantee respect for fundamental rights and freedoms by the European institutions, the EU Charter of fundamental rights is only a “solemn proclamation” (CEC 2000); it will not be legally binding until it is fully integrated into the EU treaties.

### *The European Council*

Intergovernmental methods of decisionmaking are often preferred for politically sensitive issues that member states fear may infringe upon national sovereignty such as immigration policy. As a result, many subjects which are sources of contention within member governments are addressed within the context of the European Council. The activities of the European Council consist of regular summit meetings (at least twice a year) of the heads of state of the member countries (attendance of foreign ministers was added at a later date) and the President of the Commission. The presidency of the EU Council of Ministers sets the agenda and organizes the meetings.

The treaty base for the European Council is not contained in the founding treaties of the European Community. The European Council, not to be confused with the EU

Council of Ministers,<sup>12</sup> was founded in 1974 at the Paris Summit, although it was not given a legal grounding until it was mentioned in Article 2 of the 1986 Single European Act (SEA). No attempt was made to define its powers and functions until the Maastricht Treaty codified the European Council in the section entitled “Common Provisions” which retained its status outside of the EU treaty competence. The European Council still functions largely outside of the EU institutional framework although it has been fully incorporated into the Treaty Establishing a Constitution for Europe. As mentioned earlier, the European Council is increasingly engaged in “history-making” decisions (Peterson and Bomberg 1999). These types of decisions define the EU’s “‘identity’ as an area for collective action” (Wallace et al. 2005:64). For example, the European Council has been a prime motivator in the development of policy in the justice and home affairs arena, including immigration policy.

Upon examination, what becomes obvious is that due to their differing compositions, mandates, and capacities, the different EU institutions take on leadership roles for different issues. There is tension between EU institutions regarding to the formulation of immigration policy and the rights of third-country nationals. It is the *raison d’être* of the Commission to expand the competence of the EU in all policy areas in the interest of deeper integration and economic and administrative efficiency, whereas the Council defends member-state sovereignty. The EP has historically supported the expansion and protection of migrants’ rights, and cautions member-state governments against using integration policies such as family reunification as a means for making

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<sup>12</sup> The European Council should also not be confused with the Council of Europe which is an intergovernmental organization founded in 1949 with a pan-European membership of 46 member countries. Its aim is to promote democracy, human rights, and the rule of law largely through monitoring compliance with the European Convention on Human Rights (ECHR).

immigration impossible in practice. The EP, despite its vocal concern with immigration policy, has long had its role severely circumscribed by the Commission and Council although it has exercised considerable influence in other issue areas such as environmental policy (Judge et. al. 1994). All this may change: since the Hague Programme was adopted by the European Council in November 2004, the Council is directed to vote (unanimously) to change the decisionmaking rules regarding immigration policy to qualified majority voting (QMV) and as a result the European Parliament gains co-decision powers. It becomes a question of identifying the qualities (political attributes) of a specific issue that make it amenable to one form of institutional intervention and action as opposed to another.

### **Human Rights as Norms**

This project draws on international relations scholarship that addresses the diffusion, propagation, and policy application of international norms and principled ideas (Finnemore 1993, 1996; Finnemore and Sikkink 1998; Katzenstein 1996; Klotz 1995). The literature on human rights and norms is concerned with the means whereby principled ideas about right and wrong become collectivized into systemic understandings about appropriate behavior, which in turn influence state interests and identity. The body of international and regional law, national and supranational bureaucrats and policymakers, human rights activists, NGOs, and the human rights movement more generally, all serve to create an international normative social structure. The structural aspect of the analysis looks at the human rights regime itself and considers

systemic changes that have impacted EU and member-state interests, both in their policymaking and in their identity formation.

Human rights are excellent examples of international norms; they “have a special status because they both prescribe rules for appropriate behavior, and help define identities of liberal states” (Risse and Sikink 1999:8). Recognition and allegiance to human rights norms is part of the prevailing discourse in the EU. Europe has adopted the most comprehensive system for monitoring and enforcing human rights norms in the world; this was made explicit in the processes of democratic reconstruction and European integration that was occurring in postwar Europe. Europe is a normative community, unified around *inter alia*: the Universal Declaration of Human Rights (UDHR 1948), The International Covenant on Civil and Political Rights (ICCPR 1966), and the International Covenant on Economic, Social and Cultural Rights (ICESCR 1966), The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR 1950) and now the Charter of Fundamental Rights of the European Union (2000). This research tests the limits of this normative commitment in the area of the admission and treatment of immigrants, specifically immigrant women.

This study traces the process of norm promulgation from the international to the EU level, and explores how national and regional interests affect the conditions under which different norms matter. Certain institutions, directorates-general, policymaking committees, and state representatives are more sympathetic than others to human rights norms having a legally binding effect. Drawing on the same principled ideas, different groups may promote different policy outcomes. International human rights norms provide an excellent mechanism for exploring many of these theoretical and practical questions at

the EU level for several reasons. International human rights norms present a direct challenge to the primacy of state sovereignty, which segues nicely with the supranational governance impetus of the European Union. Human rights norms are manifest in many international and regional institutions, organizations, and legal instruments, and lastly, they are contested and hence vie with other principled ideas and instrumental concerns.

Modern Europe is founded on, and strongly identifies with, human rights tenets; human rights norms also guide and constrain policymaking decisions in EU member states. Human rights norms fulfill both constitutive and regulative functions. Constitutive norms serve to define the identity of an actor or an organization; they enable others to recognize the actions and attributes associated with a particular identity. Regulative norms stipulate how an established identity is to be actualized—by setting standards of proper behavior (Katzenstein 1996:5). In the EU, human rights norms have constitutive effects because commitment and adherence to human rights is mandatory to membership. Human rights norms help define the identity of the EU: “The formal and informal rules and norms specify that only democratic states with good human rights records can join the club” (Risse and Sikkink 1999:9). All new members must join the Council of Europe, thereby adopting the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). A state cannot be considered a member of the community of liberal democratic European states unless it, at the very least, demonstrates rhetorical commitment to human rights. The constitutive role of norms in the EU may be relatively uncontroversial, but the regulative role needs to be further explored empirically in order to determine the accord between aspirations and actions.

Operationalizing a manageable set of human rights concerns is important when looking at international norms. If the “core” of rights for all people, the basic “rights of the person,” is defined as the right to life, the right to bodily integrity, and the freedom from torture, arbitrary arrest, and detention, then it becomes apparent that these rights are least frequently enforced in the case of migrants. Since, these are presumably the most “universal” and least politically contentious and widely institutionalized set of rights, around which many scholars “expect human rights norms to have made an impact on human rights practices,” it follows that, “if there is no progress here, we would not expect it in other less consensual areas” (Risse and Sikkink 1999:3). This assertion only serves to prove the tenuous situation of migrants as non-citizens, even in relatively human rights observant states. I will be looking at more contested norms, scrutinizing the soft norms in a strong regime. Overall I am contributing to an argument not only about identifying how human rights norms operate at the international level but how these human rights norms can be strengthened or improved.

The norms that the EU is drawing upon are codified in international and regional human rights mechanisms. This legal culture “involves a ‘situational ethics,’ encompassing not only rules and principles but a fairness of process, an attitude of openness, and a spirit of responsibility that implicitly or expressly means submission to critique and dialogue with others about the proper understanding of the community’s principles and purposes—in a word, its identity” (Koskenniemi 1996:478). The discussion is especially pertinent in the case of the European Union, because human rights norms are an inextricable element of the identity of EU member states. Yet in

certain issue areas, immigration policy being one of them, I would argue that principled beliefs often give way to instrumental rationality.

This dissertation also draws on the body of feminist literature that critiques international human rights law for its failure to recognize as human rights violations those oppressive practices and policies, which specifically and disproportionately impact women (Peters and Wolper 1995; Cook 1994; Binion 1995; Bunch 1990). As Spike Peterson (1990) points out: “systematic critiques presuppose and prefigure alternative understandings” (306). A critique should provide suggestions for reconfiguring the current understanding of the human rights discourse. I will explore how human rights norms themselves might be conceptualized differently if the experiences of women were taken as foundational for theorizing, codification, and implementation. Norms themselves can be normatively challenged. Gayle Binion (1995) argues “if one works from the life experiences most common to women, the principles of human rights that would emerge would not necessarily reflect the universe of such rights as they are commonly understood by liberal nation states” (509). Thus I am not only interested in how human rights norms have influenced immigration-policy decisions in the European Union, I am also making a more fundamental argument about the nature of those norms, and their already built-in inability to adequately address the realities of third-country immigrant women.

### **Theoretical Framework**

A synopsis of current international relations theory will be provided in chapter 2; in this introduction I will only briefly review the major international relations theories

that inform this discussion about international migration. There is a growing body of literature on the role of ideas and norms in international politics (Finnemore 1996; Goldstein and Keohane 1993; Katzenstein 1996; Klotz 1995; Sikkink 1991; Yee 1996). This research contributes to the undertaking in international relations that interrogates rather than assumes state interests and identity. The social constructivist school does not characterize the international structure solely by the distribution of power; cognitive processes and ideational frameworks assign meaning to material conditions (Wendt 1999; Jepperson et al. 1996). This shared knowledge is what establishes the structure of global politics as social and process-oriented. Actors need norms and values for guiding their interactions in collective endeavors as well as terms of reference for developing their identities and interests (Finnemore 1996). The international social environment provides incentives for various forms of state behavior, and also contributes to the identity of states. The properties and interests of states are socially contingent not inherent (Jepperson et. al. 1996).

The fundamental precepts of social constructivism will be dealt with in much greater detail in the following chapter; for our purposes here suffice it to say that *norms* are ideas about appropriate behavior held in common by a group of actors with a given identity. *Identity* is a politically and socially constructed conception of self held by an international entity. In the study of international relations, it is primarily deemed applicable to states, but in this project it also pertains to regional bodies with customary and historical collective affinities. Discourse and institutions are the conceptual sites where the application of norms can be investigated; they provide important clues to the causal links between identity and policy formulation. Social discourse is revealed in the

regularities and assumptions found in decisionmaking processes. This focus on discourse or “communicative interactions shifts attention away from choices between structures or agents and toward the fundamentally shared or intersubjective nature of norms.... Thus ‘intentionality’ and ‘acceptability,’ rather than mere behavioral compliance or deviance, become central to our understanding the constraining effects of international identity and norms” (Klotz 1995:30). The consistent recognition of, adherence to, and enforcement of shared norms provides a methodological device for tracing any changes in international norms and links it to the EU policymaking process.

I am seeking to explain state behavior with an added level of complexity because the EU is a community of states functioning as a collective political system (Wallace et al. 2005). Both the international environment and domestic factors shape state identity, and by extension European regional identity (Wendt 1987; 1992). International norms interact with different domestic structures in different ways but the EU is comprised of discrete domestic structures that are striving for harmonization. A constructivist approach is particularly appropriate for a study of a supranational entity like the EU. Its ability to focus on norm change by considering domestic, international, and transnational influences concurrently is preferable in this case to artificially separating these factors by adopting the assumption of sovereignty and the prevailing levels of analysis approach (Klotz 1995). Thomas Christiansen et al. (2001) assert that constructivism provides an apt theoretical model for researching the European Union:

A significant amount of evidence suggests that, as a process, European integration has a *transformative* impact on the European state system and its constituent units. European integration itself has changed over the years, and it is reasonable

to assume that in the process agents' identity and subsequently their interests and behavior have equally changed. (2)

The body of feminist inquiry critiquing the foundational principles of international relations theory has grown over the last twenty years (Enloe 1989; Grant and Newland 1991; Tickner 1992; Peterson 1992; Sylvester 2002). The recent dialogue between constructivists and feminists has been particularly fruitful. These theorists share an ontology—they seek to explain a world that is in the process of *becoming*, not a world that *is*. For them, structure in international relations is not grounded in materialism, but represents a process of mutual constitution. In other words, a positional ontology is replaced with a transformational one (Wendt 1987). Constructivist epistemology follows the postpositivist argument according to which knowledge claims are all grounded in socially and historically constituted contexts. However, once constructivists have acknowledged the intersubjectivity or social nature of truth claims, epistemological questions fade from their view: “questions of what constitutes knowledge, how knowledge claims can be justified, and what purpose knowledge creation serves have largely dropped out of constructivist debates” (Locher and Prügl 2001:119). Feminist epistemology explores how gendered social relations are reflected in our knowing practices; it problematizes the position of the knowing subject. Feminists investigate these normative distinctions in an epistemic sense: in terms of genuine knowledge creation and in a socially transformative sense of working for social justice. Feminist epistemology often connects these two forms of normativity (i.e., knowledge production and social transformation).

While constructivist and feminist theories provide a framework for understanding the international social environment, the theories of hegemonic stability (Keohane 1984; Gilpin 1987) and embedded liberalism (Ruggie 1982), as informed by realist theory, help explain the emergence of the norms which protect the rights of immigrants in the international system. European states have adopted a rights regime based on international and regional human rights instruments. These laws make it difficult for states to easily deport individuals as if they were simply interchangeable cogs in the wheels of production (Larsen 2004). When it comes to managing migration, the EU is “confronted with the task of resolving the liberal tension between rights and markets” (Hollifield 1992:28). It is also confronted with the task of resolving the tension between the realist imperative of retaining sovereign control and the liberal imperative of maintaining open-markets.

According to realist theory, international migration must be regulated in order to protect national economic and security interests. States are the only pertinent units of analysis; decisions about the rights of aliens and all forms of international exchange are made at the domestic level. Liberal international relations theorists believe that international migration is the result of inequalities in the global market. Open markets and borders serve to eliminate economic inefficiencies which will result in a decrease in migration because the economic inequalities between countries will diminish. Hegemonic stability theory is an amalgam of realist and liberal lines of reasoning. States no longer pursue their circumscribed interests in a state of anarchy in which military power is preeminent. An international order emerges that is reflective of the interest of the

dominant state(s), and the international rules governing international migration reflect the interests of the hegemon.

Hegemonic stability theory contributes to an explanation of modern migration patterns because it explains how the international system came to be defined by human rights norms. Ruggie (1982) posits that any international order or regime will incorporate—or have “embedded” within it—the norms and values of the most powerful states. Hence, in the period after WWII, the United States and its allies—determined to create an international order founded on capitalism and individual rights—promoted liberal ideas and institutions. Postwar political struggles over civil rights at the state level indirectly benefited migrants at the international level. Liberal concepts of human rights were embedded in the postwar international regime; certain rights are “extended to individuals (qua workers) in liberal societies—rights which spill over into international relations” (Hollifield 1992:26-27). These rights can function as a constraint on the behavior of states. The hegemon(s) establishes the rules that structure the international system and the resultant migration regime reflects the interests of the dominant state(s). Certain inalienable human rights were embedded in this new hegemonic order, which made it problematical for liberal states to refuse entry to migrants. Domestic human rights laws effectively tie the hands of governments and delimit states’ ability to develop policies to control border flows.

Social constructivist theory contributes to our understanding of the process through which principled ideas such as human rights influence state interest and identity which in turn affects policy formulation. However a theory of EU integration and policymaking is also required to structure the analysis of why certain norms are

institutionalized and ultimately internalized at the regional level. Constructivist theory elucidates the international process of arriving at normative inputs but the venue-shopping approach (Guiraudon 2000, 2003) is needed to interrogate the EU policy outputs. The venue-shopping model is a descriptive theory; it does not have predictive or explanatory power but it does provide an analytical toolbox which makes it possible to arrive at the pertinent questions that provide an explanation.

The venue-shopping model accounts for the structure and content of European cooperation on immigration policy. It describes why member states permitted the EU to expand its jurisdiction over areas traditionally considered to be exclusively domestic-level concerns, such as the rights of third-country nationals. It makes the case that member states have consented to supranational collaboration on immigration matters due to the relative lack of institutionalization at the EU level; this allows national government elites to avoid the limitations imposed by domestic laws and interest groups in order to adopt more restrictive policies than would be politically or legally feasible at domestic level.<sup>13</sup> Simply put, certain national political actors found that they could exert greater control over immigration policies at the EU level than at the domestic level. This supranationalization of immigration decisionmaking does not necessarily indicate a harmonizing of national interests, but more of a self-interested opportunism on the part of a specialized set of civil servants, who had a security-oriented agenda and were starting to feel constrained by embedded liberal norms and principles. Member-state justice and interior ministers and their staffs “shopped” around for the most promising policy venue

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<sup>13</sup> “Domestic constitutional principles (equality before the law, fundamental rights), general legal principles (due process, proportionality), national jurisprudence and laws and, albeit in a very limited fashion, international legal instruments have developed since the 1970s in such a way as to constrain the restrictive objectives of migration control policy” (Guiraudon 2000: 258-259).

which would enable them to advance their own agenda of framing immigration as a security concern.

Baumgartner and Jones (1993) define policy venues as the “institutional locations where authoritative decisions are made concerning a given issue” (32). Different political settings have different rules and points of access that privilege certain types of actors and strategies over others. Baumgartner and Jones (1993) also develop the heuristic device of policy image which is closely related to the concept of policy frames: they define policy image as “how a policy is understood and discussed” (25). The image or frame that is expounded for a policy problem determines how it will be resolved. When seeking out the most receptive venue, the process of image manipulation is essential. The venue-shopping model underscores the importance of the strategies actors employ to promote their policy frame but it also acknowledges the existence of institutionalized norms and rules which provide the context in which the policy entrepreneurs must act. Political “actors seek new venues when they need to adapt to institutional constraints in a changing environment. To do so, they must resort to framing processes or policy images—the ‘constructivist’ moment” (Guiraudon 2000:258). The manipulation or reframing of a policy issue is a deliberate act of privileging certain norms over others.

If the venue shopping has any explanatory power then I should observe the formulation of EU immigration policy that is restrictive and centered on illegal immigration and border control. The legislation passed will not diminish member-state national authority in favor of supranational jurisdiction. Indeed the purview and capacity of other more supranational EU institutions and transnational advocacy groups will be limited, so as not to interfere with the intergovernmental authority of the Council of

Ministers in this issue area. The objective of the justice and home affairs ministers in the Council is “to pass policy that furthers the EU immigration agenda, while most importantly protecting the national interest of the member states and, at least, not hurting the national interests of any of the member states” (Larsen 2004:52-53).

There were several landmark rulings at the state level which reinforced the right to family life and the right of stay for long term residents in member states in the 1970s. This situation severely diminished national governments’ ability to arbitrarily restrict entry, or force the expulsion of certain categories of foreigners such as family members. The European immigration policy tide turned in the early 1980s when governmental actors interested in migration control were forced to come to terms with the growing number of legal protections and programs being developed at the national level to address the integration and rights of aliens. Interior and justice ministry personnel were feeling hemmed in by court rulings, the advocacy work of nongovernmental organizations (NGOs), and the turf wars over framing the issue with other government ministries. As a result, “they set out to find policy venues more amenable to their ends by exploring new instruments and seizing upon windows of opportunity to occupy political space such as that opened up by the 1985 Schengen agreement”(Guiraudon 2000:258). The institutional venue shift in immigration policymaking occurred because national level law and order functionaries recognized the advantages of seizing upon the inchoate policymaking capacity of the EU and tailoring it to meet their goals. The Council of Ministers and the Justice and Home Affairs (JHA) Council in particular are notoriously closed door environments with limited public accountability.

The securitization of migration was not an inevitable response to a post-1989 global situation characterized by an upsurge in asylum-seekers and illegal immigrants. Different institutions and political actors are predisposed to construct policy problems in different ways based on their frames of reference and areas of expertise. Justice and law enforcement ministers were mobilized in the early 1980s to address the immigration issue and they “have a professional disposition to represent and categorize a policy concern in a security discourse and to propose security measures to deal with it” (Huysmans 2000:757). This is by no means the only, or even the most effective way, of framing the issue. Immigration and asylum could have been framed as a human rights issue and human rights instruments could have been consulted to provide guidance and solutions.

### **The Argument**

Do human rights norms affect immigration policymaking? In the simplest terms, this question can be answered in the affirmative. The Commission and the EP regularly produce white papers, communications, and reports which emphasize the need to strengthen the rights of third-country nationals. Homage is paid to the importance of human rights in the official political discourse and observance of international human rights law is written into the legislation. So why the continued divergence between aim and practical realization? Constructivist theory effectively accounts for why human rights norms constitute part of EU member-state identity, and why human rights are an integral part of the immigration policy discourse. The venue-shopping model goes a long way towards explaining the rhetoric/practice gap—why the resultant policy is disappointing from a human rights perspective. The venue-shopping framework illuminates how,

through strategic political maneuvering, security norms aimed at protecting one definition of the national interest promulgated by actors operating within the Council of Ministers, were able to surpass human rights norms in urgency and importance. Member-state justice and interior ministers, who, due to their particular areas of expertise and institutionalized perspective, framed immigration as a security issue, found the supranational level a promising venue because the framing of the issue of immigration was not established and embedded in particular institutions.

Ruggie's (1982) posited liberal international regime, which was constructed after WWII, accounts for the emergence of certain commonly recognized norms protecting the rights of migrants; however, it is important to note that international human rights instruments in general do not recognize the human rights implications of the migration of women. Regardless, particular representatives of EU member-state governments had an interest in circumventing all such domestic and international constraints and monitoring. Interior and justice ministers did not want to create an international regime in immigration, thus the preference for secrecy and non-binding agreements. These national civil servants succeeded in becoming the accepted interpreters of immigration policy by capitalizing on the window provided by the emergence of a more inclusive policy frame: the post-1989 security agenda (Guiraudon 2003).

The rights of migrants, when first conceived as such in postwar Europe, may initially have been subsumed under individual human rights but these member-state policy players were trying to fundamentally redirect the discussion. Venue shopping explains how justice and interior ministers, operating in intergovernmental working groups and the Council, were able to hijack the immigration policymaking process at the

EU-level and move the framing of the issue from one of labor or human rights to one of security. The result is that EU policy circumvents the constraints imposed by embedded liberal norms and principles with a statist policy response that evokes the national interest and security concerns. My analysis contends that not only has immigration legislation in Europe historically been gendered to the detriment of migrant women, but also that the securitization of migration policy has added a new gendered aspect to policy formulation.

### **Immigration Policy**

While the free movement of workers has been recognized as essential to the single market since the inception of the European communities, immigration policy is very much an emergent policy domain in the EU. It was not until 1993 that the Treaty of Maastricht formally established the free movement of EU citizens and their dependents. European regional cooperation on migration over the years has consistently taken on the form of intergovernmental bargaining; nonetheless, EU institutional actors are slowly taking on a more prominent role in the process. The substance of EU legislation has tended to stress migration control and security concerns and the resultant policies have generally consisted of informal agreements or non-legally binding pronouncements. The legally recognized freedom of movement for EU member-state citizens and their families has led to a closer examination of and concern over the rights and responsibilities of resident third-country nationals.

Given member states' fairly recent consensus over a number of immigration-related issues, the EU has been granted increased competency in certain immigration policy matters. Immigration and asylum were first broached as matters of "common

interest” in the Maastricht Treaty; however, under the Amsterdam Treaty and the new draft Constitution, immigration policymaking has become subject to Community deliberation and jurisdiction. The EU is committed to facilitating immigration-policy convergence in order to ensure the successful management of migration flows. Policy convergence is defined as an “increase in the similarity between one or more characteristics of a certain policy (e.g., policy objectives, policy instruments, policy settings) across a given set of political jurisdictions (supranational institutions, states, regions, local authorities) over a given period of time” (Knill 2005:768). Policy convergence is often the result of different political entities, in this case member states, responding to parallel “problem pressures” (Bennett 1991). A number of shared problems have stimulated the desire to formulate a common response at the European level; among them are concerns over local integration, regularization of illegal immigrants, growing numbers of asylum seekers, and the rise in anti-immigrant sentiment (Zincone and Caponio 2006).

Policies that affect third-country nationals legally immigrating to the EU, with a particular focus on family reunification policy, are the areas of empirical investigation. Policies that address non-nationals exist at the intersection between the principle of national sovereignty, which determines who can enter and exit the territory of a state or region, and human rights standards that place limitations on actions taken by liberal states. Immigration policies are relevant both from the perspective of the primacy of territorial integrity and from the perspective of human rights norms (Guiraudon 1998). The growing numbers and diversity of migrant flows have led to the development of new forms of dual and transnational identity and belonging. Human rights discourse and law

have the potential to be more relevant in these new heterogeneous societies, wherein membership and residency rights could be reformulated and ultimately the conception of citizenship could be expanded.

This research is interested in how the recognition of human rights norms contributes to the political process of immigration policy formulation; this particular emphasis does not fail to recognize that there are other practical and material considerations. Human rights norms contribute to the ways in which EU policymakers and member states come to understand the larger immigration problematic. When contemplating how to approach the matter, norms help them to frame the issues and choose a course of action. The objective conditions within the member states determine whether immigrants are viewed positively or negatively; this orientation depends on the political, economic, and security climate of the receiving country at the time, and in turn influences all policy decisions.

#### *Council Directive on the Right to Family Reunification for Third-country Nationals*

This dissertation will trace the evolution of policy which addresses the right to family reunification.<sup>14</sup> Family reunification is an extrapolated individual privilege grounded in the right to freedom of movement and the right to family life found in international instruments. Family migration has typically been treated by policymakers as second-order migration with a negligible impact on the labor market, as distinct from

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<sup>14</sup> On 27 February 2003 a political agreement on the right to family reunification was reached by the Council in order to harmonize recognition of the right throughout the EU. This directive is grounded in the Charter of Fundamental Rights of the EU: Article 7, respect for private and family life, and Article 9, the right to marry and the right to found a family. The full text of The Charter of Fundamental Rights of the European Union can be found on the Eur-Lex web portal to EU law at [http://europa.eu.int/eurlex/pri/en/oj/dat/2000/c\\_364/c\\_36420001218en00010022.pdf](http://europa.eu.int/eurlex/pri/en/oj/dat/2000/c_364/c_36420001218en00010022.pdf).

male-led labor migration. Notwithstanding the importance of family migration, many issues have emerged that have not been given adequate attention by policymakers. These include the ways in which the composition of the family itself is undergoing changes, the gendered aspects of family migration, and the different repercussions policy measures have on men and women.

An example of the expanded competency of the EU in immigration matters, as imparted by the 1999 Tampere European Council summit, is the self-appointed goal of strengthening the rights of third-country nationals in order to make them comparable to the rights of citizens of EU member states. The Council Directive 2003/86/EC of September 22, 2003 on the right to family reunification was formulated to assist in achieving this goal. This dissertation will ascertain whether the Directive succeeds in fulfilling its own internal mandate of granting third-country nationals comparable rights and whether it fulfills its stated obligation of respecting the international human rights of women and the right to family life.

Immigration policy is so rich a topic and provides such an interesting case study in part because it is linked to many other public debates and policy concerns. Alternative and competing factors, such as state sovereignty, economic imperatives, security concerns, illegal immigration, social cohesion, demographic worries, and historical obligations influence priorities when EU-level policies are being formulated. As things stand now, any of these material and instrumental constraints may hold sway over human rights norms in a given context. However, drawing on human rights as a basis for formulating immigration policy would minimize the fluctuation in treatment of immigrants under varying temporal conditions.

## **Migrants in Europe**

The large and varied foreign population in the EU includes ex-colonial subjects, foreign workers and their families who can be either EU nationals or non-EU nationals, migrants seeking political asylum, refugees, and illegal immigrants. Any discussion of immigration policy in the EU, and freedom of movement more generally, is influenced by the mandate of the EU to regulate the entry and residence of migrants who originate from within and outside the Union and to successfully integrate those who have chosen permanent residence in their host country. There are three main categories of migrant in the EU: (1) formal citizens of other EU member states, (2) citizens from the remaining European Free Trade Association (EFTA) countries,<sup>15</sup> and (3) third-country nationals. Each of these categories of migrants has a different legal status regarding visa requirements, external border checks, work and residence permits, internal controls, applications for family reunification permanent residency and regularization systems, as well as naturalization procedures.

People who are citizens of an EU member state do not require a permit to work or reside anywhere in the European Union. However, there were always some limitations on this freedom of movement. Originally this liberty to relocate was tied exclusively to employment, thereby effectively granting freedom of movement to workers but not to people. Subsequent Community legislation extended the right of mobility and residence to families of employees and to EU nationals who reached pensionable age while working in a country other than their country of origin. This was followed by provisions

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<sup>15</sup> EFTA is comprised of Iceland, Liechtenstein, Norway, and Switzerland

which allowed students, retirees, and other persons who were not seeking gainful employment freedom of movement within the EU.

To some extent, mobility between EU countries has been promoted through such devices as mutual recognition of professional, vocational, and academic credentials. Student exchanges and foreign-language learning have also been encouraged, but the number of EU nationals that reside in another EU country has actually dropped since the 1960s. The category of EU resident that has risen dramatically, particularly since 1988, is non-EU, or third-country, immigrants. The legal and political rights that pertain to all citizens of the European Union do not devolve to this type of migrant; as a result they “risk becoming an underclass in their host countries” (Philip 1994:171).

According to the most recent statistics on the composition of the EU labor force, there were more than 17 million third-country nationals legally residing in the 25 member states of the Union in 2003 (Eurostat 2003).<sup>16</sup> Third-country nationals do not enjoy the same rights and protections as EU citizens. They can be subject to discriminatory treatment in working and living situations, be refused legal residence, or even deported. And when these circumstances arise they have fewer access points for appeal and more limited options than EU citizens when petitioning national and EU legal institutions. Border control in the EU has acquired an ethno-cultural dimension. Formally, the external EU border controls have been made more stringent for all third-country nationals, but in practice, this is clearly not the case: for example, the creation of a list of third countries whose nationals must hold a visa to travel to any EU country does not

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<sup>16</sup> The number of member states has risen to 27 since Bulgaria and Romania became members on January 1, 2007. The current member countries are Belgium, France, Germany, Italy, Luxembourg, Netherlands, Denmark, Republic of Ireland, United Kingdom, Greece, Portugal, Spain, Austria, Finland, Sweden, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Bulgaria, Romania.

include citizens of non-EU Organisation for Economic Co-operation and Development (OECD)<sup>17</sup> countries that are rarely viewed as a threat. Given that the number of third-country immigrants continues to grow,<sup>18</sup> the political, economic, and social situation of this group figures as an important policy concern. Significantly, from a legal-rights-based perspective, this discriminatory treatment violates the norms and principles laid down in Article 13 of the Consolidated Treaty of the European Community (TEC)<sup>19</sup> that prohibits discrimination based on nationality (Larsen 2004).

Third-country nationals (even among those who have never lived anywhere but their current country of residence) do not have the right to move freely among the EU countries as a visitor or a potential permanent resident. Third-country migrants are required to obtain a visa, which must be available for verification at all times, in order to travel within or between member states. For third-country nationals, temporary work and residence permits are valid for a limited time period; the standard permit used, such as those issued in France, Germany, Italy, and the Netherlands, is good for one year and has the option of renewal. In order to qualify for a residence permit, an alien must be able to prove steady employment. The longer that an alien is legally resident, the more secure his/her position becomes. In general, in order to qualify for permanent residence, most European countries require that an immigrant has been legally resident for at least three

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<sup>17</sup> The OECD is an organization that grew out of the postwar reconstruction of Europe. It was established in 1961 and facilitates activities among the governments of thirty market democracies.

<sup>18</sup> In statistics on third-country nationals for the EU15, EUROSTAT reported 12 million in 1995, 13 million in 2000, and 14.7 million in 2002.

<sup>19</sup> In 1997, as a result of the amendments agreed to in the Treaty of Amsterdam, a Consolidated Treaty of the European Community (TEC) was issued which combined and renumbered the provisions of the 1958 Treaty establishing the European Community and the 1993 (Maastricht) Treaty on European Union. Article 13 allowed EU policy “to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” The development and passage of Article 13 helped create a more receptive policy environment for immigrants’ rights concerns to be heard.

years (in Germany five years is required), can demonstrate a record of stable and continuing employment, and has adequate housing. In some countries other assurances of successful integration must be proven by, for example, signing contracts, passing exams, completing civic education courses, and/or by demonstrating a satisfactory command of the national language (OECD 2006; Murphy 2006; Kofman 2005).

Many third-country nationals are subjected to a thorough examination upon entry into an EU country. Often migrants have to produce bank statements, references from their country of destination, insurance policies, and return tickets among other documents. Frequently the strictures under which visas are issued vary depending on the applicant's country of origin. In addition to the legal stipulations, consulates may generate unofficial bureaucratic obstacles that hinder a prospective migrant's ability to obtain a visa. These unofficial deterrents can range from limitations on the number of visas that are issued per day to protracted and excessively complicated application procedures to prohibitively expensive and non-refundable application fees. The stated goal of all such policies is to protect the domestic labor market from illegal foreign labor. In European countries, attempts to monitor and control the immigration situation by introducing measures such as increased police supervision has resulted in claims of civil rights violations as well as infringement of international human rights agreements.

Certain categories of third-country nationals have preferential treatment in the EU attributable to bilateral agreements among individual member states and their primary labor-exporting neighbors, and/or association agreements formulated at the European level. Association agreements exist between the EU and Turkey, Morocco, Tunisia, and Algeria. Both of these types of agreements usually contain nondiscrimination clauses

with respect to employment conditions and opportunities, social protection, and welfare benefits. The European Court of Justice (ECJ) has ruled on several occasions that these association agreements and their implementation have a direct effect and are binding on all member states.

In sum, immigrants are viewed more or less favorably according to a changeable set of criteria. Different categories of migrants have been preferred during different historical periods and by different sectors of the economy within different member states of the Union. Some states and/or sectors want skilled, others want unskilled, some want women, others want men, yet others prefer illegal immigrants who are easier to exploit (Hammar 1985; Fielding 1993; Kofman et. al. 2000). In some EU host countries, “this manipulation of identity categories may take the form of both discriminatory practices and preference categories under immigration and asylum laws. Native-born and immigrant identity-based groups are structured and restructured to occupy different spaces in racialized labor and social hierarchies” (Lewis 2001:203). Migrants acquire meaning within the social context in which they are assigned meaning. Since migration has been framed as a problem overall, and since certain categories are deemed less problematic than others, one may safely conclude that the concept of migration itself is interpreted through an evolving social structure.

### **Third-country Women Immigrants**

When looking at the rights and obligations connected to entry and residency status, it is important to consider those who are in the position of greatest vulnerability in relation to the state—be it a nation-state or a supranational jurisdiction with state-like

attributes—particularly as immigration policies and ideas about citizenship are being reconfigured. The ideal typical resident of the EU, whom my analysis intends to use as its continual referent, is a nonwhite, non-European, working-class, immigrant woman. Her membership is lived at the intersection of gender, race/ethnicity, and class, and any difficulties she may experience living day-to-day are compounded by the fact that she is not a legitimate formal citizen of the nation-state in which she resides.

This dissertation will consider two broad groups of legal women immigrants. The first consists of women who migrated as part of the process of family reunification. Patriarchal cultural mores and gendered policies confine women to the role of an actual or potential wife and mother, who is dependent on a hypothetical male breadwinner. This assumption dictates the conditions under which these women live and sell their labor. The second group of female immigrants is composed of women who have migrated alone for economic reasons. Most of these women are subject to the same restrictions and discrimination as their male counterparts. But immigrant women are even more vulnerable to unemployment and possible deportation due to the sexual segmentation of labor that often confines them to the lowest paid, least secure jobs (Phizacklea 1983; Kofman et. al. 2000, 2004b, 2005; Freedman 2003). The migration statistics in Europe that inform policy are also biased because they focus primarily on legal migrants. The most common legal channel women use to enter Europe is that of family reunification, but women also comprise a significant proportion of undocumented laborers (Koser and Lutz 1998).

I am primarily interested in studying legal first-generation, third-country women migrants, who enter a member state for purposes of family reunification and/or

employment. Asylum seekers, illegal immigrants, and trafficked migrants are not within the scope of this project, although I do realize that there is a great deal of overlap between these categories and the ones I am studying. According to the relevant EU documentation on immigration, the rights deemed applicable to immigrants are entry and residence, education, employment, and non-discrimination. I am mainly considering entry and residence provisions which have a bearing on the right to family reunification. I examine how these rights have been adapted into EU legislation within the context of the legitimacy and appropriateness of a broader human rights discourse acknowledged by member states. The operationalization of this right is of particular interest to my analysis because it speaks to a historically significant, highly visible, and relatively easily traceable policy concern which directly impacts immigrant women.

This dissertation analyzes, and then critiques, from a feminist perspective, not only European immigration policy as it has been formulated and implemented but also the human rights discourse which is intended to be the foundation of much future legislation. In order to be truly useful, to be inclusive, and to address the actual circumstances surrounding immigration in Europe, EU immigration policy should accommodate the lived experience of immigrant women. Although constructivist theorists maintain that ideas, norms, and institutions are context-dependent and that knowledge is socially constituted, they avoid “critically reflecting on the location from which their knowledge issues, of thinking through the political and ethical implications of their knowledge claims. By failing to problematize the partiality of their claims, they avoid responsibility for their political effects” (Locher and Prügl 2001:121). By actively taking into account those considered marginal to international politics, such as third-

country immigrant women, feminist analysis not only provides a clearer understanding of the world, but also contrasts what *is* with what *should be*.

### **Research Methods**

The purpose of this research is largely exploratory: By investigating decisionmaking processes in EU institutions, I attempt to determine the impact of human rights norms on policy outcomes. What I am trying to ascertain through research grounded in both primary and secondary sources is whether, and to what extent, rights claims were integrated into immigration policy outcomes, beyond the rhetorical commitment.

My analysis contends that human rights have been an important component of European identity since the end of WWII and that human rights norms already function as such at the structural level in the EU. What I am interested in is not *whether* human rights, as a conceptual package, permeate the consciousness and rhetoric of EU policymakers, but rather, *how* they are incorporated into EU legislation and with what degree of adherence to the letter and spirit of the applicable international human rights instruments? How do the decisionmaking processes in the EU affect the incorporation of human rights norms, and how are the interests of immigrant women represented in this process? How do gendered social structures (e.g., paternalistic political institutions, existing discriminatory or gender-blind policies) and institutionalized rigidities impact the variation in adherence to international norms?

As mentioned earlier, immigration policy has traditionally been considered part of the purview of the state. I explore how international systemic level norms, human rights,

influence the EU—as a polity in its own right with its own sense of purpose and vocation—and also, by extension, influence member-state interests. This research sheds light on the dialectic between EU interests and member-state interests by focusing on the European Union’s observance of human rights norms when formulating a common immigration policy, specifically family reunification policy; and how these norms affect how the issue is framed. Human rights norms found in international, regional, and Union instruments are my independent variable.<sup>20</sup> The dependent variable is the formulation of a common European immigration policy. The variables that intervene between the systemic norms and the EU-level outcomes are member-state preferences (as expressed in intergovernmental fora and EU institutional settings).

In general, there are two main methods employed to study policy formulation: institutionally-based and case-based. This analysis undertakes a combined approach; it traces the evolution of thinking and problem-solving on immigration policy across all the EU institutions. This research tackles the case study of EU family reunification policy development from both an international and European perspective, while also considering the role of member-state, intergovernmental, and EU legislative actors acting within national, transnational, and EU institutional contexts.

Although this dissertation investigates in detail only one policy case study, that of the Council Directive on the Right to Family Reunification for Third-country Nationals, the EU presents a very complex study for which multiple observations are possible. Each institution in the EU—the Commission, the Council, the Parliament and the ECJ—brings differing priorities and concerns to the discussion of immigration policy. My research,

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<sup>20</sup> While for analytic purposes I must hold codified human rights as constant, I recognize, and, indeed, part of my premise is that international norms are not static but are continually undergoing processes of reinterpretation through the dynamic interaction of structure and agents.

according to Lijphart's typology, is a theory-building case study (1971:92). It contributes to the already existing body of theory-confirming and theory-infirming case studies analyzing the impact of norms on domestic policymaking (Klotz 1995; Finnemore 1996; Keck and Sikkink 1998; Risse and Sikkink 1999). My research will either strengthen or weaken the findings and conclusions of other related scholarship. This research also contributes to the venue-shopping approach developed by Guiraudon (2000; 2003) to explain the structure and content of EU immigration policy.

The evolution of the family reunification directive serves as a case study to test the usefulness of the constructivist and venue-shopping theories. I am able to infer from tracing the evolution of the directive through EU proposals and legislation why the directive passed in the form it did and how particular actors and institutions influenced the outcome. I performed a comparative textual analysis between the proposed and the final directive. This enabled me to assess the Commission's stance in comparison to that of the member states as represented by the Council. In the final analysis it seems that human rights norms matter so much in the development of immigration policy that immigrant control-minded policymakers pursue novel avenues of influence in order to circumvent their influence. This research adds a layer of complexity to the socialization thesis of constructivist IR scholars (Finnemore and Sikkink 1998; Risse and Sikkink 1999; Schmitz and Sikkink 2002). Ostensible internalization and legal codification of human rights principles at the national level does not necessarily lead to an incorporation of these precepts into regional policy. The venue-shopping model indicates that the actions of intergovernmental bureaucrats at the European level are serving to impede the liberatory potential of human rights norms.

To test my first rhetoric/practice gap hypothesis of whether human rights norms have impacted immigration policy formulation at the EU level, I reviewed pertinent primary source documentation and scholarship in both the immigration and human rights issue areas in order to trace policy evolution and cross-pollination. The policy mapping process consisted of in-depth textual analyses of EU, and international where applicable, legal, political, and institutional documents including: treaties, constitutions, charters, resolutions, decisions, directives, communications, recommendations, proposals, press releases, and speeches. I have examined relevant case law and jurisprudence produced by the ECJ. I have also followed the press coverage, in particular the specialized EU press, of the debates in the Justice and Home Affairs Council, the EP, and the Commission. I analyzed documentation and legal treatments produced by NGOs such as Statewatch, the Migration Policy Group, the European Coordination for Foreigners' Right to Family Life (COORDEUROPE), and the European Women's Lobby in order to evaluate their possible normative impact on policy outcomes. As a result of this qualitative research, I have pieced together the discourse concerning immigrants' rights and mapped the immigration policy process in the EU.

To test my second hypothesis that EU immigration policies and the human rights norms that inform them are gendered, I scrutinized relevant member-state and EU legislation, mainly related to family reunification, using a feminist analysis. I also drew on existing feminist critiques of the human rights discourse, and scholarship on the migration patterns and lived experiences of women immigrants in Europe. For the chapters which address how immigration policies affect the circumstances of third-country immigrant women living in EU countries, I also collected statistical data on

immigrant women both as workers and as applicants for family reunification compiled by the Statistical Office of the European Communities (Eurostat) and the Organisation for Economic Co-operation and Development (OECD).

The main advantages of relying mainly on written records (e.g., EU legislation and scholarly analyses) are that it allows me the ability to trace the evolution of the EU immigration policy process over time. It gives me a historical perspective on how the debates took shape and when and in what circumstances different ideas were introduced. More importantly it allowed me to increase my sample size (Johnson 2001). From a practical perspective, I never would have been able to get a sense of the broad sweep of immigration policy formulation in the twenty-seven member states, which converges to form EU immigration policy, without the use of secondary sources. Data gleaned from secondary sources as well as statistical data also enabled me to provide snapshots of socio-economic conditions and policy developments in particular countries at particular points in time, which contributes to an understanding of the larger arguments.

It seems possible to criticize this project because it looks at a single region with a traditionally strong commitment to human rights and, at least in Western Europe, a well developed common conception of a shared “European” commitment to and institutionalization of human rights. However, I argue that is exactly why it is such an interesting case study; because of the level of institutionalization and the prevalence of the discourse of human rights, it is possible to trace with greater subtlety and precision the variation in the level of commitment to different rights under different conditions in respect to different groups of actors across the broad spectrum of rights.

## **Chapter Outline**

The dissertation has a two part structure. Part one which contains this introduction also consists of the chapters which provide the theoretical and historical framing for the more empirical chapters. Chapters 1, 2, and 3 are included in Part I. Chapter 1 introduces the central puzzle and establishes the importance of human rights norms and feminist critique to immigration policymaking in the EU. Chapter 2 provides the theoretical framework for the study, and discusses feminist international-relations theory and the social-constructivist model in depth. Chapter 3 traces the evolution of immigration policy in the European Union. Part II contains the empirical data relevant to the case study. Chapter 4 describes the particular political, legal, and social circumstances confronted by third-country immigrant women in the EU. Chapter 5 elaborates on family reunification policies in Europe and provides a feminist legal analysis of the EU Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. Chapter 6 imparts some concluding ideas and sets out to summarize the main points of the study.

## Chapter 2

### Theoretical Overview

Most theories of international politics take states as the point of entry for analysis; this is a problematic approach in itself, because while in many ways the EU still functions as an intergovernmental organization, particularly in its role as an architect of European-wide policy, it is greater than the sum of its parts. An argument can be made that the EU is simply another multifaceted international regime with which the member states engage—such as the North American Free Trade Agreement (NAFTA) or the Asia-Pacific Economic Cooperation (APEC) (Moravcsik 1999; Mattli 1999). Nevertheless, what is being explored in this dissertation is how international systemic level norms—human rights—infiltrate different EU governance bodies in different ways and by extension reconstitute member-state interests.

In this chapter I will explicate the evolution of the feminist constructivist approach to international politics. It will posit how human rights function as norms at the EU level. Both constructivist theorists and feminist theorists maintain that ideas, norms and institutions are context-dependent and knowledge is socially constituted. However, feminist theorists, through their analysis of gender and power are able to incorporate into their theories people, institutions, and concerns often considered marginal to international politics by mainstream theorists. Human rights norms are generated and promulgated in international social environments and all social interactions and understandings have gendered consequences. After a more general explication of how human rights precepts function as norms, the applicable human rights norms are approached from a feminist angle. This section will expand upon two areas of conceptual contention that have been

of particular interest to feminist critics: the state as primary rights-violator, which sustains the separation of public and private spheres and the family as a locus of oppression. The chapter will end with a discussion of the relevance of human rights norms to EU integration and identity.

In any discussion that utilizes international relations (IR) theory to elucidate and frame the experiences of a sub-population that exists within and between states—namely immigrant women—it becomes necessary to address the question of whether gender is a legitimate independent category of analysis for the study of international politics. If gender is understood as merely an academic euphemism for woman and gender studies as a means of addressing bias in a particularistic, albeit systematic way, then feminist theories of international politics would seem supplemental and hardly transformative of the discipline. But if one accepts the view of this author, and most contemporary feminist theorists, that all social life is gendered, then gender, as an analytic category becomes a constitutive element of international relations.

In conventional international relations scholarship, states are conceptualized as unitary actors, but these units are composed of individuals, and women exert influence within and beyond all domestic societies. Few scholars of international politics would deny the importance of women in the international arena; not only do they play a significant role in international migration and transnational activities, they are intimately involved in development, nationalist and revolutionary movements, as well as various other political, business, and nongovernmental organizations. Issues concerning women's rights have become a very visible component of international law and diplomacy as

witnessed by significant UN-sponsored conferences on women and population and the drafting of a number of human rights instruments.

Most IR scholars would agree that women should be taken into account when conducting research into particular areas of international concern such as development and population growth; however, many are unclear as to how women specifically figure into theory (Grant 1991). The usual response has been to dismiss the express role of women (and presumably men) individually and collectively as not helpful in illuminating the workings of the international system. The real question lies in how gender awareness gives meaning to the organization of knowledge about the global environment (Scott 1986). How does gender as an analytic category fundamentally change the way we perceive the operation of the international system? Does it benefit us to become bogged down in the specificities of how identities are shaped? How are empirical studies of international activities and relationships conducted, and how do they contribute to the construction of theory? Does the inclusion of gender and how it affects the behavior in and between states really augment a model of the international system or does it “threaten an end to theory, as it undercuts all the bases for generalization” (Grant and Newland 1991:6)?

International relations has been perceived through a male conception of the world, carried out according to male models of activity and social interaction, and “apprehended through a male sensibility” (Grant and Newland 1991:1). As a discipline, it has been especially resistant to a gendered analysis. It draws such a sharp distinction between domestic and international activity and, by definition, is not concerned with what are considered to be individual-level traits in societies. Conventional wisdom contends that

the international system does not involve individual men or women as such; it is a world of states, international institutions and global markets; “yet in the theories which depict this abstract system, there seems to be a structuring-out of women and their activities and an implicit structuring-in of men and their activities” (Sylvester 1990:230). The very foundations of international relations theory that reinforce the dichotomy between private morality and public expediency must be challenged. Women cannot simply be added to international relations without addressing and analyzing the roots of their “global subordination” (Grant 1991:21-23).

### **Gender as an Analytic Tool**

Gender is one of the most fundamental divisions of society. Gender is a system of socially constructed roles and norms, completely distinct from physiology, that dictate what are masculine and feminine traits and behaviors. It is not a matter of women *per se*: the biological reality of being male or female is not the issue so much as the social constructions that are known as “man” and “woman.” Gender was developed by feminists as a conceptual tool to stress that the focus is not exclusively on women; the term necessarily implies a relational aspect (Scott 1986). Men/women and masculine/feminine— “rather than categorically separate, independent categories, [these] terms are mutually constituted and interdependent: they presuppose each other,” and a more complete understanding of all social and political institutions requires that they not be studied in isolation (Peterson 1992:9). In a larger sense, gender determines who is considered fit to participate in the public realm. Because what is considered appropriate gender behavior has varied over time, it is possible to recognize that gendered means of

social control are not ahistorical or inseparable from the contexts in which they are observed.

The tendency to create binary oppositions is one of the main mechanisms through which power relationships are established. Gendered thinking is indicative of an entire system of relationships, particularly the metaphysical dualisms that are a staple of any intellectual diet in western civilization. These contrasting and mutually constituted categories become both gendered and hierarchical: “asymmetrical dichotomies—such as public-private, culture-nature, rational-irrational, order-anarchy, mind-body, and objective-subjective—implicitly, and sometimes explicitly, map on to or are derived from a fundamental Western construction of masculine over feminine” (Peterson 1992:7). Objective gendered categories are established which then constitute the “concrete and symbolic organization of all social life.” These categories determine the allocation of “power (differential control over or access to material and symbolic resources), so that gender becomes implicated in the conception and construction of power itself” (Scott 1986:1069).

Gender is a particularly resilient code because its meaning is enmeshed with understandings about sex as a biological category. The notion that there should be a power disparity between men and women is socially sanctioned based on what are perceived to be “natural” differences. Gender roles are constructed both to conform to and to justify this power disparity. The continued legitimacy of the patriarchal social order relies on maintaining these gender role stereotypes. While it is not clear how different values were originally ascribed to different behaviors or how the hierarchy was created, the point is that gender stereotypes have been systematically reinforced and

reproduced throughout history, “and nowhere in the public realm are these stereotypical gender images more apparent than in the realm of international politics”(Tickner 1992:6).

Feminist theories of international relations contend that gender is ever present and relevant in an international reality that is socially constructed. Gender is a factor in all aspects of international politics: state formation, war and peace, revolutions, international political economy, international organizations, global governance, and foreign policy. Whereas most mainstream IR theorists view gender as an ideological dynamic not relevant to power politics.

In his classic realist text *Politics Among Nations* (1948), Hans Morgenthau employs the standard conception of power as “power over” or the control of man over man. This view of power-as-domination is usually identified as masculine because traditionally women have not exercised power in the public sphere. Feminist theorists have posited a different conception of power that is premised on the lived experience of women. Many women, because of their traditional role in the family and community groups, have learned how to affect change through cooperation, connectedness, and empathy, and exert a power that is mutually enabling rather than zero-sum. This form of power is shared rather than forced and is characterized by the ability to form successful coalitions (Arendt 1970). This conception can in no way be reduced to some sort of essentialist formula, but it is never the less an alternative formulation of power that is compatible with the notion of the “inherent dignity” of all peoples found in the human rights discourse.

Traditional western political philosophy has either viewed women’s experience as irrelevant or secondary which has made it difficult to draw feminist or gendered

conceptions into the realm of international politics. Throughout most of classical political thought men are citizens and the primary political actors while women are confined to family and the private sphere; “by adopting these examples without investigating the gender bias in them, international relations theory has duplicated patterns of bias. At the same time, international relations theory has developed with virtually no tools for assessing gender as a political force” (Grant 1991:8). An entire sphere of practices and behavior was devalued and often seen as naive. Gender informs some of the most fundamental divisions of the political sphere; questions of citizenship, property ownership, voting, holding office, or being permitted to go into combat have all been determined on gendered grounds. Gender is one of the main building blocks of political experience; therefore, in IR scholarship, “the identity of the state and the structure of the international system, have been constructed on an exclusive and sometimes artificial basis” (Grant and Newland 1991:2).

### **Feminist Epistemology: Empiricism, Standpoint, and Postmodernism**

Gender as a category of analysis has to be contextualized within a larger theoretical framework if it is to serve a not purely critical but also a creative function. Feminist epistemology is distinguished by its commitment to elucidating how gender situates the knowing subject and influences the resultant methods of inquiry and systems of justification. In feminist inquiry all knowledge is positional and reflects the perceptions of a particular subject. All knowledge claims need to be evaluated in the context of the social situations which produced them.

Feminist scholars have used gender to penetrate and enrich the discipline of international relations. Many have drawn upon the taxonomy which Sandra Harding (1986) created delineating the three main methodological approaches that feminist theory uses to uncover and remedy the androcentrism that is evident in mainstream theories of social science: empiricism, standpoint theory, and the postmodern move of which constructivism is considered a part. As feminist epistemology continues to develop, it has attempted to address the diversity of women by incorporating the standpoints of other marginalized groups. Before delving into specific theories of international politics, I will discuss these three frameworks which provide us with the ideological and methodological tools for establishing an entry point into traditional theories of the international system and how gender can serve as an important category of analysis.

### *Empiricism*

By drawing attention and compiling data on areas of human existence that were traditionally neglected, feminist empiricists demonstrate that many of the historical trends that helped create what we now consider the international system were most likely misogynist as well as racist and classist. Feminist empiricists challenge the notion that research programs that attempt to be rigorous and scientific are free from embedded expectations about gender roles. They generally work within mainstream theoretical paradigms and examine evidence that has been overlooked or undervalued. Many feminist researchers have found that when the experience of women is taken into account the very foundations of the truth claims found in many mainstream theories are thrown into turmoil because social scientists often “tend to equate humanity with men in ways

which distort theory, affect hypothesis formation, and skew the data” (Sylvester 1990:236)

The bias of many assumptions that are essential to theories of international relations such as the assumption of rational calculation on the part of actors and states, a gender-unitary society as a unit of analysis, the functional equivalence of states, and the gender neutrality of international processes are brought to the fore by feminist empiricists and challenged. These assumptions will be discussed later in this essay when I specifically address the dominant paradigms of international political theory.

One of the limitations of feminist empiricism is its main contention that a more comprehensive picture of the world can be obtained through the gathering of empirical data on women. However, we cannot simply limit ourselves to descriptions of women’s experience. Case studies require some sort of synthesizing: why do inequalities persist; how do we account for continuities and discontinuities in social experience? It seems a rather short-sighted agenda in that feminist empiricists neglect to take into account how uncovering the sources of gender bias in scientific research might be more transformative of mainstream theory than they had anticipated (Sylvester 1990). Initially what appeared to be a simple empirical gesture, the project of adding women to the calculation by consistently questioning gender bias, soon revealed itself to be much more complicated. Adding women qua women to categories defined by masculine gender markers (e.g., strength, autonomy, rationality) revealed a paradox. Either women who manifest feminine gender traits cannot be added (i.e., they must become men) or the category must be fundamentally transformed (Peterson 1992).

### *Standpoint*

Standpoint theory like feminist empiricism is interested in reclaiming the lived experience of women. It was elaborated by Nancy Hartsock (1983) and grew out of the Marxist argument that the oppressed working class has access to and comprehension of forms of knowledge, especially about social relations, which the privileged ruling elite has no ability to apprehend. It is the “standpoint of people who have been systematically excluded from power” (Keohane 1991:41). The perspective of the ruling group is self-interestedly partial and willfully myopic. However, standpoint goes one step beyond empiricism in claiming that the scientific method itself is a product of patriarchy. Advocates of the feminist standpoint posit that women have a unique insight and perspective learned as a result of their political and social subjugation and marginalization. Women, due to their subordinate position to men, are able to perceive more clearly all forms of oppression as well as inconsistencies in the dominant modes of thought. The standpoint of women is morally superior as well as a more defensible foundation for scientific research. Also, unlike feminist empiricism, standpoint theory is not as concerned with correcting erroneous assumptions; “the emphasis is less on women as victims of bias as on valorising her standpoint as a point of departure in understanding and changing her relationships to the world” (Sylvester 1990:241).

Most proponents of the feminist standpoint theorize at a level that scholars of international relations do not find useful; however, it is instructive to investigate the creation of philosophical dualisms. According to standpoint theorists, the construction of gender originates within the family—how it is influenced by and connected to larger social structures such as the state and market-place is left unexplored. Carole Gilligan

(1982) claims that boys and girls have distinct moral developments due to different lived experiences. However, this theory reveals the problematic aspect of fixing a binary opposition of male and female. Joan Scott (1986) asserts “the first is a slippage that often happens in the attribution of causality: the argument moves from a statement such as ‘women’s experience leads them to make moral choices contingent on contexts and relationships’ to ‘women think and choose this way because they are women’” (1065). This contention would seem to endorse an ahistorical, or even an essentialist conception of woman.

Is defining women’s lived reality as unproblematic as many feminist standpointers would lead us to believe, and is it sufficient for constructing a feminist epistemology or way of knowing? Feminist research must take the experience of women as a starting point, but should every experience be valued equally? Rebecca Grant (1992), who conducted research on women in the armed forces, concluded, “it appears that women’s actual experience may not always serve the needs of a critical transformative project. To be female is not necessarily to be feminist. Likewise, to experience is not necessarily to know” (93-94).

### *Postmodernism*

Since the middle of the twentieth century, social and political philosophers have relocated the “grounds of knowledge from the (individual and atomistic) mind and the realm of abstract logic to the larger social context.” They argue that all knowledge claims are embedded in a socially constituted normative schema: “knowledge is always produced in specific social and historical contexts, reflecting the interests and culture of

the groups in question. What counts as knowledge can be assessed against standards of rationality but is ultimately tied to a particular social and historical location” (Locher and Prügl 2001:118-119).

Feminists who adopt a postmodern approach challenge the theoretical edifices in international relations that allow for the pointed ignorance of gender. Ambiguity and uncertainty are not the enemy of the postmodern researcher; she is skeptical of any parsimonious or universalizing notion of “the self, gender, knowledge, social relations, and culture” that is apprehended through “linear, teleological, hierarchical, holistic, or binary ways of thinking and being” (Flax 1987:629). There is no single feminist standpoint; historicism and diversity are valued. If primacy is placed on a single feminist perspective, feminism is in danger of becoming yet another way of imposing a hierarchy on knowledge.

Spike Peterson (1992), who considers postmodernism as part of the “post-move” of which she takes part as a “postpositivist,” asserts that postmodernism is not purely critical. Its strength lies in its rejection of universal or decontextualized criteria for assessing knowledge or normative claims. The epistemological question of “Who knows?” is an extremely important one for feminist scholars. Most truth claims are thought valid when “a community of scientists” reaches a consensus. But, of course, this raises the question of how these communities are constituted; they are often quite exclusive. That fact that some knowledges are privileged raises political and ethical questions, not merely epistemological ones (Locher and Prügl 2001). Intellectual and normative “claims to know” can be evaluated and compared in a systematic fashion but they need to be contextualized. Monological processes of deliberation performed by the

reasoning subject in isolation are not capable of reconstructing the concrete intersubjectivity of all lived experience. All knowledge is socially constructed. Another function of the dichotomizing tendency of traditional positivist approaches is that the denial of a single atemporal universal order or “grand theory” is considered to be a denial of all forms of ordering. Peterson (1992) argues, “knowledge and power cannot be categorically separated, because knowledge claims are necessarily embedded in social relations and their power dynamics... However, “recognition of this embeddedness does not entail either nihilism or ‘absolute relativism’” (19).

There are two ongoing and complementary projects underway in feminist scholarship: deconstruction, which attempts to rectify the omission of women from androcentric knowledge claims, and reconstruction, which explores the theoretical implications if gender is taken seriously. The linchpin of the reconstructive project, of which feminist constructivism and this dissertation is a part, is gender: “what renders this concept systemic and transformative is the feminist claim that all of social life is gendered” (Peterson 1992:8).

### **The International Relations Canon**

The evolution of international relations as a discipline was influenced by a course of events that is unique among the social sciences. It developed in the wake of World War I and was fuelled by the desire to prevent another war from occurring. As Steve Smith (1989) states, “it was prescriptive, normative and based on a conception of scholarly activity that stressed the immediate policy relevance of the work, [which] led to

the discipline being concerned above all with devising procedures and techniques to assist rational decision makers to avoid war” (7).

Much of the feminist scholarship over the last few decades has served to draw attention to the inherent gender bias in all of western intellectual history; and most of the foundational international relations scholarship drew inspiration from classical Greek historians such as Thucydides or modern western political philosophers such as Machiavelli, Hobbes, and Kant. Nevertheless, feminist scholars who are critical of the gendered formulation of international political theory as a discipline, usually take the dominant paradigm of political realism as a logical starting point.

After WWI, politicians, diplomats, and policy-makers attempted to sustain peace primarily through collective security arrangements and international law, the embodiment of which was found in the League of Nations. However, when these endeavors not only did not prevent World War II, but were seen as contributing factors, political realism was born (Tickner 1992). These scholars of the realist school warned against the emotionally and morally charged idealism of the interwar years. They asserted that conflict was unavoidable, and effective policy could only be arrived at by “objective” and “rational” calculation. Realists declared that the world was anarchical. No overarching authority existed capable of maintaining peace; the only way individual states could ensure their own security was by being prepared for the worst. As a result, national interest and national security are inextricably tied to military security.

In realist thought, self-regarding, territorial states are the focal point of international politics. Hans Morgenthau (1985), one of the most important promulgators of realist thought, utilizes a fairly traditional conception of power: “power covers the

domination of man by man” (10). The interest of states is defined in terms of power. This conception is what enables us to describe the actions of states as rational, “that is with reference to consistently ordered preferences and cost-benefit analysis” (Sylvester 1990:231). Morgenthau (1985) also asserts that, “political realism believes that politics, like society in general, is governed by objective laws that have their roots in *human nature* [italics added]” (4). The world is a tenuous and insecure Hobbesian environment in which there is no higher authority. In a world of limited resources, security is the rational pursuit of power in a zero sum game; one state seeking to ensure greater security necessarily results in a loss of security for all. In light of this inevitable international insecurity, “balancing mechanisms akin to market forces operate to check the tyranny of small decisions;” and not only becomes a means to self-preservation but explains the behavior of states (Sylvester 1990:231).

Liberalism as a field of enquiry in international political theory gained prominence in the 1970s. This was due in large part to the rise in oil prices caused by the OPEC crises which made manifest the economic interdependence in the international system, as well as the relative global stability that ensued during the Cold War. The liberal theorists were more process oriented. They contended that the locus of the conflict of interests had shifted. International political theorists should be less concerned with power politics and more attentive to the increasing levels of economic sensitivity and vulnerability among states, as well as regime formation, and the activities of international organizations and other non-state actors. Liberals believed that it was possible to speak of a transformed international system because global economic integration was so complete.

However, while liberal theory was critical of realism, it did not challenge the fundamental categories of analysis (Tickner 1992).

Neorealism is in many respects an adaptation of classic realist thought to the interdependence theories proposed by the liberal school of international relations. Neorealists attempted to construct a grand theory of international relations by stressing the need to collect data on wars and international interactions and subject them to a rigorous analysis according to a positivist methodology (Waltz 1979). Models were adapted from the natural sciences and economics to try to create an authentically objective science of international politics. Neorealists recognize that there are pressing emergent issues in international politics, such as population growth, environmental concerns, pollution, energy shortages, debt crises, and the underdevelopment of the third world. However, these fields of political investigation do not portend an end of the statist model: economics and interdependence are still shaped by politics and state interest. Regimes and international organizations help orchestrate convergence around issue areas and facilitate state management of interdependence. Despite this, the system is still anarchic and the only way for each state to ensure anything approaching an optimal outcome is through self-reliance. International insecurity, rather than fading into obsolescence because of fully integrated economic and global interests, is still determined by the balance of power.

All these theories of international politics fall prey to the methodological individualism that pervades much of contemporary social science, which is typified by Morgenthau's (1985) "political man" and Waltz's (1979) theory of the state as a unitary political actor. The concept of rationality which is essential to neorealism assumes that

actors in the international arena are self-interested and make decisions by calculating the costs and benefits of proposed actions according to a carefully ordered system of preferences. States themselves become gendered; they become the personification of the rational, autonomous, calculating individual man. This presupposition is evident in Waltz's (1979) conception of socialization and competition: states are "maximizing units" that are motivated by calculations of instrumentality.

Most theorists of international politics would probably agree that policy makers have limited time, resources and capabilities, and as a result, maximizing behavior is simply not possible most of the time. In addition, in policymaking that is informed by global concerns and has international implications such as immigration policy, it is particularly difficult to divorce the ideological element from the equation. This provides an interesting opening for feminists: rather than conceding that rational decisionmaking is impossible in the governmental or international context, we need to indicate how rationality is a gendered concept and then expand our definition of what constitutes rational behavior. Tickner (1991) states that, "Morgenthau encourages us to try to stand back from the world and to think about theory building in terms of constructing a rational outline or map that has universal applications" (35). Postmodern feminist theorists reject unmediated concepts of objectivity or rationality. They contend that science is a human activity and is always conducted and interpreted in a particular social and historical context. Constructivist scholarship—which will be discussed below—also maintains that "state interests do not exist to be discovered by self-interested, rational actors. Interests are constructed through a process of social interaction" (Katzenstein 1996:2).

To the extent that mainstream international relations scholars have adopted feminist ideas, the standpoint approach is favored. In his discussion of the contribution of feminist thought to international political theory, Robert Keohane (1991) takes as his premise the international state system. His approach is largely one of “add women and stir.” He declares that women should sympathize with his process-oriented model of neo-liberal institutionalism because they would contribute their tendency to think in terms of cooperation and connectedness and, as a result, interdependence and institutional change would become more gender conscious (44-48). Women as soldiers and leaders may or may not change the course of international security, but the challenge is not to catalog how the impact of specific women acting within the contexts of traditionally male-dominated institutions contributes to feminist epistemology, but how a gendered perspective that delivers alternative modes of human behavior might recast the contentious nature of the security dilemma itself.

The central issue for feminists should not be one of contesting these theories point by point but rather a matter of advancing the argument that all of these models are at best a “partial description of international politics” because they are “based on assumptions about human nature that are partial and privilege masculinity” (Tickner 1991:29). It has already been discussed the way in which knowledge is constructed by using conceptual dichotomies and, in general, the way realist, neorealist, and liberal theories of global politics characterize the make-up of the international system which, in terms of strength, power, capability, autonomy, independence, and rationality, is rigidly masculine. The much vaunted “parsimony” of the model of the international system that neorealism

proposes is made possible by the utter absence of women and the sphere to which they have historically been consigned (Elshtain 1987).

The theories of international politics discussed here vindicate the use of force and the assertion of political power by deferring to the anarchic system in which the “natural” impulse is self preservation. The international system is fixed; it is outside of human construction. To be based on a natural order that is already gendered necessarily creates binary oppositions and the social processes which establish gendered relationships “become part of the meaning of power itself; to question or alter any aspect threatens the entire system” (Scott 1986:1073).

The delineation of public and private in society enabled state leaders to adhere to a morality that was supposedly divorced from the relations among individuals; public action is superior to domestic need-based activities. Rebecca Grant (1991) asserts that, “in the security dilemma, international relations theory seeks an abstract representation of the state which can be manipulated as a generic model of the rational actor. Women have been left out of this model because the division between public and private has been enshrined in political theory” (15). The end result is that what is considered good for the security of the state is not necessarily what the population views as important in terms of a flourishing life.

### **Social Constructivism**

Constructivism is concerned with the impact that norms of behavior, principled beliefs, socially determined values, and customary logic have on the international political environment. The structure of global politics is dependent on ideas; this

ideational structure is considered social because knowledge is shared. These social phenomena and processes mediate agents and structures; as a result, agents and structures are co-constituted. Social-institutional contexts both regulate actors by shaping the incentive structure and constitute the actors they set out to regulate. These socially constructed variables are causal and shape preferences, actor identities, and policy decisions. Constructivist theory emphasizes “the importance of intersubjective understandings in structuring the ways in which actors understand what kinds of actions are valuable, appropriate and necessary” (Finnemore 1996:15). The social structure of the international setting is necessarily a process; agents must explicitly or implicitly agree to act according to shared understandings.

Attributing an independent causal status to international institutions contravenes the state-centric structure of most established theories of international politics. These theories generally make two assumptions: “that preferences are unproblematic, well known to both states and to researchers, and that they are inherent properties of states” (Finnemore 1996:8). Neorealist and neoliberal regime theories each posit an underdeveloped model of the international system. Neorealism views the normative aspect of the global environment as subordinate, if not nonexistent; interests are assumed and are considered a reflection of the materialist composition of the international system, which directly constrains policy decisions. Neorealists consider neither norms nor nongovernmental actors as capable of exerting independent influence in the international arena. In neoliberalism, ideas and beliefs merely function as intervening variables between interests and behavioral outcomes. Received neoliberal regime theory gives norms a primarily regulative and procedural role. Norms may change the international

decisionmaking context in which actors negotiate their interests; however, actor interests themselves are assumed, given exogenously as the pursuit of power, security, and wealth. These norms possess a logic that operates independently but is not perceived as being constitutive of state interests. States attempt to maximize their inferred material interests; the only contention involves how states calculate the costs and benefits of particular institutional arrangements (Keohane 1984). As a result of this limited focus, regime theory contributes little to discussions concerning the construction and maintenance of identity, the self-affirming and group-affirming role of norms (Klotz 1995).

Constructivism assigns a causal role to socially constructed variables and asserts that social structure—the common material, moral, and ideological environment of states—significantly influences preferences (Ruggie 1983; Haas 1983). The increasing interest in the influence of ideas and norms “has resulted from the empirical failure of approaches emphasizing material structures as the primary determinant of state identities, interests, and preferences” (Risse and Sikkink 1999:6). Neorealist and neoliberal theory works from a predominantly material understanding of international politics. And to the extent that they address norms at all, they typically maintain the false dichotomy of material interests standing in opposition to ethical ideals. Audie Klotz (1995) observes that “realists characteristically reject norms as rationalizations for self-interest and deny them explanatory power” (13). In contrast, constructivist scholars stress the importance of norms and values and thereby adopt a more ideational or social conception of international relations. Material conditions are given meaning in the context of cognitive processes and frameworks. The international structure is not characterized solely by the distribution of power but also by its ideational context and the value ascribed to those

ideas. For constructivists, norms have an impact and purpose beyond a simply ideological, superstructural, or regulatory one: “norms are no longer a superstructure built upon a material base; rather, they help to create and define that base” (Checkel 1998:327-328). In practice most actions do not spring from a single motivating factor: choosing a course of action often involves a combination of self-interested functional concerns, self-affirmation to buttress a usually positive self-conception or identity, and group interest to reinforce collectively agreed-upon affinities.

*Norms* are ideas about appropriate behavior held in common by a group of actors with a given identity. As an insight that sociology has contributed to international relations theory, norms act as behavioral templates—routines, standards of appropriateness, cognitive schema. Norms provide analytical tools for interpreting and assigning meaning to international political existence. Norms are not secondary to the distribution of power, they are fundamental in providing a structure in which value is assigned to manifestations of material strength, and political alternatives are negotiated. Norms condition behavioral responses; they require action which adheres to principled beliefs. Constructivists advance two main arguments about the role of norms in the international environment: (1) norms, not only material capabilities are an essential constituent of the international system; and (2) norms have a decisive impact on how actors conceive their interests.

The positivist epistemological assumptions and methods employed by many international relations scholars fail to account for the intersubjectivity of norms. Norms are intersubjective precisely because they are collective expectations; they presuppose a community exists which is able to pass judgment upon perceived violations of recognized

standards of behavior. Norms are instrumental in defining international conflict and cooperation. Constructivists not only look at how norms affect policy outcomes but also how norms affect how a problem is framed initially and how norms influence actor behavior in choosing an appropriate course of action which then can establish new norms. Norms do not only have a limiting influence (e.g., constraining choices) but a generative influence. For example, human rights norms have expanded the repertoire of framing devices that policy actors can draw upon when devising immigration policy alternatives. However, there can also be conflicting norms in play, such as the liberalizing tendency of human rights norms versus the protective tendencies of the norm of national sovereignty.

Norms legitimize the means of achieving a goal and also legitimize the goals of states themselves, goals which establish their interests. This context of collective understanding which exists in the international environment enables states to understand their interests and assert their identities. *Identity* is a politically and socially constructed conception of self held by an international entity. Political identities are contested and mutable by nature, and norms become “causally consequential” during the process of identity formation (Risse and Sikkink 1999:9). Wendt (1999) and Jepperson et al. (1996) investigate state identity formation as a means to explaining national interests and state practices.

Actor’s preferences and interests cannot be developed in the absence of social interactions or assumed based on material structural constraints. Actor interests are not assumed; they are explored in relation to identity. National interest, which grows out of state identity, replaces the classical realist conception of power embodied in quantifiable resources, as the main factor explaining state action: “norms and principled ideas are

assumed to have constitutive effects on the identity formation of actors, rather than simply intervening between interests and behavior” (Schmitz and Sikkink 2002:521). The normative context which shapes state interest “changes over time, and as internationally held norms and values change, they create coordinated shifts in state interests and behavior across the system” (Finnemore 1996:2). The normative context in which immigration policy is formulated has changed over the years, with significant shifts occurring after WWII, after the fall of the Berlin Wall and the subsequent political disruptions in Eastern and Central Europe, and again after the more recent wave of terrorist attacks in the U.S. and Europe. In summary, normative ideas influence the identity formation of states, national interests are generated or realized as a facet of a state’s self-conception or identity, and national interest is what determines and justifies state behavior.

### **Feminism and Constructivism**

Both feminist and constructivist international relations scholars have challenged the epistemological privileging of specific social collectives as paradigmatic generators of knowledge about, and participants in, world politics. They break away from state-centrism and investigate more seriously the role of transnational and non-state actors. However, constructivists in most cases view these regional entities, NGOs, social movements, and advocacy networks as objects of inquiry rather than granting them a subjective status as producers of knowledge in their own right.

Feminists have long argued that gender is a social construct. Although both constructivists and feminists adopt an ontology of becoming, the role of power is

underspecified in the mainstream constructivist discussion. Power relations are socially determined and gendered valuations serve as a code for power. Joan Scott (1989) writes, “gender is a constitutive element of social relationships based on perceived differences between the sexes, and gender is a primary way of signifying relationships of power” (1057). Feminism contributes to constructivism an understanding of relational power as integral to the processes of construction: “Because they leave the social construction of power undertheorized, constructivists lack the tools to explain how gender and power reproduce, how and why certain constructs emerge as more influential than others” (Locher and Prügl 2001:113). Most constructivist scholars conceive of power in one of three ways: (1) As a quantity, which resides within the state as legitimate authority and operates in the international arena as a demonstrable material resource—actors use power strategically to meet self-interested aims. (2) Power also provides incentives and constraints when pursuing particular courses of action. (3) Finally, all international rules, norms, and institutions “systematically distribute privilege to create patterns of subordination”(Locher and Prügl 2001:117).

International institutions operate within the context of existing power structures. As a result, institutions tend to reproduce hierarchical and hegemonic understandings and relations. Recognition of this expression of power allows for analyses capable of uncovering systematic practices of subordination keyed to gender, race, ethnicity, and other statuses. It thus becomes possible to comprehend how power functions in institutions and how ideas and agents contribute to reproducing or subverting these power relations. This project investigates how gender influences decisionmaking in EU institutions.

Power is manifest in identity construction; the subordination of women is implicated in the process by which the modern subject erects a sense of self in opposition to an “other.” Immigrants are often conceived of as other or non-European, e.g., brown, non-Christian, traditional. Commonly accepted notions about gendered others and naturalized identities have contributed to the formulation of certain policies and practices; this is particularly the case with immigration policies. Feminist constructivism contributes another level of analysis to the argument cited in the introduction that immigration is being reframed as a security concern. Huysmans (2000) writes: “to the extent that the Europeanization of migration policy fosters the securitization of migration it sustains a radical political strategy aimed at excluding particular categories of people by reifying them as a danger (for example, to cultural values, to the provision of social assistance, to public safety, to health, etc.)” (771). Applicants for family reunification still comprise the majority of immigrants applying for entry to the territory of the EU member states (OECD 2006; Kofman 2005). To the extent that women make up the greater percentage of these flows, women are more vulnerable to policies which cast all third-country immigrants in a negative light. The securitization of immigration policy exacerbates the insecurity of migrant women’s existence and infringes on their human rights. It adds another layer of uncertainty to a position already rendered vulnerable by legal dependency and susceptibility to individual and institutionalized forms of violence.

### **Human Rights Norms**

As a sociological theory, constructivism attempts to illuminate the links between agents and structures and the capacity for change in global politics, but it does not “make

any particular claims about the content of those social structures or the nature of the agents” (Finnemore 1996:27). This analysis contends that human rights has become an intrinsic part of the social structural reality—the “content”—of the post-cold-war international environment. Realists who tend to write off human rights institutions as unimportant, liberal theorists who focus solely on binding human rights treaties with proven enforcement mechanisms because only these instruments are believed to have the capacity to infringe upon state sovereignty, and many constructivists who treat rhetorical compliance with human rights as manifest destiny all miss the importance of the political strife generated by the process of developing a catalogue of practicable international norms. Norm compliance is undergoing a continual process of renegotiation which is affected by changing international conditions.

Scholars have asserted “the centrality of human rights discourse as the moral philosophy currently operative at the global level” (Peterson 1990:304). Human rights are probably one of the most readily recognized and easily understood examples of international norms; they play both a constitutive and a regulative role. As stated in the introduction, constitutive norms establish identity and regulative norms set standards of behavior for realizing the proposed identity (Katzenstein 1996). They are prescriptive in the sense that they aim for behavior modification and they are an essential component in the identity construction of modern states. Human rights are a form of principled belief

that provides the criteria for distinguishing right from wrong in the international structure.<sup>21</sup>

A country's reputation as an observer and respecter of human rights norms is necessarily inter-subjective; it is determined by the judgment of others. Image promotion is a public relations exercise: "an actor's community relations largely involve the control (or manipulation) of information in attempts to fit into the normative frameworks within which other members evaluate its actions" (Klotz 1995:31). A risk associated with this inter-subjective quality of norms for politically integrating communities of states such as the EU is that the more powerful states will be able to impose their preferred interpretation of the applicability and legitimacy of particular human rights norms on the collectivity.

There are several contributing factors to the normative strength of human rights. The intellectual foundations of individual human rights discourse are predominantly European, however, their legitimacy and institutionalization at the international level is reflective of globally and culturally diverse sources of wisdom and activism (Lauren 1998). The influence of human rights may be directly linked to their western origins and the perceived legitimacy that earthly power conveys, or human rights may be more normatively robust and enduring because they resonate with basic ideas of human dignity shared by many cultures around the world (Keck and Sikkink 1998).

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<sup>21</sup> Goldstein and Keohane (1993) differentiate three types of beliefs: *world views* or the fundamental conceptions that define possible courses of action, *principled beliefs*, which are normative ideas that provide the criteria for distinguishing right from wrong: "principled beliefs mediate between world views and particular policy conclusions; they translate fundamental doctrines into guidance for contemporary human action" (9). The third type of beliefs is *causal beliefs*, which define shared conceptions about cause and effect relationships; they take form as strategies for achieving set goals.

Windows of opportunity for the introduction of new ideas are opened when there is a significant shift in power—however gradual; “in times of national or global crisis old power structures are cracked open and fundamental questions about the identity and purpose of social systems are more likely to be contested” (Schmitz and Sikkink 2002:522). The *Universal Declaration of Human Rights*, the *European Convention for the Protection of Human Rights*, and the formation of the European Communities all emerged as a response to the horrors of WWII. And finally numerous non-state actors such as Human Rights Watch and Amnesty International, in addition to the many UN agencies that have human rights concerns as part of their mandate, have played an important international role, largely through the tireless collection and dissemination of information.

Schmitz and Sikkink (2002) have identified two strands of thought in constructivist scholarship. One posits that norms become an intrinsic part of the identity of actors through a dynamic and purposeful process of socialization and internalization, in which non-state actors play an important role (Risse and Sikkink 1999). The second account maintains that the observance of norms on the part of collective and individual actors is essentially rhetorical. States do not adopt human rights norms because they believe in their fundamental justness, but because they perceive human rights to be part of the modern script of legitimate statehood. It denies the transformative aspect of the norm recognition process (Meyer et. al. 1997). Of course, both of these tendencies can be operating at the same time to different degrees within each of the EU institutions; exploring this possibility is part of the purpose of this project.

These divergent arguments necessarily lead to very different predictions regarding the ways that norms influence behavior. This disparity traces the tension between actions attributable to principles rooted in identity and behaviors stemming from utility-maximizing calculations. The argument is especially pertinent in the case of the European Union, because I would argue that human rights norms are an inextricable element of the identity of EU member states. Human rights precepts are common coin in the EU and Europe has developed the most far-reaching legislative and organizational infrastructure to promote and protect human rights. Countries can accept and implement human rights norms for “rational” reasons (for example, the costs of defecting and benefits of appearing to be part of the community of states who support liberal western values), but for “non-rational” reasons, they have also adopted human rights norms as part of their identity—it is a socialization process in which abiding by these norms becomes the “right” thing to do. Kathryn Sikkink (1993) contends that the emergence of human rights policies in postwar Europe, “demonstrates the power of ideas to reshape understandings of national interest. The adoption of human rights policies represented not the neglect of national interests but a fundamental shift in the perception of long-term national interests” (140).

Finnemore and Sikkink (1998) proposed the idea of a “norm cascade” to explain the process through which norms are adopted. Advocacy for a particular norm builds until it achieves a threshold, a critical mass of support. At this stage acceptance by other members in a community is more rapid, and the result resembles a cascade of approval. Many observers would contend that a human rights “norms cascade” has occurred over the last twenty years as more and more countries sign international conventions and

acknowledge the legitimacy of human rights principles; however, Schmitz and Sikkink (2002) ask, “is the norm cascade an inconsequential commitment on the part of state actors to weakly institutionalized human rights norms, or does it actually signal a profound transformation of international and domestic politics” (523)?

In certain issue areas, particularly in ones that are embedded in definitions of national sovereignty, such as immigration policy, principled beliefs often give way to instrumental rationality. However, national actors do gradually learn to accommodate international norms as a result of outside influence. They might do so initially for pragmatic reasons, but as they are compelled to justify their new position in domestic and international fora, they change their rhetoric. Through engaging in dialogue about the incorporation and implementation of norms domestically, a rhetorical change can lead to a perceptual change; “even instrumental adoption of human rights norms... sets into motion a process of identity transformation, so that norms initially adopted for instrumental reasons, are later maintained for reasons of belief and identity” (Risse and Sikkink 1999:10). There is a concurrent deepening of the process of international institutionalization and a deepening of moral awareness.

Socialization theorists such as Risse and Sikkink (1999) “accept the possibility of an initial superficial rhetoric of norm adoption, but their ultimate goal is to show that such norms have a profound long-term impact on the identity of state and non-state actors” (Schmitz and Sikkink 2002:523). For more state-centric constructivist scholars such as Wendt (1999) and sociological institutionalists such as Boli and Thomas (1999) “sustained ‘decoupling’ between norm rhetoric and behavior is the rule” (Schmitz and Sikkink 2002:523). Both of these claims need further empirical testing. Where do the

rhetorical assurances end and the behavioral adjustment and policy commitment begin, and where does the influence of nongovernmental advocacy groups and principled state actors come into this process?

This dichotomy between fully realized socialization and empty rhetorical posturing may be overdrawn, however. The “legal process school” contends that participating in international legal “processes of persuasion and justification on the basis of norms play a *constitutive* role in the formation of actors’ identities and interests” (Slaughter et. al. 1998:381). International law exercises a legitimating function which gives human rights norms a legal gravitas that enables the human rights discourse to be a more effective tool in influencing political processes at national and international levels. Legal process theorists navigate the tension between actions attributable to seemingly quixotic goals rooted in identity and behaviors stemming from functional calculations. Rhetorical commitment and discursive human rights practices are cumulative; they initiate a process of dialogue and create a frame of reference within which all future legislation must be justified. In a related argument, Risse and Sikkink (1999) claim that as human rights norms are recognized in international institutions “the logic of discursive behavior and of processes of argumentation and persuasion rather than instrumental bargaining and the exchange of fixed interests prevails when actors develop collective understandings that form part of their identities and lead them to determine their interests” (14).

Constructivist research maintains that nongovernmental groups and actors and their “principled mobilization” are crucial contributors in the construction of the social environment in which states operate. This analysis acknowledges that there are

international institutions in place capable of advancing and legislating on human rights norms—an extant social structure—and that there are activists within international nongovernmental organizations (NGOs) and officials working for international organizations and governments, who act as “norm-promoting agents” (Risse and Sikkink 1999:21). States officially preside over the process of recognizing and adopting human rights norms at the regional and international levels; however, nongovernmental actors have consistently played a crucial role by agenda-setting and by tirelessly appealing to officials and the public the need for establishing particular standards. To date, most of the constructivist scholarship has sought to shed light on the role of international organizations in the process of norm diffusion, specifically in how NGOs function as agents of change, as a consequence, “additional knowledge about the role and motivations of state actors in the process of establishing international human rights norms is necessary” (Schmitz and Sikkink 2002:525). It is also important to examine the processes of norm adoption within regional organizations. From this theoretical perspective EU-level institutions are neither fish nor fowl—sometimes acting as representatives of states and other times acting more like norm-promoting international organizations.

### **Women’s Rights as Human Rights**

Law is not neutral and objective—it exists within a gendered global social context.<sup>22</sup> Historically, the experience of women has not been incorporated into the

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<sup>22</sup> “In actual practice then, law—both nationally and internationally based—does not necessarily serve the interests of all individuals equally. Its effectiveness remains dependent on the specific context of power relations in which it is mobilized”(van Walsum 2003:4).

development of international law; therefore the inclusion of a “woman’s voice” contributes to questioning some fundamental legal premises. One strand of feminist critique of law associates sexual equality with equal treatment. It has attempted to reform the law by challenging the legal barriers to women’s full participation in the public sphere. This norm of formal equality and nondiscrimination is endorsed by the major human rights covenants. Hilary Charlesworth (1994) contends: “The language of ‘equal rights’ and ‘equal opportunities’ tacitly reinforces the basic organization of society. The promise of equality as ‘sameness’ with men only gives women access to a world already constituted” (64).

So, what does equality signify: Is it simply nondiscrimination using men’s experience as the norm against which women’s experience is measured? Is it parity in accessing the means and resources necessary for empowerment? Is equality the maintenance of separate spheres, that is, an implicit policy of separate but equal? Is the equality of women separable from class, race, or ethnic group membership? Does equality entail that the state take over all caregiving functions so that women can participate on an equal footing with men in the public sphere? Or is equality the abolition of patriarchy in its multiple manifestations—a complete social transformation (Coomaraswamy 1994)? As this variety of conceptualizations illustrates, any formulation of women’s equality that relies exclusively upon men’s understanding of the world as the basis for rights claims is bound to be problematic. A definition of equality on male terms, which does not take women’s experience into account, is an inadequate solution because “the concept of equality is much more than treating all persons in the same way, for the

equal treatment of persons in unequal situations will perpetuate rather than eradicate injustice” (Robinson 1999:62).

As discussed above, in the realist portrayal of the international sphere, women are still virtually invisible; “from the start international relations has had difficulty drawing the connections between individual citizens—male or female—and the states system”(Grant and Newland 1991:2). In addition, de-gendered nation-states are the primary subject of international law. The international human rights discourse is important because it enables women to challenge assumptions made about the composition and functioning of the global community. Although the *Universal Declaration of Human Rights* (UDHR) is not a binding treaty but an affirmation of aspirations or normative principles, the “inherent dignity” of men and women is enshrined in it, and all the rights elaborated therein are understood to apply to all “members of the human family” (*Women and Human Rights* 1996). However, the normative foundations, and the operational capacity of the UN’s human rights infrastructure, impede the advancement of women. The rights safeguarded by the UDHR have not been interpreted or expanded upon from the stance of women’s lives; “the need to develop a feminist rights discourse so that it acknowledges gendered disparities of power, rather than assuming all people are equal in relation to rights, is crucial” (Charlesworth 1994:62).

The human rights discourse and the concrete pursuit of rights claims have been very effective, and have provided empowerment strategies for oppressed people internationally. Through the preparation of the UDHR, the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and*

*Cultural Rights* (ICESCR), and various other more specialized instruments, the content of human rights norms, and the practices of rights-promoting movements and organizations have evolved. As more diverse voices are brought to the table, previously unrecognized concerns have been incorporated into the expanding vision of human rights. Although women have been active participants in the human rights dialogue for more than three decades, this has not led to effective protection—or even recognition as to the legitimacy of women’s rights claims—on the part of states (Cook 1994; Peters and Wolper 1995; Charlesworth 1998). Nor has the codification of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) resulted in consistent enforcement or universal acceptance of the idea of women’s human rights.

The human rights discourse is marked in its “failure to recognize the need to characterize the subordination of women as a human rights violation” (Cook 1993:231). Despite the fact that 185 nations have signed on to CEDAW (as of November 2006),<sup>23</sup> there is no general consensus among states on the acceptance of women’s rights as human rights (Charlesworth 1998; Bunch 1995). Many signatories have attached critical reservations (e.g., Germany and Spain), and some states have failed to ratify it (e.g., the United States). Critics of the idea of women’s rights as human rights charge that the inclusion of women’s rights threatens the universality of human rights, or reject the contention that states should be held responsible for violence that occurs in the private sphere. Instead, they urge reliance on the more passive establishment of standards of non-discrimination based on traditional liberal notions of equality, rather than taking the active, albeit difficult and somewhat more uncertain, steps to address the structural violence against women that is present in virtually every culture (Copelon 1994).

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<sup>23</sup> See <http://www.un.org/womenwatch/daw/cedaw/states.htm> for a list of state parties.

Human rights norms are gender specific, both in theoretical formulation and in practical application. This has been definitively proven empirically by studies documenting gender discrimination and violence perpetrated against women all over the world (Peters and Wolper 1995). To the extent that human rights law has evolved to reflect the experiences and priorities of men, does it have any claim to universality? Are human rights a useful tool for third-country immigrant women in battling structural injustice in the European Union? Feminist jurisprudence presents a challenge to institutionalized human rights law. Feminists interrogate both the procedural issues involving how human rights are defined, adjudicated, and enforced and the substantive questions of who and what the law is aiming to protect. By uncovering bias, feminist analysis has implications for the rights of all disempowered peoples (Binion 1995). This analysis explores the ways in which a circumscribed definition of human rights has impacted women's lives. Women can be victims of human rights abuses, such as political repression, in much the same way as men are. But women struggle for visibility in a world in which the principal political actor is presumed to be male, and are also victims of specifically gendered forms of abuse.

The primary and perhaps most fundamental difficulty with the human rights discourse stems from the idea that human rights are a codification of men's rights. Charlesworth (1994; 1995) argues that human rights law is "androcentric."<sup>24</sup> It is based on a male model of public citizen and is reflective of a male sense of threat to body or

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<sup>24</sup> "Many feminists have pointed out that law is part of the structure of male domination. Its hierarchical organization, its adversarial format, and its aim of the abstract resolution of competing rights make the law an intensely patriarchal institution. Law represents a very limited aspect of the human experience. The language and imagery of the law underscore its maleness: it lays claim to rationality, objectivity, and abstraction, characteristics traditionally associated with men, and is defined in contrast to emotion, subjectivity, and contextualized thinking, the province of women" (Charlesworth 1994: 65).

freedom. By starting from a position that defines issues of concern to men as general human concerns, international human rights, and the practice of international human rights law, the discourse is unable to recognize the particular hardships and abuses that women confront. The discussion of women's international human rights needs to extend beyond the creation of human rights instruments drawing on the norm of nondiscrimination, and that deal specifically and exclusively with women's concerns. However, the creation of a separate branch of human rights law, to address women's human rights, as exemplified by CEDAW, has allowed for its marginalization. Not only do women's human rights treaties carry weaker enforcement obligations, but more general human rights bodies often ignore women when applying human rights norms.

Scholars who look to the principles found in international human rights instruments as a foundation for developing emancipatory policies for women need to be more critical about the theoretical and practical foundations of the human rights discourse which they espouse. One should begin by problematizing the order and importance of the three "generations" of rights contained within the human rights discourse itself. The category of human rights designated as first generation consists of civil and political rights; the second includes economic, social, and cultural rights, while the third generation, based on concepts of human solidarity, embraces self-determination, the right to a healthy environment, and the right to development.

First-generation rights reinforce the concept of distinct public and private spheres of being. Civil and political rights define men's relationship to the government, and are rights that an individual asserts against the state. The state must be prevented from infringing upon the private freedoms of the individual. Negative liberties involve a

fundamentally public set of guarantees, but harms perpetrated in public life are not the violations from which women most often need protection.

Second-generation rights—economic, social, and cultural rights—do not adhere to the individual versus the state model. Nevertheless, the rights set out in the ICESCR do serve to reinforce the public-private distinction; the power to address and implement these rights falls to the state. The ICESCR does not speak to the economic, social, and cultural conditions in which most women live: the invisibility and non-remuneration of women's work performed in the private sphere; the economic devaluation of all work traditionally performed by women; and the higher priority given to protecting culture and religion than to ensuring gender equality. Feminist analysis also draws attention to one of the main problems with cultural relativism: all power structures, value systems and social orders can be construed as “culture.” These judgments are often implicit and should be made explicit as to which “manifestations of ‘culture,’ whether unique to one society or ubiquitous worldwide, are acceptable to the human family” (Binion 1995:521).

Third-generation, or collective/group rights, could “be of particular promise to women, whose lives typically have the quality of connectedness with others, centering more around the family, the group, and the community than the individual” (Charlesworth 1994:75). This, however, has not proven to be the case as the evolution and articulation of third-generation rights has failed to incorporate the experience of women. The right to development, for example, has reinforced established male-defined and male-dominated models of economic development. Claims to the right of self-determination, and other third-generation rights, have rarely been interrogated as to how they allow for the oppression of women.

Individual and collective rights are not distinct but are mutually constituted. Individual *rights*, often equated with civil and political rights, are contrasted with social and economic *needs* such as economic development and poverty reduction. The focus on civil and political rights has resulted in an emphasis on limiting state power rather than on developing constructive programs to ensure rights. The attention to civil and political rights should not be lessened, but the normative framework needs to be expanded to encompass abuses suffered predominantly by women, often at the hand of private individuals. It is neither useful nor sensible to isolate rights from needs. To rank rights denies the reality of women's lives since the rights to political self-determination and bodily self-determination are linked. Petchesky (2003) argues: "Underlying the rights-needs dichotomy is a basic fallacy. What it ignores is that rights are merely the codification of needs, reformulating them as ethical and/or legal norms and thus implying a duty on the part of those in power to provide all the means necessary to make sure those needs are met" (18).

#### *The Role of the State and the Public/Private Distinction*

The model of human nature presupposed in the human rights discourse suffers from western bias in three related ways. First, generalizing what is specifically western historical experience distorts our understanding of non-western experience. Second, the western postulation of abstract universality in its definition of 'human' masks the particular interests served by any such categorization. Third, the prevailing model privileges not only western but specifically male experience and interests (Peterson 1990:313-314).

Viewed from an historical perspective, international law was intended to constrain the power of the state. Infringements of human rights are commonly regarded as violations perpetrated by states against individuals. Within the liberal context, mainstream human rights thinking subscribes to the ideal type of a monolithic state with centralized forms of coercion and social control, identifiable agents, and absolute management oversight (Rao 1996). The human rights discourse often fails to appreciate how private or ideational (normative) structures influence the highly complicated nature of the modern state. This conception of the state by scholars and activists has several determinants: international law was established to regulate affairs among states; civil and political rights have preeminence in international law; and international norms that speak to family life function to protect and reify the family as an institution and affirm the family as the apotheosis of privacy. Sullivan (1995) notes, “the liberal ideology underlying much of civil and political rights discourse views the law principally as a means of regulating state intervention in private life, generally without acknowledging the role of the state itself in constructing the separation of public from private”(127). The state, in the form of the police, social services, and law courts, regularly interferes in the reproductive and working lives of poor women, women of color, and immigrant women, while concurrently ignoring or refusing to intervene in rights violations when committed within the sanctity of the home.

Regardless of whether the most important human right—the right to life—is defined narrowly as the protection of life from state-sponsored action or more broadly as the responsibility of every government to undertake policies that enable all individuals to have access to adequate means for survival, only public forms of violence are deemed

relevant. Women regularly experience all sorts of life-threatening risks: infanticide, malnutrition, inadequate health care, and physical and psychological abuse. Charlesworth (1994) asserts that “the great level of documented violence against women around the world is unaddressed by the international legal notion of the right to life because that legal system is focused on ‘public’ actions by the state” (72). The difficulty is that much of the abuse that is visited upon women is embedded in socio-economic and cultural configurations that resist being categorized as “exclusively political or solely caused by states” (Bunche 1995:14).

Violence against women is not arbitrary or uncommon but structural; gender-related violence is a primary tool in regulating women’s identity and role in society. In many states there is what could be considered a practice of non-prosecution of cases of violence against women including wife murder, battery, and rape. If violence against women is structural, it can hardly be considered a purely private matter; “the maintenance of a legal and social system in which violence or discrimination against women is endemic and where such action is trivialized or discounted should therefore engage state responsibility. Rethinking the traditional notions of state responsibility is a vital project in women’s human rights law” (Charlesworth 1994:73). The tendency of the human rights scholarship to focus on state-sponsored violence fails to address the types of violence most often perpetrated against women even in the public sphere.

The aspect of the human rights discourse that most commonly comes under feminist scrutiny is the underlying premise of separate spheres. The repercussions for women of the dedication to this principle are that many of their concerns, grounded in family or community life, are not deemed appropriate subjects for legal deliberation.

Centuries of western political thought have served to naturalize the foundations for women's subordination to men.<sup>25</sup> Women's reproductive function is portrayed as indicative of her weakness and dependence on male protection and authority. Women's role in biological reproduction determines her entire role in social reproduction (Okin 1979).

In the western manifestation of the public/private split, women are consigned to the private realm of home, family, and caregiving, while men operate largely in the public realm of paid labor, politics, law, economic decisionmaking, and cultural and intellectual life.<sup>26</sup> This arrangement is usually attributed to roles freely chosen on the basis of nature or convenience. This division is not only practical but also normative: greater value is placed on the roles assigned to men. The public realm is where power is exercised and women are dependent on men for subsistence. The ostensibly hallowed privacy of the home renders women's lives invisible and serves to uphold the status quo.

This distinction made between public and private life is politically determined and ultimately arbitrary; it also maintains power relations linked to gender, race, and class. The state's decision not to intervene in selected matters deemed private does not necessarily indicate a neutral stance. Certain policies such as tax laws, employment regulations, and social-security provisions have a direct impact on women and reinforce their subordination. These policies reinforce the division of labor between men and women and tacitly endorse the maintenance of particular family structures. The law also

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<sup>25</sup> cf. discussion of gender and metaphysical dualisms above.

<sup>26</sup> Peterson (1994) asserts, "gender differences are reified in establishing a set of social dichotomies. Men are seen as 'fully human,' that is, rational, self-interested individuals who participate in the public political world. Women are dependents—lesser individuals consigned 'naturally' to the realm of familial, private, and apolitical affairs" (314-315).

maintains power relations by its failure to regulate other forms of conduct; “lack of direct state intervention in the name of protection of privacy can thus disguise the inequality and domination exercised in the private sphere” (Charlesworth 1994:70).

The predominantly elite and predominantly male drafters and promulgators of human rights instruments were most concerned with the violation of civil and political rights in the public domain, thus human rights work has tended to focus on violations in these areas. The liberal narrative that provides the foundation for human rights law is one which propounds a model of a free, independent, empowered, rational individual who is capable of entering into contracts on the basis of equality. This model endorses a gender-neutral and universalizable body of law. Its primary concern for the public sphere of government and politics discounts the private sphere of the family and the market. Despite these historical shortcomings, the attention to formal gender equality and non-discrimination in all human rights instruments would seem to provide a receptive context for the analysis of feminist critics. Gender discrimination must be addressed in all its manifestations regardless of the locus of the violation.

The entrenched bifurcation of public and private in western legal thought has resulted in a distinction arising between what is considered an appropriate subject of legislation, and what is considered outside the realm of regulation. Because its signatories are states not individuals, international human rights law, even more than national law, is applicable mainly to violations occurring in the public sphere—in the predominantly male worlds of government and the public sector. International law adds another layer to the public/private distinction. The public realm of international law is distinguished from the private domestic jurisdiction. Human rights law has challenged this boundary

between public and private by allowing individuals and groups to seek redress at the international level. Nevertheless, this innovation “has not challenged the much deeper public/private dichotomy based on gender: rights are defined by the criterion of what men fear will happen to them” (Charlesworth 1994:71).

The public/private dichotomy allows for the conception of a public realm of state responsibility separate from a private realm (the family) that is free from state interference. However, the primary site of rights violations in the lives of women is within the family, which, for those who are abused, can be seen as a “system of terror” with “multiple modalities” of violence (Romany 1994). Human rights norms that restrict focus to women’s participation in the public sphere ignore the degree to which practices within the family can circumscribe women’s activity in the public sphere.<sup>27</sup> Feminist critics argue that the public/private dichotomy can be rejected as spurious because, despite protestations to the contrary, the family has never been an autonomous sphere free from government intervention. Instead, the family has always been subject to state interference and state scrutiny (Eisler 1987).

Of course, the major conceptual problem with the two spheres precept is that it does not hold up in legislative practice. Frances Olsen (1985) expresses uncertainty as to whether the concepts of intervention and nonintervention are even useful or applicable because “the state constantly defines and redefines the family and adjusts and readjusts family roles.” Consequently, “nonintervention is a false ideal because it has no coherent meaning” (842-843). Governments throughout the world are committed to regulating and

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<sup>27</sup> Arati Rao (1996) writes: “In most societies, the family is the chief normative site of a woman’s existence, where her primary responsibility is the family’s well-being and where she attains status and recognition. In these societies, the family is a powerful regulatory mechanism of a female’s productive abilities, reproductive capacity, sexuality, and participation in other social contexts” (250).

scrutinizing familial relations. The demarcation between public and private varies within and between national settings. Laws governing marriage, divorce, child custody, and inheritance are unquestioningly accepted as matters of public policy concern. Sullivan (1995) claims, “the law constructs and sustains power relations within private life through both active regulation of private life (by such means as social welfare and taxation systems) and by the failure to regulate other conduct in private life” (128).

The boundary between public and private is considerably less sacrosanct when the state is attempting to monitor and regulate communities who are less equipped to protect themselves. The inviolability of the familial domain has not prevented the state from taking an active interest in the reproductive activities of immigrant and poor women of color. Poor, immigrant, and working-class people are more often the victims of police violence; “race, class, ethnicity, and sexual orientation all shape the definitions of what constitutes a family entitled to protection against state intervention and condition the extent to which that protection is available” (Sullivan 1995:128). Governments devise social policies that target particular families, although this intervention is justified in terms of acting in the best interests of the specified population. Racially or socio-economically defined groups are often monitored and regulated by government agencies. Women of childbearing age “are targeted by governments concerned about the demographic profile of the country, through sterilization, forced abortion, and prenatal policies. Inflow and outflow of childbearing women is equally important” (Rao 1996:247-248).

This separate spheres model makes it difficult for lawmakers to recognize that parties other than the government can be held accountable for human rights violations. It

also obscures the oppressive power of some mediating or civil society institutions such as religious communities, corporations, educational institutions, and cultural organizations. Binion (1995) claims that “were women’s experience the focus of human rights law, attention to the nongovernmental sphere would be heightened, and patterns of social organization and practices that are exploitative, not just of women and not just by family patriarchs, but also by other powerful bodies, would be brought into bold relief” (518). One option for ensuring the protection of women in the private sphere relies on the principle of state accountability. International organizations can hold states accountable for systematic failure to enforce and prosecute human rights violations perpetrated in the private sphere if the state’s action or inaction is found discriminatory and thereby constitutes a violation of the right to equal protection. However, it is a “paradox that in operational terms, human rights names governments as the chief violators of human rights, even as the state-based human rights treaty system requires governments to be both the chief protectors of citizens’ rights and the chief negotiators of rights documents” (Rao 1996:245).

### *The Family*

Interestingly, given the conventional wisdom regarding the public nature of international human rights, one private institution is singled out for special consideration: the family. This fact has significant implications for the later discussion of family reunification policies. The limited conception of family used in European legislation would seem to be endorsed by international human rights instruments. The act of establishing definitional parameters for a legal usage is an essential but dicey proposition.

Most international legal decisions leave definitions intentionally vague because short- and long-term interests must be taken into account (Apap and Sitaropoulos 2001).

The family is a complex social organism; however, only one form of family and marriage receives detailed consideration in the major human rights instruments. The UDHR both provides a very conservative definition of the family and holds the state accountable for its preservation. Article 16(3) of the UDHR defines the family as “the natural and fundamental group unit of society and is entitled to protection by society and the state.” Essentially this same wording is repeated in the ICCPR, Article 23 (1), the ICESCR, Article 10 (1), the European Social Charter Part I (16), and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (MWC), Article 44(1). Neither the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) nor the *Charter of Fundamental Rights of the European Union* (EU Charter) explicitly define the family, but the EU Charter in Article 33(1) specifies that the “family shall enjoy legal, economic, and social protection.”

According to the UDHR a family is founded between men and women of “full age” who both freely consent to the union and enjoy equal rights in both its formation and dissolution. Aside from the problematic issue of the family being defined as “natural” and “fundamental,” the definition assumes a concept of family based on a heterosexual, conjugal, and, in the west, even a nuclear model. This not only does not speak to peoples who have extended or different ideas about family constitution, but it also elides the fact that many relations built into traditional understandings of the family unit are oppressive

to women. This circumscribed characterization of family has tangible societal consequences and women bear the brunt of the limitations of this definition.

This “treatment of the family in major instruments leaves hidden from the eyes of the rights discourse not only egregious violations, but also the power relations that maintain the institution and contain gender roles. Not only is the profoundly political nature of the family obscured, but the ever-present state is painted out of the picture” (Rao 1996:248). With an explosion in the number of single parents as well as increasing recognition of same-sex families and multigenerational caregiving arrangements among people of all ethnicities, a more elastic conception of family cannot help but affect the reality of the standard model of the heterosexual two-parent families (Stacey 1998). The ingrained stereotype of the conventional nuclear family needs to be challenged as the main model for social organization; however, the particular definition of family that is codified in existing human rights documents allows for resistance to a more inclusive vision.<sup>28</sup>

Radhika Coomaraswamy (1994) contends that the formulation of family law provides a “litmus test in any society with regard to legal norms and the status of women” (48). In the liberal paradigm the family is considered to be pre-political; it is the site of sentiment and non-contractual duties. To call on rights-based protections explodes the myth of naturalized hierarchies, self-sacrifice, and shared enterprise. Formal guarantees of equality in the family seem neither necessary nor judicious: “Thus the state is seen to

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<sup>28</sup> “In human rights, however, to ask for a more nuanced reading of the family and its many faces is more challenging. Some of the resistance is familiar and stems from the vested interests of individual, institutional, and state actors. Some actors insist that the vulnerability of women in the family is offset by certain rewards, and others claim the cultural defense that accords different status to different members of the family” (Rao 1996: 256).

enter the home only when normalcy has left, to protect the vulnerable and punish the abnormal. The state is seen to enter reluctantly and only to control damage and restore the home to its original position of state-free equilibrium” (Rao 1996:245-246). Legal institutions and instruments take the terms and structure of marriage to be long-established. Since the disposition of family and marriage are presumed tacit and unproblematic, law and social customs dictate and intensify any inequalities already present in the institution of marriage.

The question of what influence international human rights law has on increasingly restrictive immigration policies in Europe is inextricably linked to the feminist examination of the efficacy of the law in serving the interests of women from developing countries and women more generally. Among activists, there have been increasing calls for and recognition of the need to “mainstream” both women’s rights into all international human rights instruments and women themselves into international organizations charged with developing, monitoring, and enforcing human rights. However, the challenge is not merely to evaluate existing “laws, policies, programs, customs, practices, and an array of inequities from a gender perspective” in order to develop new policies using the same mold in an effort to rectify any discrimination (Gaer 2001:98).<sup>29</sup> Redirecting resources and facilitating dialogue cannot easily remedy the problem of gender inequality and the socially embedded power disparities between men and women. (Copelon 1994).

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<sup>29</sup> Indeed, some feminists have argued that, “a continuing focus on the acquisition of rights may not be beneficial: women’s experiences and concerns are not easily translated into the narrow, individualistic language of rights; rights discourse oversimplifies complex power relations and their promise may be thwarted by structural inequalities of power; the balancing of ‘competing’ rights by decisionmaking bodies often reduces women’s power; and particular rights, such as the right to the freedom of religion, or the protection of the family, can in fact justify the oppression of women” (Charlesworth 1994: 61).

The human rights of women are broader than women's rights and subsume the international instruments that deal specifically with women's concerns. Rather than simply using male-defined rights as a measure and trying to ameliorate discrimination, it might be more useful to identify a set of positive rights that specifically address women, such as reproductive rights and maternal health, wages for work within the home and subsistence farming, and the right to literacy. By refusing to rely on compensatory rights, addressing these positive rights could also begin to bridge the public/private distinction. Women's lived experience needs to be woven into the understanding and interpretation of the entire field of human rights—the challenge is not to amend an oversight but to transform the discourse.

### **Human Rights Norms in the EU**

*Human rights are clear examples of what constructivists call 'social constructions'—invented social categories that exist only because people believe and act as if they exist, that nevertheless come to have the capacity to shape the social and political world (Schmitz and Sikkink 2002:517).*

Risse and Sikkink (1999) delineate four criteria for determining whether states have accepted the validity of human rights norms and have reached the “prescriptive status:” ratification of applicable international human rights conventions; codification of human rights norms into domestic law; the establishment of an institutionalized grievance mechanism for citizens; and the government's adoption of discursive practices which endorse the legitimacy of human rights norms (e.g., ceasing claims that human rights interfere with national sovereignty and countenancing and responding to critics who cite

human rights violations).

The European Union itself is a forum in which Europe is redefining its identity. EU actors “accept the validity and significance of norms in their discursive practices”; however, “actors might actually agree on the moral validity of the norm, but disagree whether certain behavior is covered by it” (Risse and Sikkink 1999:13). There can be differences in how the context is defined for which norm-guided behavior is deemed appropriate. Is immigration a freedom of movement issue, a right to family life issue, a security issue, or an economic and demographic necessity issue?

The collision of supranational and national priorities over the issue of migration in Europe raises a persistent contradiction in the aims of liberal democracies: the desire to control the movement of people across its borders and the desire to promote free markets and liberal democratic norms. Scholars who embrace the theory of embedded liberalism (Ruggie 1982; Hollifield 1992) contend that domestic liberal norms of western nation states have become institutionalized at the international level in the form of human rights instruments. As a result, nation states are constrained in their freedom to act and take autonomous decisions by human rights principles articulated in customary law or international conventions. These constraints affect their relations and interactions with other states and their treatment of individual migrants.<sup>30</sup> This theory endorses the idea that the international arena has become preeminent in regulating immigration and defining policy priorities. Nevertheless, issues of concern to human rights advocates are often vulnerable to the overriding imperatives of state interests. Lahav (1997) argues that

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<sup>30</sup> “The feminist critique of human rights practices reminds us that good intentions and liberal commitments are not in themselves sufficient. Although the liberal rights tradition admirably serves to minimize the incidence of direct violence, it stops short of challenging structural violence” such as patriarchy (Peterson 1990: 306).

scholars who emphasize the influence of human rights norms and international instruments more generally on migration-policy formulation “fail to consider changing domestic constraints and interests in an evolving international order... By focusing on international and judicial resistance to state action, there is a tendency to ignore the fact that many rulings do not generally represent an expansion of immigrant rights but, rather, are attempts to limit or perhaps to slow down a contraction of such rights” (351). The 2006 European Court of Justice’s judgment<sup>31</sup> on the case brought by the European Parliament contesting the final family reunification directive’s adherence to human rights law could be considered one such example of this tendency by courts to delimit recognized human rights norms. However, Lahav’s argument does not take into account that international norms and instruments are also undergoing a continual process of reinterpretation and adaptation to changing circumstances. Domestic imperatives and international norms are mutually constitutive. Domestic interests may seem to have an upper hand at times, particularly during times of heightened domestic security concerns, but during times of relative peace, such as immediately after WWII, international cooperation on human rights flourishes.

I argue that human rights norms have reached “prescriptive status” in the EU with regard to the rights of immigrants. This “means that the actors involved regularly refer to the human rights norms to describe and comment on their own behavior and that of others; the validity claims of the norms are no longer controversial, even if the actual behavior continues violating the rules” (Risse and Sikkink 1999:29). Yet, adoption and adherence to human rights norms in one policy area does not guarantee adherence across the board, which has been proven in the gap created by the precedence given to civil and

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<sup>31</sup> ECJ Case C-540/03

political rights over social and economic rights in most western countries. This analysis attempts to uncover some institutionally-based reasons for why some human rights norms are viewed as less politically contentious and more adaptable to EU legislation. This question is inextricably linked to existing member-state domestic norms, laws and practices. Once international laws and conventions have been put into practice, regional and transnational factors need to be considered when attempting to understand how international norms will be incorporated. This equation is made more complex by EU legislation which also interprets international norms; however, these documents are strongly influenced by member-state preferences.

Asserting the rights of immigrants or non-nationals is still very contentious, and securing most of the rights which pertain to the admission of migrants, such as the right to family reunification, can be deemed irrelevant in the face of the need, for example, to screen out potential terrorists. However, the “prescriptive status of a norm can also be well examined in situations in which the actual behavior is still partly inconsistent with it” (Risse and Sikkink 1999:30).

This research on human rights and norms picks up where Risse and Sikkink (1999) leave off; to a large extent, deference to human rights norms is taken for granted in the EU. I would argue that for the EU member states of western Europe, human rights have passed through the stage of being principled ideas or “beliefs about right and wrong held by individuals” and enjoy the status of recognized norms (“collective expectations about proper behavior for a given identity”)(Jepperson et al. 1996:54). Most citizens and leaders have been schooled to recognize when a human rights violation has taken place, and are quick to point it out when it happens outside the EU community of states (hence

the emphasis on external relations when human rights are discussed), but the main question regards the inviolability of those rights—the non-derogability—when there are extenuating circumstances. It is necessary to clarify what rights belong to non-citizens, which non-citizens, and under what conditions.

### **EU Identity and Human Rights Norms**

Many of the social and identity affirming interactions that occur in the international sphere are largely informal, but some of these interactions, particularly those that have the greatest impact on state behavior are mediated by bureaucracies. These organizations have an important “role in institutionalizing and propagating cultural norms—norms that define identities, interests and social realities for the people who inhabit those organizations” (Finnemore 1996:3). In addition to the EU, European states participate in several bureaucracies that socialize them, including the United Nations, the Council of Europe, and the Organisation for Security and Co-Operation in Europe to name a few. States join international organizations and institutions “for identity-affirming reasons, as well as for material gains... Actors affirm their identities and legitimize their actions within the framework of prevailing norms, then these communities are crucial arenas in which identities influence actor behavior” (Klotz 1995:29).

Human rights norms contribute to how EU policymakers and member states come to understand the larger international migration problematique. When debating how to address the subject, norms provide a framework for understanding the issues and help them decide on a course of action. Social structures or norms constitute states; they enable them to grasp and articulate their interests: “state interests emerge from and are

endogenous to interaction with structures” (Checkel 1998:326). A logic of appropriateness not one of utility maximization prevails.

Constructivist theory provides a framework for tackling the question of how EU actors and institutions define their interests when it comes to immigration policy. What is the relationship between human rights norms and EU member-state interests when it comes to their immigration policy priorities? What is the link between norms and policy choices? There are multiple sites of identity and interest formation in the international community of states; the normative configuration of the international environment is not monolithic. For example, how does the addition of new members, from former communist countries in Eastern and Central Europe, with the potential introduction of new norms, affect the “European” value-structure of the EU? Risse and Sikkink (1999) contend that the degree to which “a nation values its membership in an emerging community of liberal states; it will be more vulnerable to pressures than a state that does not value such membership” (24). Countries receiving material and economic assistance will also be more susceptible to normative pressure.

The care and tending that EU states devote to their reputations as proponents of human rights is a non-coercive aspect of norm legitimation that contributes to interest and identity formation. By examining the discourse employed by actors engaged in EU policymaking, it is possible to ascertain the influence of norms on the policymaking process. To what extent do human rights norms simply constrain EU member states’ choices with regard to immigration policy, and to what extent do they actually constitute their interests—determine how they frame the issue? Norms gain in importance and become “causally consequential during the process by which actors define and refine

their collective identities and interests” (Risse and Sikkink 1999:9).

EU actors explicitly and implicitly concede the centrality and legitimacy of norms in their discursive practices. However, there can be differences of opinion in how to define the relevant context in which norm-guided behavior is called for. Should the dominant concern in immigration policy be freedom of movement, security, economic necessity, or social stability? Some EU actors may consider the right to family reunification of secondary importance in the face of the need to exclude drug traffickers and potential terrorists. Policymakers might concede the legitimacy and necessity of certain norms but contest every instance of how, when, and to whom a norm is deemed applicable.

The import and significance of materially existing migrants acquire meaning in the social context within which they are interpreted. Third-country migrants are more problematic than EU member-state migrants, migrants from non-European countries are more problematic than Eastern European migrants, and skilled migrants are less problematic than purportedly unskilled migrants, to name a few opposing categories. Immigration is conceived of as a social and economic problem which requires EU-level policy solutions and the profile of the “ideal” migrant keeps changing as the EU evolves and responds to the escalation of globalized flows of money, information, and people. Social conditions, intellectual influences, and physical environments shape the constantly evolving identities of individuals and groups, but identity “can also involve complex processes of construction by legal, economic, social, and political systems that place human beings into categories suitable for specific agendas” (Lewis 2001:213). This directly points to the fact that immigrants and the concept of migration are interpreted

through an evolving social context in host countries and in the EU as a whole.

Critical feminist theory must question the relevance of the human rights discourse to women's lives—how do these ideas travel across borders and boundaries and maintain their validity (Petchesky 2003)? Are human rights a useful tool for third-country immigrant women in battling structural injustice? Women's relationship to the state is changed by their expanded role in all aspects of international politics and greater participation in all globalized flows including migration. In some ways limiting the focus of this project to gender is an artificial distinction. Gendered experience is complicated by other aspects of identity, including race, class, and sexuality; increasingly, “contemporary forms of globalization mean that gender is further informed and complicated by the transnational identities of the women, men, and children who cross national borders in search of work” (Lewis 2001:200). In addition to personal affinities and group identification, “some externally imposed gender, race, and cultural stereotypes operate simultaneously to serve the free-market agendas of global capital” (Lewis 2001:203). These stereotypes are identities constructed within the context of the society in which an immigrant is living and determine the access that she will have to legal and governance structures. Predetermined gendered and racialized categories can confine many non-European immigrants of color to the status of “foreigner” heedless of the documentation or residency status of the individual.

### Chapter 3

#### **The Evolution of Immigration Policy in the European Union: Overlapping and Overbearing Intergovernmentalisms**

Migration legislation is, by its nature, constantly undergoing revision and responding to new international migration trends and world events. The symbolically and politically loaded nature of immigration legislation in contemporary Europe has often compelled the newly elected leadership of national governments to reformulate migration policy in an effort to distinguish itself from the preceding administration in a highly visible way. In the last few years most member states, among them Germany, Spain, France, the Netherlands, and Italy, have made changes to their policies at the national level. The member states of the EU have divergent interests, priorities, and immigration histories. Some states are long-term labor importers; others, until relatively recently, were countries of net emigration. Geographically, some countries are more exposed to spontaneous and irregular migration flows, while others are less accessible to illegal entrants. Additionally, “in some member states, the economy—both the official and the hidden economy—expresses a strong demand for unskilled foreign labour” (Pastore 2002:4). In other member states this demand for unskilled labor is met by second and third generation children of immigrants, many of whom—as evidenced by the recent rioting in Paris—are still marginalized both in the labor market and society.

Several factors have influenced the formulation of immigration policies in Europe. High rates of unemployment within Europe and “shrinking labor markets seem to imply a diminished economic pull-factor, although cheap, and often illegal, labor is proliferating throughout Europe, particularly in the service industries”(Geddes 1995:201;

Kofman 2005; Ehrenreich and Hochschild 2003). The countries of Southern Europe (Greece, Italy, Portugal, and Spain), which traditionally had been net suppliers of immigrant labor to other European states, have become hosts to huge number of immigrants from outside the EU largely as a result of illegal immigration. Economic disparities and population growth will continue to encourage emigration from the global South. And from the East, the collapse of the Soviet bloc as well as conflicts in the former Yugoslavia have caused huge flows of asylum seekers and economic migrants to migrate westward.

Despite efforts to remove trade and investment barriers as well as other hindrances to the global movement of capital, human movement is subject to strict control especially in the northern hemisphere. Freedom of movement has been on the agenda since the very first efforts to realize some form of European economic and political integration, starting with the Treaty of Paris which established the European Coal and Steel Community (ECSC) in 1951. Since then citizens of EU member states have gained almost complete freedom of movement and what amounts to supranational social protection. But this mobility and equality of treatment does not apply to third-country nationals for whom the EU has been unable to develop an “integrated and coherent response” (Ireland 1995:232). Policymaking in this area has been jealously guarded by member-state governments and arrived at through intergovernmental arrangements that have often taken place outside of the formal EU institutional framework. However, the juridicization of many aspects of migration policy has curtailed the discretionary power of national administrations; indeed certain categories of

foreigners such as family members are now protected against arbitrary expulsion (Hollifield 1992; Guiraudon 1998, 2000).

This chapter focuses on the historical evolution of immigration policy rather than the theoretical explanations for the form the policies took. It will examine immigration control measures initiated in both European intergovernmental forums and from within the Community framework. To date, however, states have not been able to effectively control the inflow of family members, asylum-seekers, and undocumented immigrants, nor is it unproblematic to identify and expel illegal aliens. I will trace how migration-policy formulation and defining the rights of third-country nationals has become a function of the EU policymaking process rather than continuing to reside solely with the member states. This policy evolution has not occurred without contestation among EU institutions, however, particularly between the Commission and the Council. The Commission's goal is to expand the competency of the EU in regard to third-country nationals in fulfilling its institutional mandate of fostering deeper integration and enhancing economic efficiency, whereas the Council represents and defends member states' sovereign right to establish the conditions of residence and legal status of third-country nationals.

### **Influencing the Policy Process**

How porous and accessible is the EU's policymaking process at the subsystemic level? Under what conditions can networks of EU and nongovernmental organizations influence policy decisions and change conventional approaches to issues? Is it possible to fundamentally transform the way an issue is addressed: for example, by reframing the

immigration issue from being considered as an economic or security problem into a question of human rights? EU member states make a complex calculation in adhering to human rights norms when devising immigration policy. There are alternative determining factors which influence EU state interests which may seem more immediate or persuasive, but human rights concerns should not be discounted. The formulation of EU legislation opens a window of opportunity for national-level immigrant-advocacy groups to press for domestic change. The development of supranational immigration-policy legislation “creates the possibility for groups representing Europe’s immigrant and ethnic minority population to access the material and symbolic resources made available for them at EU level to press for their inclusion at the domestic level” (Geddes 2003:147).

Practices of principled mobilization are believed to be the motor behind the process of norm diffusion; this dynamic highlights the importance of nongovernmental networks (Keck and Sikkink 1998). Many advocacy networks formed in response to what they saw as the failure of the United Nations to fulfill its mandate and curb the gross human rights violations that were occurring around the world. Schmitz and Sikkink (2002) cite research that demonstrates that “even strong states in the international system are followers, not leaders of such mobilization efforts. Nongovernmental mobilization precedes and causes state action on behalf of human rights” (531).

Groups composed of unofficial actors can attempt to have an impact on the decisionmaking process. Constructivist research maintains that nongovernmental groups and actors and their “principled mobilization” are crucial contributors to the construction of the social environment in which states operate (Schmitz and Sikkink, 2002:52). Keck and Sikkink (1998) have developed the conceptual tool of “transnational advocacy

networks,” which describes not only activities of NGOs but also cooperation among other sympathetic actors and groups in religious, union, corporate, or government settings, in private foundations, and in the media. Transnational advocacy networks are characterized by diverse groups and individuals, who share a set of common values, are discursively aligned, exchange information, and share resources.<sup>32</sup>

Human rights transnational advocacy networks “include international and domestic NGOs, foundations, and some governmental and intergovernmental officials who share collective understandings and a collective identity with regard to human rights norms” (Risse and Sikink 1999:21). Certain questions should be explored: Who is representing the disenfranchised immigrants and are these groups representing people or ideas? What is the role of the immigrants themselves; as the “repressed domestic” group, what do they consider their sphere of influence and capacity for resistance? In spite of increased activity, there are very few broadly-based transnational interest groups at the EU level because the process is not as accessible to them as it is to private interests.

Common understandings and approaches in particular issue areas form between EU and nonstate actors. Certain working groups, decisionmaking bodies, and state representatives are more sympathetic than others to human rights norms having a binding effect. Drawing on the same principled ideas, different institutions and working groups within the EU superstructure may promote different outcomes. Klotz’s (1995)

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<sup>32</sup> Advocacy coalitions with political objectives, which bear a strong relationship to transnational advocacy networks, can also infiltrate policy networks (Sabatier and Jenkins-Smith 1993). Another conception related to transnational advocacy networks and advocacy coalitions is the epistemic community. An epistemic community is “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or area at issue.” These communities share a common political and ideological foundation that leads them to believe that the way to effect change in society is through participation in the policy process; however, without official recognition they “cannot produce political decisions or innovations. Politicians align with epistemic communities and invite them into the inner circles of power” (Fuchs 1994: 182).

proposition that “variations in the permeability of discourse and decisionmaking processes affect policy” deserves further study in the context of the EU (33). For example, the European Parliament (EP) and the Commission seem to be more permeable to arguments endorsing human rights norms than Council.

New types of pro-migrant political advocacy gained ground in the EU in the 1990s. This is in part due to the expansion of the Commission’s power to develop immigrant integration policies granted by the adoption of Article 13 of the Amsterdam Treaty. Article 13 allowed EU policy “to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” The development and passage of Article 13 helped create a more receptive policy environment for concerns about immigrants’ rights to be heard. In 1991, in response to an EP initiative, the Commission established the European Union Migrants’ Forum (EUMF)—an umbrella NGO consisting of 190 organizations and national associations—in order to participate in NGO activity and lend legitimacy to its own immigration policy proposals. One of the main issues addressed by the migrant inclusion agenda was developing EU citizenship rights for third-country migrants. The advent of “pro-migrant political mobilization” challenges the assertion that immigrant integration policies are all determined at the nation-state level and demonstrates the initiation and establishment of migrant rights at the EU level (Geddes 2003:142).

However, Guiraudon (2000) contends that European-level migrant aid organizations have had little success in influencing intergovernmental policymaking. The Migration Policy Group (MPG) is an independent organization with close ties to the

Commission and the EP, but has had no input in defining “third pillar”<sup>33</sup> issues. Another prominent organization is the European Council for Refugees and Exiles (ECRE) but these two NGOs do not a “transnational activist network” make (Keck and Sikkink 1998). In addition, their reach and capacities are nominal in comparison with many member-state-level migrant advocacy and aid groups.

The concept of a “Fortress Europe” as it applies to immigration policy has several implications: The first, as Baldwin-Edwards (1992) has asserted, is that the developing world views European integration as a gradual process of increasing exclusivity. The second concerns procedural transparency. Now that the Schengen Agreement has been incorporated into the *acquis communautaire*, the secrecy that used to surround intergovernmental immigration policy negotiations is somewhat lessened. But the criticism of Fortress Europe can also be seen “as part of a wider critique of the democratic deficit that is said to exist at the European level and has a special resonance for people of immigrant or ethnic origin”(Geddes 1995:208). There are multiple levels of discrimination which limit the ability of immigrant minorities to participate in the political processes of member states and by extension those of the EU. There are socio-economic barriers to political participation as well as citizenship and nationality criteria that effectively close off many possible avenues for participation. For many minority groups it is not simply a matter of fair or transparent deliberative procedures; if anti-immigrant political discourse becomes legitimated, the entire issue of immigration could be politicized to such an extent that the capacity to access and influence the political process becomes practically impossible.

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<sup>33</sup> The three pillar structure of the EU, as a conceptual framework, was introduced by the Maastricht Treaty (TEU) in 1992. The first pillar is the European Community pillar, the second is the common foreign and security policy (CFSP) pillar, and the third is the justice and home affairs pillar.

### **European Immigration Policy: The Historical Context**

Before WWII large numbers of foreign workers were present throughout Europe; however, most of these economic migrants originated from neighboring European states, and the majority eventually returned to their home countries. But the migratory flows that occurred in the postwar period were different not only in magnitude but also in composition. The labor shortages in the rapidly industrializing west caused countries such as Austria, Belgium, Germany, France, Luxembourg, the Netherlands, Sweden and Switzerland to relax their immigration controls and admit large numbers of guestworkers. Many subjects of former colonies decided to claim their right to permanent residency and settled in France, the Netherlands, and Britain. These countries as well as Germany and the Benelux states, in order to meet the growing demand for labor during this incredibly productive period of industrial rebuilding and expansion that lasted until the mid-60s, welcomed large numbers of unskilled workers from the southern European countries, North Africa and Turkey (Soysal 1994:13-19).

The two primary models of immigration which are relevant to this research were creations of this postwar international environment, at which time most of the countries of western Europe felt the need to provide some sort of official framework for their immigration regulations. The colonial model (of which France and the Netherlands are typical examples) is characterized by recruitment and heavy migratory flows from colonies and former colonies. Germany is a good example of the second model—the rotation or guestworker model. The rotation system is premised on the notion that young unaccompanied workers (usually male) will enter the host country under a fixed contract,

stay for a set number of months or years and then leave to make room for new workers. The object is to maintain “flexibility in hiring and firing” and guarantee that “unemployment can be exported to the country of origin” (Phizacklea 1983:3). Family immigration and reunification is actively discouraged and no provisions are made for a more settled population.

The period of remarkable economic growth that occurred during the 1950s and 60s called for a continual influx of migrant workers to fill the labor needs of the European economy. However, the economic downturn that was heralded by the oil crisis of the early 1970s propelled Europe into an entirely new stage of policy formulation regarding its immigrant population. The years 1973 and 1974 are watershed years in European immigration history; the oil shocks, economic recession, a rising rate of unemployment, and a disturbing surge in anti-immigrant and xenophobic attitudes led to a cessation of all labor recruitment. While this may have seemed a logical means to stop the immediate human influx, unfortunately, it treated the symptoms but did little to address the cause. As a result, many immigrants simply resorted to illegal and refugee channels to gain entry.<sup>34</sup> Countries that had formerly aggressively imported labor were now forced to confront expanding populations of foreign residents, due to low rates of return, family reunification, and natural population growth. Despite the restrictive immigration policies that have predominated in Europe since this period, the flow of migrants into EU countries has continued unabated.

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<sup>34</sup> Even during the recession, the German “economic miracle” drew many foreign workers, but due to the recruitment ban and the complex admission and residency procedures, many immigrants chose to enter and remain illegally. Most illegal immigrants were family members of primary migrants who entered as tourists or were guestworkers whose residence permits were not renewed. Because of their precarious legal status they were easily exploited by employers. These immigrants were “employed mostly in construction, hotels, restaurants and private homes,” and Horst Reinman and Helga Reinman note that the illegals who work in hotels and restaurants were “often the wives of guestworkers” (1979:68).

One of the most common and problematic trends in immigration legislation in recent decades is the formulation of what Phizacklea (1983) calls a “dual-policy.” Variants of this policy can be witnessed across western Europe. The first goal of the policy is to enforce a complete halt on all immigration from outside the EU, and the second and complementary goal is to encourage integration (preferably assimilation) of all those who are permitted to stay. The main problem with this policy is that by restricting entry for certain groups of immigrants, all the members of those groups are officially branded as “unwanted surplus.” As a result, whatever attempts are made to integrate those workers are complicated by the fact that the group has been stigmatized and pinpointed as a problem.

While western European countries may have differing immigration histories and political attitudes towards immigrants, their respective governments were joined in their myopia and inability to create coherent policies that addressed the needs of the diverse multi-ethnic populations they found living on their soil by the mid 1970s, as well as the political impact that the mass recruitment of immigrant labor would have on their societies.<sup>35</sup> As a result, “the host societies, largely unwittingly, allowed a severe sociopolitical crisis to develop, one that today defies national-level solutions” (Ireland 1995:235). Apprehensions about the weak economy, concerns over “social dumping,”

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<sup>35</sup> For example, one of the main difficulties Germany has had in formulating a coherent immigration policy, particularly in the immediate postwar period, can be traced to the fact that it has different standards for different groups of people. Germany’s concept of nation and people is constructed biologically. Douglas Klusmeyer explains: “In a very real sense, citizenship is transmitted through bloodlines, which is known juristically as the principle of *jus sanguinis*. By contrast, the acquisition of French citizenship is grounded on the principle of *jus soli*, which makes the place of birth the determining factor” (1993: 84). This policy has resulted in an open-door immigration policy for ethnic Germans who have been displaced as a result of postwar changes to political boundaries; all ethnic Germans are granted automatic entry and full citizenship rights. This is opposed to the regulations that apply to immigrants who are not of German ethnic origin who have their movement restricted; naturalization is often very difficult regardless of the length of time they have been resident in Germany. This ethnocultural view of German national identity has resulted in the absence of a general immigration policy.

and the continued viability of social protection schemes stymied the passage of any coordinated immigration policies at the EU level.<sup>36</sup> Nevertheless, efforts to protect and integrate resident migrants continued, notably among intergovernmental organizations and from rulings emanating from the ECJ.

*Cooperation on Immigration Policy Pre-Maastricht: Community Efforts*

Most of western Europe's labor-importing host countries developed bilateral agreements with the countries that were their main sources of labor. Such agreements, based on the paradigmatic Franco-Italian Accord of 1947, were forged between France and Algeria (1962) as well as between Germany and Turkey (1961). The emphasis of most of these arrangements was on recruitment, but they did contain some inexplicit references to non-discrimination, family reunification, and housing. Many of these agreements had lapsed by the mid-1960s; as a result the European Economic Community (EEC)<sup>37</sup> decided it was time to address this legal and administrative vacuum.

The 1958 Treaty of Rome laid the groundwork for the European Economic Community and contained articles that provided for the incremental realization of complete labor mobility among the member states. Article 3(c) of the treaty does specify

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<sup>36</sup> Presaging the current concern over "benefits tourism," some countries in the 1980s stipulated that the right of entry and settlement would only be granted provided that the migrant could give a guarantee that he or she would have no need to resort to public funds (Williams 1995).

<sup>37</sup> The European Coal and Steel Community (ECSC) was founded by the Treaty of Paris in 1951. The European Economic Community (EEC) was founded by the Treaty of Rome in 1957. The European Atomic Energy Agency or Euratom was founded in 1957 by a separate Treaty of Rome. Collectively these three bodies became known as the European Community (EC). The 1992 Maastricht Treaty changed the name to the European Union (EU) and the three founding treaties came to constitute the first or community pillar of the Union with common foreign and security policy (CFSP) and justice and home affairs (JHA) becoming the second and third pillars respectively. Throughout this dissertation, for purposes of clarity and consistency, I will only use European Union (EU) in the abbreviated form. When it is more accurate, for purposes of historical accuracy, to reference the European Economic Community (EEC) or the European Communities (EC), I will spell out the entire names.

the “abolition of barriers to free movement” of people as one of the primary objectives of the Community but it does not elaborate on this matter, and actually the section of the treaty which does address the issue only refers to the free mobility of *workers*, not that of persons more generally.<sup>38</sup> Article 117 and 118 detail the Community’s social policy; many legislators interpreted these provisions as providing a back door to immigration policymaking because they empower the Community to formulate proposals regarding the rights of migrant laborers, many of whom are not member-state nationals.

The Treaty of Rome authorized the European Economic Community to establish treaties with third countries and in this capacity it set up association agreements with Turkey, Yugoslavia, Algeria, Tunisia, and Morocco. For each agreement an Association Council was created that was composed of the Council and Commission and representatives from the governments of the pertinent member states and third countries. These agreements were designed to address questions regarding worker mobility and the economic and social rights of immigrants, and the decisions reached by the Association Councils were legally binding for all parties. It was in this manner that the European Economic Community first “worked toward setting a uniform, minimum social security regime to protect third-country workers in several Community member states” (Ireland 1995:250).

Two fundamental principles that are contained in the founding treaties of the European Union are inextricably linked to the issue of immigration. These two fundamental economic and social rights are freedom from discrimination, sexual and

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<sup>38</sup> The relevant articles dealing with mobility are found in articles 48-51 of Title III on the free movement of persons’ services and capital. Article 48(1) states, “Freedom of movement for workers shall be secured within the Community by the end of the transitional period,” set for January 1, 1970. The EEC treaty also was the first instance when limitations were imposed on the right to free movement based in “public policy, public security, or public health.”

otherwise, for citizens of the EU in economic and employment circumstances, and the unrestricted mobility of workers. On July 1, 1968, the customs union outlined in the Treaty of Rome was completed and took effect. Free movement of European Community workers was possible at this time. But much of the liberalization of migration policies regarding member-state nationals was developed in the comparatively flourishing economic climate that prevailed in Europe pre-1973. The demand for labor was still high and the other five member countries could easily absorb Italy's surplus labor. But even as it became evident that the economies of western Europe were growing increasingly interdependent, these fluctuating migratory flows were representative of contingency or symbiotic arrangements among the member states; there were no common policies, supranational monitoring, or erosion of member-state authority.

Potentially, free mobility of persons could have had a radical impact on the social make-up of Europe but in reality this transformative potential has not been realized for a number of reasons. When the Community was first created, the founding members were among the more developed states both industrially and in terms of extensive social welfare programs. The European Social Fund was introduced to provide training programs designed to integrate migrants into their host countries. Structural funds, as originally conceived, were an attempt to strengthen the economies of the less-developed, mostly southern European, countries and thereby give their laborers a reason to stay at home. Not insignificantly, the recession in the 1970s caused a sharp drop in employment opportunities all over Europe—even in the core states. As a result, the reasons for internal migration among the European Community states dwindled; external migration was also

extremely curtailed by the abrupt closing of borders and by newly instituted restrictions on immigration among the main labor-importing member states.

What began after the war as an attempt to capitalize on a readily available, inexpensive, and yet theoretically provisional workforce soon became an effort to regain control over a situation in which a temporary workforce transformed itself into a permanent community of European and third-country ethnic residents. By the mid-1970s the patterns of migration had changed significantly. Immigration from non-European countries, including many developing countries, had increased. Forty-five percent of new immigrants were arriving from outside of Europe (Jain 1997). Most of the legal immigration was for other than economic reasons: mainly family reunification and asylum. Additionally, the countries of southern Europe—Italy, Spain, Portugal, and Greece—which traditionally were countries of net emigration to the more developed countries in the North, were now experiencing huge inflows of immigrants from non-European countries. These countries in southern Europe were, and continue to be, viewed by new immigrants as providing access to the employment opportunities provided by the larger European Union.<sup>39</sup>

As mentioned earlier, immigration matters are politically sensitive because they raise very basic issues of how membership and identity in a civil society are defined, what rights and responsibilities are attached to citizenship, and the capacity of the state to determine these conditions. Since the Treaty of Rome, when the goal of harmonizing social policies was first established, the question continued to emerge of whether these sensitive issues involving the economic and social rights of all workers within the

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<sup>39</sup> While Italy was one of the founding (although one of the less prosperous) members of the European Coal and Steel Community (1952) and the European Economic Community (1958), Greece did not accede to the European Community until 1981 and Spain and Portugal joined the European Community in 1986.

Community should be handled using an intergovernmental approach, which requires direct consultation among member-state governments, or by conceding joint-sovereignty and devising policy using the institutional structure of the European Communities.

Despite any misgivings, in the early 1970s when economic growth slowed and most European countries tried to close their borders to migrant workers from non-member states, immigration began to become a political priority for the leadership of the European Economic Community. In 1974 the Council of Ministers adopted a resolution addressing the Community's population of foreign workers (Council of the European Union 1974). In December of that year, the Commission produced the *Action Programme in Favour of Migrant Workers and Their Families* (CEC 1974).

In 1985, shortly after the Schengen accord was signed, the Commission, in an effort to expand its domain, sent the Council a communication entitled *Guidelines for a Community Policy on Migration* (CEC 1985a). The Commission claimed that successful European integration required that foreign residents have access to certain rights. Later that year, citing the authority of article 118 of the Treaty of Rome, which gives the Commission the capacity to legislate social policy, the Commission adopted a decision mandating that member states must consult with the European Community institutions before any immigration policies concerning third-country nationals were adopted (CEC 1985b).<sup>40</sup> Several member states objected to this intervention on the part of the Commission and the ECJ ended up annulling the decision in 1987 (Guiraudon 2003;

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<sup>40</sup> See now Decision 88/384 OJ 1988 L 183/35.

Evans 1994).<sup>41</sup> Most member states viewed this as a flagrant violation of their national sovereignty and decided to pursue intergovernmental policymaking more actively both within and outside of the Council of Ministers.

Under the British presidency of the Council of Ministers in 1986, the Ad Hoc Working Group on Immigration (AHWGI) was created by the Ministers of Interior of the European Community states and was composed of the top immigration policy officials in each member state. The AHWGI “grew out of... an increasing appreciation that the creation of the Single European Market would throw up immigration issues which ministers and their officials could resolve intergovernmentally”(Philip 1994:175). This group’s deliberations regarding the removal of internal borders and the harmonization of immigration policies were carried out in closed door sessions. The ECJ and EP were granted no authority to participate in or comment on the activities of the AHWGI. The Commission had only observer status; however, it could be pulled in as an arbiter of last resort when the Council was unable to reach a joint decision. Interestingly, not only was the “policy venue” changed but also the “policy image”—how the policy was framed and discussed—was changed (Baumgartner and Jones 1993:25). The harmonization of immigration policies within the Council was addressed as part of a larger economic concern with the elimination of all internal border controls rather than as an issue of social justice as it had been conceived by the EP and the Commission.

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<sup>41</sup> The Court found that, “the contested decision must be declared void in so far as the Commission lacked competence to extend the scope of the communication and consultation procedure to cover matters relating to the cultural integration of workers from non-member states and members of their families.” See Judgment of the Court of 9 July 1987 Federal Republic of Germany, France, Netherlands, Denmark and the United Kingdom v. Commission of the European Communities. Joined cases 281, 283, 284, 285 and 287/85.

### The Single European Act (SEA)

The Commission had been advocating for an active role for the European Community in immigration policy since the 1970s. But it was the Commission's involvement in proposing solutions to issues that arose as "by-products of the drive to complete the single European market" that buttressed its more ambitious aims for devising common migration policies (Philip 1994:184). As the 1980s were drawing to a close "it had become evident to policy-makers that the nature of future immigration to Western Europe was changing dramatically in scale, scope, and cause, such that a collective and concerted response by national governments was required if some states were not to be overwhelmed by events" (Philip,1994:187).

In 1986, the passage of the Single European Act produced a renewed zeal for economic integration and member-state cooperation by setting a target date for the completion of the single market. The main goal of the single market, which was to be completed by the end of 1992, was to create a free market in goods, services, capital and labor. Article 8a of the SEA aimed to abolish all barriers impeding the free movement of labor by eliminating all internal frontiers. This article clearly brought immigration policy within the Community's sphere of jurisdiction.<sup>42</sup> The Council of Ministers, the most intergovernmental of European institutions, acknowledged "that the economic and social changes that the single-market project would effect made common migration policies necessary. Otherwise the forces of competition risked serious distortion. If third-country

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<sup>42</sup> As a result of its drive to eliminate all border restrictions, including those applying to the mobility of labor, the single market program almost inadvertently had an impact on immigration policy. This is a good example of the neo-functionalist spill-over effect, that integration in one policy sector will lead to integration in others, in that the Community was forced to address and resolve issues normally outside of its purview in order to insure the completion of the internal market. Economic policy imperatives led to legislation in the social policy arena.

nationals did not face the same totally free labor market as EC workers, job openings and jobseekers would be unlikely to match up in the way that the Commission forecast”(Ireland 1995:244). Immigrants fill a vital niche in most domestic economies; a truly transnational labor market requires all labor to be mobile.

Collaboration on external frontier policy was frustrated by two significant declarations attached to Article 8a: (1) member states were empowered to “take such measures as they judge necessary for the purpose of controlling immigration from third countries” and (2) “in order to promote free movement of persons the member states shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries.” These two qualifying statements made it clear that national governments, acting alone or through intergovernmental cooperation, would maintain control over external immigration, and that most issues relating to immigration would remain outside of the Community’s competence. The multitiered institutional configuration of the European Union presented structural barriers against creating common immigration policies. Member states were able to ensure that all measures relating to migration and the free movement of persons was still subject to unanimous voting despite the qualified majority voting on some issues that the SEA sanctioned.<sup>43</sup>

After the passage of the SEA, as border checks on goods and people were eliminated as a way of reducing costs and speeding up the flow of goods, it was recognized that greater coordination in the areas of border policing, customs and

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<sup>43</sup> “Despite the confidence of EC leaders and the European Commission accompanying the launch of the 1992 programme and the signature of the Single European Act, it soon became clear that the EC institutions were legally in a very weak position to implement the ambitions for a single market, at least in those matters concerning the movement of people across the internal frontiers of the member states within the Community” (Philip 1994: 172).

immigration policies would be required. With the removal of all internal frontiers, the strengthening of regulations at all external frontiers was indicated. There were already established traditions and mechanisms of cooperation among EU member countries in the realms of customs and policing as evidenced by the international Customs Co-operation Council and Interpol (the International Criminal Police Organization). But there had been no impetus to harmonize immigration policies prior to the creation of the internal market. As part of the common market program and the new EU-wide cooperation on immigration matters, it was implicitly accepted that “checks previously carried out at the internal frontiers would have to some extent to be replaced by internal checks away from frontiers, including checks on individuals such as [ostensibly] non-EC nationals, with or without rights of residence” (Philip 1994:172). This would result in greater internal surveillance of all ethnic minorities and possible violation of human rights.

After negotiating the SEA, “States were keen to pursue their domestic immigration control objectives at EU level without empowering EU institutions and to extend the restrictive policy frame to newer member states in southern Europe (Geddes 2003:132). The politically sensitive nature of immigration matters caused a severe disparity between word and deed in the Community. While member states would freely admit that collaboration on immigration policy was imperative, they went out of their way to undermine any Community faculty or influence in this particular issue area. In a multitiered system each institutional actor wants to protect its bit of turf; “struggles over the locus of policy control” are typical (Philip 1994).

In 1988, Jacques Delors, President of the Commission, asked, “could we conceive of an effective freedom of movement and settlement of persons within the Community

without defining progressively the bases of a common immigration policy” (22)?

However, Delors was primarily concerned with integrating the already resident and legal third-country immigrants who were living in Europe. Third-country nationals who had not achieved citizenship status—even for those who were second generation and had lived in their host country all their lives—were not granted the same mobility rights as EU and member-state citizens. The following policymaking pattern developed: the Commission would make proposals, the Council would block them, and the EP would criticize both bodies (Geddes 2003). The Parliament was one of the earliest advocates for harmonized immigration and asylum policies as a way of integrating third-country workers into European society and combating racism. There was no institutional consensus at the European level, therefore the Commission and the EP were helpless in the face of “Member State efforts to concentrate above all on maintaining their own welfare states for their own nationals” (Ireland 1995:243).<sup>44</sup>

Throughout the mid-80s both the EP and Commission tried to establish some sort of legal basis for immigration issues to be established at the European level; however, often the legality of Commission decisions were challenged by member states and resulted in protracted legal battles in the ECJ. In 1987 the ECJ “ruled that collaboration among member states in the social realm, as foreseen in article 118 of the Treaty of Rome, extended to migratory policies vis-à-vis third countries and empowered the Commission to set up enforceable regulations in this area” (Ireland 1995:251).

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<sup>44</sup> “In fact, habits of consensus seeking still linger despite the increased scope for qualified majority voting in Council afforded by the SEA. Even under the co-operation procedure, where the requirement for two readings of proposed legislation and qualified majority voting in Council combine to enhance the potential influence of Parliament, member states can undermine the EP’s policy impact by ensuring that they adopt Council’s common position unanimously. In these circumstances the common position can be re-established at a second reading without regard for Parliament’s amendments”(Judge et. al. 1994: 44-45).

Community legislation could only address issues related to the impact that workers from non-member countries had upon the labor market—any matter concerning social integration was considered outside of the realm of Community competence and deliberation. Despite this ruling the Commission ultimately realized that the ECJ was not the most effective policy venue for resolving this matter and decided that “the best prospect for making progress on free movement of persons issues, so as to meet the deadline of 31 December 1992 set up for the single market, was to proceed by means of intergovernmental co-operation” (Philip 1994:173). The Commission drafted a Communication to the Council in 1988 to make this decisionmaking arrangement official (CEC 1988).

#### The Palma Document

At the 1988 Rhodes Summit the European Council assembled the intergovernmental coordinators’ group on the free movement of persons. This “Rhodes Group” was comprised of twelve senior officials drawn from the Interior Ministries of the twelve European Community states, a chairperson, and the Vice President of the Commission responsible for the internal market, buttressed by a network of working groups on asylum, judicial cooperation, and police and customs coordination. The Rhodes Group functioned on an intergovernmental basis and was not accountable to the European Parliament. The body was formed in response to a need perceived by the European Council that greater intergovernmental administrative and practical coordination was required among the various groups that were responsible for immigration matters. Its “remit was to look at the measures needed to ‘compensate’ for

the removal of internal border controls” (Bunyan 1993:8). The Rhodes Group deliberated on issues relating to the security implications of free movement policies, such as customs, policing, asylum, and legal collaboration. In 1989, it produced the work program referred to as the Palma Document. The Palma Document dealt with all of the EU external border policy concerns. Some progress was made in reaching agreement on asylum procedures and external frontiers controls. In so doing, it delineated more than eighty separate pieces of legislation that would need to be implemented in order to realize the goal of free movement of persons within the common market. And in keeping with the rules of subsidiarity, the Rhodes Group asserted that the EU bodies had authority to act in no more than one-fifth of these areas of concern (Philip 1994).<sup>45</sup>

The Palma Document advised that greater coordination was needed among the various working groups charged with promoting cooperation on justice and home affairs. This was no small undertaking given that the “various working parties set up over the years were working separately and drafting their reports for ministers sitting in different combinations. What is more, the European Parliament and the national parliaments were unable to exercise any control over the measures taken in that context, owing to the very nature of the cooperation itself.”<sup>46</sup> The effectiveness of the Palma Document was also hindered by its grounding in international conventions, which, unlike binding

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<sup>45</sup> The European Council commissioned “a series of studies of national migration policies in the late 1980s. They all came to the same conclusions that most host societies did in the mid-1970s: it is incumbent upon the Community to integrate the legally resident foreign population, and success in that area depends on gaining control over migratory movements. European Council meetings since the mid-1980s have issued, mantra-like, denunciations of racism and anti-foreigner violence and calls for the social integration of immigrants. A genuine European-level response has had to wait, however” (Ireland 1995: 257).

<sup>46</sup> *The Amsterdam Treaty: a Comprehensive Guide*, “The gradual establishment of an area of freedom, security and justice” Retrieved 4/1/07 (<http://europa.eu/scadplus/leg/en/lvb/a11000.htm>).

supranational legislation, required separate ratification in each member state (Geddes 2003).

Concurrent with the negotiations surrounding the Schengen agreement (see below), immigration policy was being debated in other Community-sanctioned intergovernmental forums in Europe. In an attempt to resolve some of the problems surrounding the free movement of people, and realize the goals laid out in the Palma Document, two main European intergovernmental mechanisms were proposed. The AHWGI produced a convention on asylum for the Dublin Summit in 1990. The Dublin Convention resolved that the official decision on whether to grant asylum should be determined by the first country of application. This was an attempt to prevent multiple or consecutive applications. In essence, the Dublin Convention instituted a “one stop” asylum application procedure, “meaning that the freedom of an asylum seeker to make an appeal in the country of his/her choice is removed, although Member States are required to assume responsibility for the request and reduce the possibility of asylum-seekers being placed ‘in orbit’ as they are passed from one potential reluctant state to another” (Geddes 1995:206).

The second mechanism, proposed for ratification in 1997, was the External Frontiers Convention which provides for the mutual recognition of national visas for non-EU nationals. The Commission came out strongly in favor of including within the scope of the convention third-country nationals who hold residence permits. A method for coordinating visa applications was proposed: visa requirements would be abolished for third-country nationals who were legally resident in one of the member states, provided that the migrant does not intend to seek paid employment or to stay for longer than three

months. This agreement ran aground on the conflicting claims to sovereignty that Spain and the UK asserted over Gibraltar. Despite these initiatives EU policy has always fallen short of the levels of coordination that the Schengen states have been able to achieve.

The informal method of intergovernmental cooperation exemplified by the AHWGI, the Rhodes Group of Coordinators, and the Dublin Convention was less than satisfactory as a way of legislating immigration: getting member states to ratify agreements was problematic and the process suffered from a lack of democratic accountability. It was also during this period that “cooperation was largely colonized by those with a security-centered understanding of migration and migrants and a determination to restrict those forms of migration defined as unwanted” (Geddes 2003:134).

#### *Cooperation on Immigration Policy Pre-Maastricht: Intergovernmental Efforts*

Intergovernmental fora for discussing security-related concerns existed before a harmonized EU immigration policy was even proposed; this enabled political actors concerned with migration control to infiltrate the policy framing process at a very early stage. The fear among national governments was that policies intended to address the immigration problem implemented unilaterally would have an impact on migratory pressures in neighboring countries. If one member state strengthened its border controls it would redirect prospective migrants to neighboring countries with more liberal legislation. Immigration policies could be used as a weapon in regime competition among the member states. Member states were eager to preempt any potentially disadvantageous incompatibilities in national immigration policies; “nevertheless, that awareness did not

translate into agreement on how to achieve coordination or whether it should entail ‘centralized bargaining procedures’ or ‘institutionalized links between decentralized bargaining units’”(Ireland 1995:241).

Certain member-state governments were also concerned that market integration would lead to widespread “social dumping.” The anxiety surrounding social dumping is grounded in conjecture that businesses which operate in countries or regions where welfare state benefits are low will be able to put their competitors with higher social costs at a competitive disadvantage; the firms with lower social costs can undercut their competitors by offering lower market prices.<sup>47</sup> It is predicted that this distortion in competition, caused primarily by variations in social protection schemes among member countries, will force firms with higher costs to fold, relocate their production sites to areas with lower social wages (possibly even outside the EU), or lobby their respective governments to reduce mandatory social expenditures altogether. The worst case scenario is that “these actions could fuel a downward spiral in social provision, eventually producing national welfare states with rudimentary, lowest-common-denominator policies”(Leibfried and Pierson 1995:70).<sup>48</sup>

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<sup>47</sup> “The fear of social dumping, which is based on wide disparities in labor costs, has probably been exaggerated, as have the fears of employers in countries with high labor costs (such as Germany), who think that their competitiveness will be threatened unless these costs are lowered. Competitiveness depends on a host of factors other than labor costs, including education, training, the domestic financial system, and the degree of consensus in industrial relations” (Rhodes 1995: 92).

<sup>48</sup> Convey and Kupiszewski (1995) write: “The existing varying internal levels of social security provision throughout the member states, with some appearing to be more generous than others—either in fact or in the popular imagination—are widely held to be factors in the stimulation of migration from one country to another, and for migration from outside the Union to selected EU member countries. All member states have social security relations which, to one degree or another, make a wide range of social security benefits available to every inward migrant who has residence and work permits, though none of these benefits are formally available to illegal migrants. The degree to which these situations have actually been factors in increasing mobility is difficult to demonstrate, but they can easily lead to attempts by certain national politicians to reduce inward migration on the pretext that incomers would be unfairly drawing upon the national social security system” (44-45).

It is important to note that before immigration policy became incorporated into the EU *acquis communautaire* it was high on the agendas of such intergovernmental bureaucracies as the Trevi Group and the Schengen group. While these “clubs” were not officially linked to the process of integration, their work presaged the shape of EU immigration policy to come. This network of security experts developed and propagated knowledge and policy ideas that identified a “continuum between borders, terrorism, crime, and migration” (Huysmans 2000:761). Intergovernmental working groups focusing on security concerns had varying national representation and were informal and secretive. Political actors interested in migration control capitalized upon these new types of intergovernmental cooperation.

Beginning in the early 1970s, tentative moves toward intergovernmental cooperation in the fields of immigration, the rights to asylum, and police and judicial matters were being initiated.<sup>49</sup> The Council of Ministers proposed in 1975 that a special working group be established to combat terrorism and coordinate policing in the European Community. This proposal was made official in June 1976 at a meeting of member-state Interior Ministers, and the Trevi Group<sup>50</sup> was founded. This was one of several independent intergovernmental planning bodies or “clubs” that have formed in Europe which linked immigration and asylum to terrorism and cross-border crime (Guiraudon 2000). This group that met in secret on a regular basis was originally

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<sup>49</sup> In the JHA domain, “informal policy consultations, both bilateral and multilateral, have bred habits of increasingly intense transgovernmental cooperation since the early 1970s (Wallace 2005: 88).

<sup>50</sup> The Trevi Group has a three level structure: (1) the Ministerial level composed of member state interior ministers; (2) the Trevi Senior Officials group composed of senior police and security officials who report to the ministers (representatives from the Council and the Commission have been attending meetings of this group since 1992), (3) and the five working groups which include officials from the interior/home ministries, senior police officers, immigration and customs officials, and internal security service representatives (Bunyan 1993).

intended to help coordinate the fight against terrorism, but it soon expanded its scope to address common concerns regarding the drug trade, crime, immigration, and all perceived threats to the public order.<sup>51</sup> The Trevi Group operated on an intergovernmental basis since police matters are outside of Community competence. It had no accountability to the Commission, the EP, or national parliaments.

In the early stages of cooperation on immigration policies, EU member-state governments favored international conventions as the foundation for legitimating and enforcing immigrant controls rather than developing Community law which would have overridden national law. Particularly when it came to third-country migration each member state vigorously maintained its autonomy; they were loathe to relinquish any control over entry into their domestic labor markets. Even when taking into account the diversity in national social protection schemes, during the retrenchment in the 1980s the differences between immigration policies among the EU countries actually increased. One important factor that inhibited the creation of common policies was that each host country had a unique migratory history. Whether it was due to a colonial past, shared borders, or guestworker contracts, each member state had established relationships with different immigrant-origin communities.

### The Schengen Agreement

One of the reasons why tracing the evolution of immigration policy in the European Union has been rendered so complex is that during the “Relaunching of Europe” (the period of intense activity surrounding the passage of the SEA and leading

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<sup>51</sup> Patrick Ireland (1995) observes: “It was concern over this rather telling juxtaposition of issues that provoked EC interest in the social integration of resident immigrants, especially the potentially disruptive second generation” (239).

up to the single market in 1992) several different intergovernmental bodies were competing to control the outcome of immigration policy in Europe. In many respects, the 1980s can be characterized by the creation of informal structures of intergovernmental cooperation that were neither answerable to EU institutions nor even to state-level decisionmaking bodies. A year before the AHWGI was created in the Council of Ministers, the Schengen Agreement was negotiated between Germany, France, and the Benelux countries in a small town in Luxembourg. Frustrated with the slow pace of decisionmaking in the EU, they signed this agreement in June 1985 to help them coordinate their immigration and security policies and facilitate freedom of movement at their common frontiers.<sup>52</sup> The 1985 Schengen Agreement set out the measures necessary to ensure the free movement of people within an area without internal border checks and the Schengen Convention, which followed in 1995, abolished the border controls between the signatory states.

However, in order to eliminate internal borders it was deemed necessary to strengthen the restrictions on the external borders of “Schengenland.” The seeds of the securitization of migration and the stratification of rights among different types of immigrants can be apprehended from Article 17 of the Schengen agreement found in the title dealing with long term measures:

With regard to the movement of persons, the Parties shall endeavour to abolish checks at common borders and transfer them to their external borders. To that end

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<sup>52</sup> Julian Schutte (1991) addresses the issue of overlapping intergovernmental discussions: “These developments make one wonder how the achievements of ‘Schengen’ relate to the discussions and negotiations going on among all the EC Member States with a view to the realization of the objective to create an internal market with a free movement of persons, as contemplated in Article 8A EEC, introduced in that Treaty by the Single European Act of 1986. Those discussions and negotiations are about virtually the same topics as have been elaborated in the Schengen Implementing Convention” (563).

they shall endeavour first to harmonise, where necessary, the laws, regulations and administrative provisions concerning the prohibitions and restrictions on which the checks are based and to take complementary measures to safeguard internal security and prevent illegal immigration by nationals of States that are not members of the European Communities.<sup>53</sup>

This article illustrates the effort to associate movement across external borders and illegal immigration. The movement of third-country nationals is linked with internal security concerns.

The Schengen Convention, which falls under the jurisdiction of international not community law, proposes a system of international border checks and common visa policies. A giant data base called the Schengen Information System (SIS) has been devised in order to facilitate the exchange of information about undesirable aliens, asylum seekers, criminals, missing persons, witnesses and the like.<sup>54</sup> The Schengen Agreement was scheduled to enter into force on January 1, 1990—a full three years before a “frontier free” Europe was to be realized in the European Community. However, in mid-December the Schengen countries decided to postpone the implementation. Passage of the Schengen Convention was delayed for various reasons including different national policies on the possession of soft drugs, bank secrecy and data protection,

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<sup>53</sup> The Schengen acquis of June 14, 1985, “Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders” accessed at [http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922\(01\):EN:HTML](http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(01):EN:HTML)

<sup>54</sup> The function of the SIS is “to help with the maintenance of public order and security, and the enforcement of the laws on the control of aliens” (Schutte 1991:559). The SIS contains information on aliens who are to be refused entry into Schengen countries. If one country refuses entry to a migrant, it records the data related to that decision on the SIS, and all countries are bound in principle to remove that alien if found.

sovereignty issues such as that between Spain and the UK over Gibraltar, and the presence of anti-immigrant sentiment all over Europe.

The January 1990 date set for the realization of “Schengenland” was less than a year before the German reunification and Germany decided that it needed more time to assess how the agreement would affect the mobility rights of East Germans. In addition, Luxembourg and Belgium expressed concern about the proposed SIS computer network and police cooperation schemes. Luxembourg was reluctant to compromise banking secrecy and Belgium feared that the SIS would violate the individual right to privacy. France was concerned that the sections pertaining to the freedom of movement of migrant workers were not sufficiently explicit or restrictive; it feared that an influx of East Germans into Germany would cause displaced Turks to migrate to France.

Although the Schengen Agreement would not enter into force, the five states did agree to reopen negotiations and acceded to a supplementary agreement known as Schengen Implementing Convention (SIC) on June 15, 1990. This agreement elaborated on the implementation of many of the free movement provisions, amended some national legislation, and stipulated that the agreement would require ratification by each of the national parliaments before it could be enacted. The main substance of the Schengen Implementing Convention attempted to hammer out a common asylum policy for the five countries. This SIC is one of the earliest and best examples of the reframing of immigration and asylum as a security issue: migration was explicitly linked to terrorism, transnational crime, and external border policing (Huysmans 2000). At the time of its passage many human rights groups condemned the Schengen agreement for being

restrictive and protectionist and for countering the more liberal immigration policies of member states (Hollifield 1992).

Since the SIC was signed by the original five countries, membership has expanded to include Italy in 1990, Spain and Portugal in 1991, Greece in 1992, and Austria in 1995. The new southern-European member states were viewed as especially problematic when it came to securing their porous external frontiers. As a result, Spain required visitors from the Maghreb (the majority of whom are regular seasonal workers from Morocco) to obtain visas before being allowed entry; Italy increased the number of its maritime border police fourfold; and Portugal withdrew the automatic right that Brazilians had previously enjoyed of opting for Portuguese citizenship.

On April 1, 1995, a trial-run of Schengen I and the SIC was instituted and full implementation followed three months later. Citizens of six of the seven countries that signed the agreement were now able to enjoy genuinely free movement when crossing the internal borders of "Schengenland." Belgium, Germany, Luxembourg, the Netherlands, and Spain all agreed to participate in the elimination of internal borders; France opted out, citing security concerns. Italy, Greece, and Austria were not eligible for full participation as they had yet to implement policy changes necessary to reinforce security arrangements at their external borders (Hurwitz 1998).

One way in which some countries had been enforcing immigration controls was by imposing fines on private carriers transporting passengers who do not have acceptable travel documents. This policy essentially requires employees in the private sector to act as immigration officers. Convey and Kupiszewski (1995) contend that this practice "actually abuses the U.N. Convention on Asylum of 1951, as it transfers the decision of

whether a person will have the chance to apply for asylum into the hands of the personnel of a commercial carrier company” (18). The Schengen accord requires commercial transport companies to verify the travel documents of all passengers; if an alien is unable to produce the requisite documents and as a result is denied entry into a Schengen-member state, the commercial carrier is responsible for returning the person to his/her point of origin.

The Ministers who formulated the Schengen Agreement did recognize the legitimacy of community law and decisions reached through community organs, and this is reflected in the language of the agreement in several ways. According to the Schengen agreement, EU citizens are not to be considered aliens anywhere within the territorial EU; therefore, they are entitled to a freedom of movement that can only be restricted by EU legislation. The Schengen ministers maintained “that the regulation of the law on free circulation and the free movement of persons is a matter of Community law in so far as nationals of EC Member States are concerned and should not be affected by Schengen-law” (Schutte 1991:566). It was clearly specified that the stipulations outlined in the Convention are only applicable insofar as they correspond with Community law.<sup>55</sup> In addition, the five contracting governments made a joint declaration at the time of their signing of the Convention in 1990 which stated that, “the Convention constitutes an

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<sup>55</sup> Article 142(1) of the Schengen Convention reads:

*When Conventions are concluded between the Member States of the European Communities with a view to the completion of an area without internal frontiers, the Contracting Parties shall agree on the conditions under which the provisions of the present Convention are to be replaced or amended in the light of the corresponding provisions of such Conventions.*

*The Contracting Parties shall, to that end, take account of the fact that the provisions of this Convention may provide for more extensive co-operation than that resulting from the provisions of the said Conventions.*

*Provisions which are in breach of those agreed between the Member States of the European Communities shall in any case be adapted in any circumstances.*

important step towards creating an area without internal borders and take it as a basis for further activities amongst the Member States of the European Communities.”<sup>56</sup>

The question arises of whether this is an attempt to pressure the other member states and the EU governing bodies themselves. Were the Schengen governments attempting to preemptively set the agenda before the European Commission had the opportunity to do it for them? The declaration mentioned above unequivocally states that the Schengen countries are going to use their negotiated agreement as the framework for any future discussions with the EU partners.<sup>57</sup> Immigration policy initiatives have arisen from the Schengen process as well as from within the EU decisionmaking apparatus. Dueling intergovernmental arrangements existed, one set of policy entrepreneurs functioning under the aegis of the EU legal and policymaking framework and another set operating within freelance intergovernmental bodies that dictated policy conformity based loosely on international law. Some commentators have contended that the Schengen Agreement was viewed as a laboratory to test out the success of measures that might be suitable for implementation as larger EU policy (Monar 2001; Geddes 2003). This intergovernmental stance may have tipped the scales in favor of simply acceding to the Schengen Convention on the part of the Commission and the EP rather than trying to advocate for an autonomous position on these matters. Hence the groundwork was laid

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<sup>56</sup> Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (19 June 1990) found at [http://www.unhcr.bg/euro\\_docs/en/schengen\\_en.pdf](http://www.unhcr.bg/euro_docs/en/schengen_en.pdf).

<sup>57</sup> Convey and Kupiszewski (1995) write: “There seems to be little doubt that the Schengen group is setting standards for overall European migration policy... So it could be argued that the Schengen Accords are not so much paralleling or duplicating the moves being taken by the EU as a whole, but are acting as trailblazers for the working out of detailed future EU migration policy”(24).

for the Schengen rules to be incorporated into the EU legal and institutional structure by a protocol attached to the Treaty of Amsterdam.

### *Asylum*

While this dissertation does not explore policy pertaining to asylum and refugees in any depth, a brief discussion of the political environment and the intergovernmental bargaining is illuminating. As previously noted, the SIC included common guidelines regarding the handling of asylum applications that were quite similar to the provisions laid down in the Dublin Convention. The principle of “first handling” was developed which specifies that the country which first reviews a refugee’s application remains responsible for that person. This level of accountability can involve retrieving an asylum seeker who is staying in another Schengen country. A decision by one state on whether to grant or to reject an asylum application is binding on all the other signatory states. However, “supranational supervision of the agreement’s implementation was not provided for in Schengen II [Schengen Implementing Convention], and there was thus no institution that could settle disputes between the national authorities in this area. Accordingly it was assumed that under Schengen II [SIC] a country would reject an asylum application as quickly as possible rather than risk a lengthy dispute with another country about responsibilities for individual refugees”(Hurwitz,1998:413). The fact that several intergovernmental bodies—the European Council, the Council of Ministers, and the Schengen Group (all of which had overlapping membership)—were attempting to produce regulations to address the same problem seems a case of unnecessary parallel deliberation and duplication of tasks.

The immediate problem facing Europe in the early 1990s was the flood of asylum-seekers originating predominantly from the former Yugoslavia. A considerable bureaucratic backlog in processing applications developed; national and local governments were put under financial strain by trying to provide accommodations and other forms of social protection for refugees while their applications were pending. Many member-state governments were still reluctant to accept that the EU “treaty-based institutions should lead on immigration matters (other than visa policy)”; however, individual states found themselves “acting separately but in concert, to put in place policy and administrative changes to find more resources and to secure changes in national law if needed” (Philip 1994:184).

The initial response in western Europe to the influx of refugee-seekers was prohibitive: restrict the number of applicants considered legitimate asylum seekers, deter the number of refugees coming from Yugoslavia especially, and speed up the processing of applications—even if this practice resulted in an applicant having decreased chances of sufficient representation or appeal. The predictable result arising from this effort to curtail immigration without any corresponding change in the conditions that were forcing people to flee or emigrate was a growth in the level of illegal immigration. The growing concern with illegal immigration enabled EU bodies to frame immigration policies in terms of crime and security policy and propose more restrictive measures such as more frequent and systematic internal checks on those presumed to be non-EU nationals and enhanced efforts to facilitate deportation.

*The Maastricht Treaty*

Due to growing concern over the problems surrounding immigration and asylum policies after 1989, many of the actors in the EU institutions began to take a greater interest in these issues. The main political consequence resulting from this heightened awareness was that the Commission was brought back into the process. Despite the fact that member states had made sure that it had relatively little legal competence in the field, the Council of Ministers and the European Council relied on the Commission to facilitate their discussions and provide much needed oversight. The Commission established a group at the request of the Council of Ministers that was charged with conducting an in-depth study of the different immigration laws within the Community and making suggestions as to areas that would be amenable to EU level legislation.

When the European Council in 1989 called for an intergovernmental conference (IGC) on European political union, several member states, particularly Germany, were keen to have immigration policy added to the EU treaty base. Germany was experiencing a huge influx of immigrants and asylum-seekers due to the fall of the Berlin Wall and the incipient conflict in the former Yugoslavia<sup>58</sup> and hoped that EU level legislation could help it to surmount the constraints contained in its own Basic Law placed on limiting

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<sup>58</sup> Lavenex and Wallace (2005) write: “German concerns and anxieties were a driving force in the development of common policies. West Germany had a particularly sensitive history and geographical position, a citizenship law based on ethnic descent rather than birth within the national territory, a liberal asylum law drafted in the aftermath of the Third Reich as the cold war divided Europe, a large *Gastarbeiter* population attracted by its strong economy, and a structural ambivalence about sovereignty and nationhood” (461).

specifically refugees.<sup>59</sup> The UK government was staunchly opposed to integrating any justice and home affairs (JHA) matters into the EU framework. The French government expressed ambivalence, endorsing both common action and the protection of state sovereignty.

It seems that the recognition, on the part of both the member-state governments and the EU bodies, of “the *de facto* development of an EU immigration policy through informal intergovernmental arrangements, prompted consideration of greater [*de jure*] formalization” (Geddes 1995:208). The tendency appeared to be a move toward greater supranationalism. The concept of supranationality employed here does not necessarily imply that EU institutions would attempt to usurp member-state authority, rather as Ernst Haas elaborates, it is an approach to decisionmaking: “a cumulative pattern of accommodation in which the participants...seek to attain agreements by means of compromises upgrading common interest” (Haas 1964:64). Member states had been loathe to contemplate the long-term repercussions of European integration for immigration policy at the national level. However, the drive for a single market and certain ECJ decisions forced their hand. While continually refuting claims that an EU-wide policy was necessary, they were quietly establishing the preconditions for such a policy in the negotiations leading up to the Maastricht Treaty.

The European Council summit held in Luxembourg in June 1991 requested that the EU Ministers develop concrete proposals for harmonizing immigration policy in

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<sup>59</sup> Prior to 1993, sixty percent of all applications for asylum in Europe were made in Germany. This situation led to an amendment being passed on the right to asylum contained in the Basic Law. The new law permits authorities to return asylum-seekers to a “safe” country, either of origin or of transit. The EU applicant countries in Eastern Europe—Poland, Bulgaria, the Czech Republic, Slovakia and Romania—became a convenient “safe” immigration buffer zone.

preparation for the Maastricht Summit.<sup>60</sup> Following from this, the Ad Hoc Working Group on Immigration drafted a report which put forth the three main goals of an EU immigration policy: (1) harmonization of policy that defines the criteria for admission of aliens with entry claims based on family reunification, prearranged gainful employment, and for admission based on humanitarian grounds; (2) policy coordination concerning illegal immigration and immigrant deportation; and (3) establishing a common policy on admitting third-country nationals for work purposes (including guestworker schemes).

As difficulties with the Dublin Convention and the External Frontiers Convention demonstrated, agreements based in international law do not ensure that individual nations will change their domestic policy or that all member-state law will eventually be harmonized. In addition, international lawmaking is notoriously undemocratic; agreements are negotiated by the executive branches of national governments. National legislatures must vote to ratify these accords, but they are not part of the decisionmaking process, nor are they able to amend the final text. This contention was substantiated when elected politicians, both in the European Parliament and those at the national level, objected to the impenetrable and domineering fashion in which decisions were being reached in accordance with the Schengen Agreement as well as at the European level more generally. In light of the growing level of immigration into western Europe since the end of the 1980s and the economic strains that have fueled feelings of racism and xenophobia, many parliamentarians in the member states “question[ed] the legitimacy of EC-wide decisionmaking in this policy field and its confinement to a small, largely

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<sup>60</sup> *Presidency Conclusions*, Luxembourg European Council (28 and 29 June 1991); *Conclusions of the Luxembourg European Council*: Bull. EC 6-1991, point 1.17.

unaccountable Community-wide policy-making elite of ministers and officials” (Philip 1994:178).

In 1991 the Commission prepared a communication to the Council and the EP on immigration. It was not a proposal for EU legislative action as such; it was prepared as a discussion paper to inform the deliberations at the Maastricht summit. It noted that all the EU member states were experiencing growing political concerns over immigration which coincided with a change in the character of migration that was taking place. The Commission reasserted that a prerequisite to the free movement of persons in the EU was the successful integration of all immigrants into their host societies; it concluded that successful integration “could only be achieved by controlling migration flows” (CEC 1991:9). These assertions provided an argument for harmonizing policies on family reunification and illegal immigration including uniform sanctions against illegal immigrants.

The Maastricht Treaty or Treaty on European Union (TEU), which incorporated the Treaty Establishing the European Community, was approved in December 1991 and signed on February 7, 1992. It set a framework for member states to address immigration and asylum issues, along with other “Interior and Justice” matters. The TEU, which entered into force on November 1, 1993, inserted a new section on citizenship into the *acquis communautaire* of the Union. Title 2, Part 2, Article 8 of the Treaty states: “Every person holding the nationality of a Member State shall be a citizen of the Union.” As a result of this mandate, citizens of member states of this new political entity acquire certain rights independently of their national affiliation. The Council of Ministers is

charged with the responsibility of facilitating the realization of these rights by all member-state nationals.

The TEU actually served to widen the rights gap between EU and third-country nationals by granting special rights to EU citizens residing in other member states. The rights attendant on EU citizenship include (a) the right to move and reside safely within the territory of the member states; (b) the right to vote and stand as a candidate in municipal and European Parliament elections; (c) the right to protection by the diplomatic or consular authorities of any member state; (d) the right to petition the European Parliament and appeal to the EU ombudsman. The TEU proposed a framework for EU citizenship, but this citizenship was derived from national citizenship which, as a matter of course, excluded the millions of legally resident third-country nationals.<sup>61</sup>

The array of rights available to immigrants in the EU exists along a continuum from the illegal immigrants who have no rights at one end, to the short-term residents who are granted certain rights from the government of the country in which they are living, to immigrants who have rights awarded on the basis of long-term residence (often referred to as “denizenship” rights, see Hammar 1990)<sup>62</sup>, to the full citizenship at the other end of the continuum which is guaranteed to nationals of the former colonies of some European countries.

The intergovernmental conferences that led up to the Maastricht Treaty provided the first opportunity for immigration policy to be raised for serious consideration at the

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<sup>61</sup> 2003 Eurostat estimate for the population of third-country nationals in EU25 is 17 million.

<sup>62</sup> Denizenship describes the in-between situation of long-term permanent resident immigrants who have a secure residence status, and enjoy many of the same rights as nationals, but are not naturalized citizens. “From a legal perspective, these immigrants were still aliens—non-citizens. From a social or political perspective, they had obtained a status equal or similar to that of a citizen” (Groenendijk 2006:3).

EU level. There was no EU immigration policy as such until the TEU. In order to accommodate the countries concerned about the threat to national sovereignty that a common immigration policy posed, as well as the countries that supported having these difficult issues incorporated into the EU institutional structure, the TEU was broken up into three “pillars.” This structure entails a first pillar where decisions are made at the community level and ratified by qualified majority voting, and a second and third pillar governed by intergovernmental cooperation and unanimous decisionmaking.

The negotiations leading up to the Schengen agreement provided a window of opportunity (Kingdon 1984) for justice and interior ministry technocrats to promote their agenda in a new political setting. They were able to link migration and security by emphasizing the various forms of criminality that can be associated with open borders such as drug and arms smuggling and illegal immigration. The third pillar of the Maastricht treaty institutionalized this merging of cross-border crime and migration (Guiraudon 2000).

The division between the second and third pillars, the Common Foreign and Security Policy (CFSP) and the Justice and Home Affairs pillar (JHA) respectively, was somewhat contrived particularly as internal and external security concerns tended to overlap. The three-pillar structure was a compromise between the member states that wanted policy harmonization and the states that wanted to maintain complete autonomy. The pillared arrangement served to keep the role of the supranational institutions to a minimum: “Thus, co-operation at EU-level between ministers and officials could be supported, but extended powers for the European Commission or the European Court of Justice were to be avoided because these could alter a system that had delivered stringent

restrictions on immigration based on a system of executive dominance and external frontier controls that did not fit with the Schengenland model” (Geddes 2003:135-136).

The TEU transferred management of JHA matters to a new body in the Council of Ministers—the JHA Council. The K4 Committee, named after the relevant provision in the TEU, replaced the Rhodes Group of Coordinators which originally oversaw a number of different committees including the Trevi Group and the Ad Hoc Working Group on Immigration. Within the K4 Committee there was a steering group responsible for immigration and asylum policy. Under the pillar on Justice and Home Affairs, the old intergovernmental committees were replaced—at least in name if not in personnel—by three new committees: Steering Committee One replaced the AHWGI and handled migration and asylum matters, Committee Two replaced the Trevi Group and addressed policing and security concerns, and Committee Three supervised judicial cooperation.

In the TEU, intergovernmental coordination on asylum, refugee, and immigration issues was included as part of the “third” or community pillar which invoked cooperation on Justice and Home Affairs: “In this way the existing network of [intergovernmental] committees [e.g., the Rhodes Group of Coordinators, AHWGI, and Trevi Group] was formalized, without transforming the framework of authority and accountability” (Lavenex and Wallace 2005:461). The participants in this complex network of Council committees was made up of representatives of member-state justice and interior ministries as well as various other agencies and forces each with their own distinctive geographical concerns, national traditions, and approaches to ensuring “freedom and

security.”<sup>63</sup> To further complicate matters, the purview and responsibilities of the individual justice and interior ministries varied between states.

Decisionmaking in the third pillar did not fall within the community legal order; as a result, the EP and the ECJ were effectively excluded and the Commission was denied the right of initiative. This policymaking realm not only required Council unanimity, but, in addition, no powers were afforded to the ECJ for reviewing, ruling on, or enforcing the resultant provisions. The competence of the ECJ was limited to situations in which there was a specific clause in the text of a piece of legislation calling for judicial interpretation. Immigration scholars have contended that this arrangement marks the beginning in a shift toward framing immigration policy as primarily a security concern. If it had been considered more as an economic issue it would have been deemed more suitable for inclusion in the first pillar (Caviedes 2004; Huysmans 2000).

Title VI of the Maastricht Treaty lays the groundwork for intergovernmental cooperation in the field of Justice and Home Affairs. In this section of the TEU, nine areas of “common interest” (i.e., not common policies) are delineated (Articles K.1[1] to [9]). Articles K.1[1] to [3] include: (1) asylum policy; (2) rules governing the crossing by persons of the external borders of the member states and the exercise of controls thereon; (3) immigration policy and policy regarding nationals of third countries. The latter includes (a) conditions of entry and movement by nationals of third countries in the territory of member states; (b) conditions of residence by nationals of third countries in the territory of member states, including family reunion and access to employment; and

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<sup>63</sup> Lavenex and Wallace (2005) assert: “Ministry of interior officials had remained among the least internationally-minded within national governments throughout the first forty years of western European integration, working within an ideological framework which clearly separated domestic law and order from events beyond national boundaries” (463).

(c) combating unauthorized immigration, residence, and work by nationals of third countries in the territory of member states.

The Commission and the member states share initiative in Title VI areas. When a policy initiative was put on the agenda, the Council could enact joint positions, joint actions, and conventions. Joint positions are mainly hortative and have no legal effect. Joint actions involve objectives that are believed to be best addressed at the Community level—in keeping with the principle of subsidiarity; these actions may have legal effect but this is uncertain. Conventions are subject to international law and must be adopted at the national level; any effect that these legal instruments might have varies depending on the legal system of the signatory state. The Maastricht Treaty did not address “the institutional framework within which joint action on migration is to be produced” (Ireland 1995:258); as a result, intergovernmental bargaining would still serve as the main motivator regarding immigration policy. Only policies grounded in the free movement of labor are considered of “common interest,” not any governmental actions that affect resident migrants’ social, economic, and political integration. It has also been suggested that there was a tacit reference to the Schengen Agreement in Article K.7 of the TEU when it specified that the treaty does not in any way interfere with the intergovernmental cooperation between two or more member states. Jan Niessen (1992) contends that the TEU actually served to reinforce intergovernmental rather than Community methods of cooperation on immigration.

The three-pillar structure also served to divide the Commission in its approach to immigration and has dispersed both duties and personnel. Historically, the Commission has been sympathetic to the rights of third-country nationals as well as to harmonizing the

rules pertaining to EU national migrants and non-EU resident migrants in the interest of ensuring its primary goal—a smoothly functioning single market. The Maastricht treaty provisions negotiated by immigration control bureaucrats resulted in a situation of divide-and-conquer in regard to the Commission. Prior to Maastricht, all issues involving the free movement of labor were dealt with by DG V, the Directorate General for Employment, Industrial Relations and Social Affairs. DG V works with pro-migrant NGOs but has no competence over determining the rights of third-country nationals. After 1992, some responsibility was shifted to the DG for internal market and financial services, and the General Secretariat also created a task force to liaise with the Council on JHA migration matters. Guiraudon (2000) contends that this Commission task force takes a very pragmatic approach to immigration policymaking with the Council. Its only goal is to facilitate EU integration through negotiating lowest-common-denominator proposals rather than endorsing a transformative approach.<sup>64</sup>

The TEU partly served to amend the Treaty Establishing the European Community but also contributed to the EU treaty base and expanded EU competence in areas that were up to this point exclusively the dominion of the nation-state. In regard to immigration policy, only visa policy was passed, based on Article 100c of the first pillar. The community institutions are responsible for drawing up a list of third-country nationals who must acquire a visa before crossing the external borders of any of the member states. Traditionally, admission policies have varied from one country to another within the EU. One method used to circumvent the difficulties that can arise from

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<sup>64</sup> Geddes (1998) has noted that the Protocol on Asylum contained in the Amsterdam Treaty violates the Geneva Convention and concludes that the Commission's support of the measure can only be explained by the fact that the federalizing imperative had taken precedence over its commitment to protect human rights.

conflicting immigration policies has been to create a definitive common list of countries whose citizens will be required to obtain a visa. Certain member states considered this “an important measure as it is intended to prevent ‘shopping around’ for visas from the traditionally more ‘liberal’ member states of the EU” (Convey and Kupiszewski 1995:19). The Justice and Home Affairs ministers agreed upon a list of 101 countries whose nationals must obtain a visa before entering the EU and a list of 28 countries whose nationals may need a visa to enter some countries. This discrepancy demonstrated that visa policies were still far from being harmonized (Baldwin-Edwards 1997). The ECJ countermanded the newly established visa regulations because the Council failed to consult the Parliament (Geddes 2003).

To the extent that member states were willing to cooperate under Article K of the Maastricht Treaty, they seemed to be more interested in controlling immigration at the EU external borders than harmonizing and strengthening the rights of the third-country nationals already living on EU soil. The uncompromising decisionmaking rules in the third pillar reveal the reluctance on the part of member states to cede any actual authority in immigration matters to the EU. The need for unanimous decisions in the Council made negotiation and passage of any piece of legislation extremely difficult.

### *Amsterdam Treaty*

The Treaty of Amsterdam was signed in October 1997 by the foreign ministers of the then-fifteen EU member governments, and entered into force on May 1, 1999, after having been ratified by each of the member states. The treaty stated as one of its primary objectives to establish the EU as an “area of freedom, security, and justice” in which the

free movement of people is guaranteed, while appropriate measures are taken regarding external border controls and immigration. Article 61(b) states, “In order to establish progressively an area of freedom, security and justice, the Council shall adopt...measures in the fields of asylum, immigration and *safeguarding the rights* of nationals of third countries, in accordance with the provisions of Article 63” [italics added]. And Article 63(3)(a) affirms that the “Council, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt measures on immigration policy”... regarding the “conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion.”

The reforms to JHA policymaking procedures introduced by the Amsterdam Treaty were the result of a growing frustration with the existing intergovernmental framework. Questions were raised regarding the lack of political and public accountability of the largely bureaucratic organizations that were coordinating policy in this area. There were also no measures in place to ensure the successful ratification or implementation of agreed policies at the member-state level. This “democratic deficit” had become a major source of concern for the EU. One of the priorities of the Westendorp Reflection Group (1995), which prepared the agenda for the 1996 intergovernmental conference (IGC) leading up to the Amsterdam Treaty, was to “make Europe more relevant to its citizens,” by providing “a better response to modern demands as regards internal security, and the fields of justice and home affairs more generally.”

The members of the Reflection Group explicitly linked migration and internal security.<sup>65</sup> They justified this approach as a way of ensuring popular support for the EU (Lavenex and Wallace 2005).

In 1994, also in preparation for the IGC to revise the TEU, the Commission published a white paper entitled *European Social Policy: A Way Forward for the Union*. In this document, the Commission came out strongly in favor of enhanced mobility and social rights for third-country nationals in the interest of building an efficient European labor market: “Integration policies must be directed in a meaningful way towards improving the situation of third-country nationals legally resident within the Union by taking steps which will go further towards strengthening their rights relative to those of citizens of the Member States” (CEC 1994:29). The Commission continued to advocate for expanding the rights of third-country immigrants in proposed treaty amendments leading up to the Amsterdam Treaty negotiations. The Council of Ministers objected to many of the Commission’s positions regarding third-country nationals and argued in favor of the maintenance of national discretion over the rights and movement of immigrants resident in member states (Geddes 2000).

In July 1997, before the Amsterdam Treaty was ratified, the Commission submitted to the Council a proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the member states (CEC 1997). This proposal, along with the External Frontiers Convention, was one of the two proposed conventions that were never ratified. The objective of the convention was to provide

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<sup>65</sup> The Reflection Group’s Report (1995) states, “high levels of unemployment, external migratory pressures, increasing ecological imbalances and the growth of international organised crime have stimulated a public demand for greater security that cannot be satisfied by Member States acting alone.”

common rules for member states regarding the initial admission and conditions of residence for third-country nationals including family reunification and access to employment. This proposed convention was significant in that it contained internationally enforceable rules on the right to family reunification; nevertheless, the legal basis for the convention was nullified with the passage of the Amsterdam Treaty. The Commission may have tabled the convention proposal to test the waters with member states in preparation for future EU legislation (Larsen 2004). The Commission, with the encouragement of the EP, indicated that it would redraft the principles into a more legally binding regulation; it has yet to do this.

In the intergovernmental conference leading up to the Amsterdam Treaty the EU Migrants' Forum (EUMF) issued a series of proposals for revising the EU treaty. The EUMF proposed modifying Article 8 (Article 17 of the Treaty Establishing the European Community) to grant citizenship to people who have been lawfully residing in the territory of a member state for five years. However, the EU was explicitly denied the competence to legislate on questions of nationality by declarations attached to the Maastricht and Amsterdam treaties (Geddes 2003).

In the wake of the Maastricht negotiations, immigration policy was still limited in the TEU to cooperation in the areas of asylum and transit visas, and all policymaking was limited to third-pillar procedures which were often charged with being overly complicated and not sufficiently transparent. The Treaty of Amsterdam "communitarized" immigration policy, brought it into the supranational policy realm; however, it preserved intergovernmental decisionmaking in this issue area for at least five years until the treaty came into force in 2004. A new Title IV on "Visas, asylum,

immigration and other policies related to free movement of persons” was incorporated into the treaty founding the European Communities. And the Schengen *acquis* was incorporated into the EU decisionmaking framework by a protocol attached to the Amsterdam treaty.

Guiraudon (2003) contends that the adoption of the Schengen agreement actually came as something of a surprise because it had not figured on the agendas of the Italian or Irish Council presidencies in 1996. The foreign affairs ministers who negotiate treaty revisions were interested in curbing the activities of justice and interior officials and reining in the influence of the Schengen process. At the time of the signing of the Amsterdam Treaty there was no finalized, approved text of the Schengen *acquis*. It had become a vast disjointed body of law comprised of over 3,000 pages of which not even the law and order ministers were certain as to the entirety of its content; they unquestionably had no desire to see it adopted wholesale into the EU legal framework. Thus, the member states had “signed, and ratified, a treaty without having agreed the text of one of its most sovereignty-sensitive subordinate documents” (Lavenex and Wallace 2005:465).

The inclusion of the Schengen *acquis* in the Amsterdam treaty ostensibly reinforced the position that immigration policy should be determined at the EU level; however, this conclusion was not accepted by all member states. Amsterdam codified the practice of Europe *à la carte*. The UK, the Republic of Ireland, and Denmark all opted out of participating in the new area of freedom, security, and justice (Guiraudon 2000).

Potentially, the European Court of Justice could play an important role in defining migrants’ rights, given the positive impact that national court rulings have had on

expanding migrants' social and political rights. However, the French delegation was instrumental in ensuring that the ECJ had limited jurisdiction. TEC Article 35(3)(a) (ex. Article K7 of the Amsterdam Treaty) which limits the ECJ to issuing preliminary rulings on questions for which "there is no judicial remedy under national law," can be seen as constraining the ability of the ECJ to influence Community law. It restricts the access of lower courts to the ECJ. TEC Article 35(5) also explicitly denies the ECJ jurisdiction to "review the validity or proportionality" of measures taken by member states "with regard to the maintenance of law and order and the safeguarding of internal security." Guiraudon (2003) notes that the final "position reflects the original motivation of intergovernmental cooperation, which was to avoid judicial scrutiny that had undermined migration control policy at the domestic level" (270-271).

The changes instituted by the Amsterdam Treaty enabled the Commission to take a much greater formal role in developing immigration policy, although it shares the right of co-initiative with member states. The country holding the rotating Presidency often uses this agenda-setting opportunity to promote policies which respond to domestic level interests. As a result of its new powers granted under the treaty, the Commission established a Directorate General of Justice and Home Affairs (to replace the small task force created after the Maastricht negotiations), in order to solidify its institutional commitment to JHA matters. It also issued two communications addressing immigration policy in fairly short order (CEC 2000, 2001). Despite the Amsterdam Treaty revisions, some of the policy positions were the same as had been submitted under the third-pillar

framework. In its communication on an open method of coordination (OMC)<sup>66</sup> for EU immigration policy the Commission set out its desired role in managing and facilitating information flows and coordinating national immigration policy proposals (CEC 2001). This method for encouraging the adoption of more integrated Community methods of policymaking has met with resistance in the Council.

One of the main accomplishments of the treaty was that immigration policy was shifted from being a matter for intergovernmental coordination to one for which the European Commission and member states develop policy proposals, which are then reviewed and adopted by the Council of Ministers. The Commission shares the right to initiate legislation with member states. However, measures must be adopted unanimously by the Council, which makes passage of legislation very difficult. Nevertheless, the policy process remains largely intergovernmental; member states are still the main players with the Commission and the EP in secondary roles (Sandholtz and Stone Sweet 1998; Guiraudon 2000).

The Council is only required to follow the consultation procedure with regard to the EP prior to adopting a JHA measure; the EP has no power to amend or block legislation. A consultation deadline for proposals falling under the third pillar was established that requires the Council to allow the EP at least three months to examine legislation and propose amendments. However, the Council is not bound by any of the Parliament's positions and has often ignored them. Relations between the Council and the

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<sup>66</sup> The open method of coordination (OMC) is generally considered an instrument developed by the Lisbon Strategy (2001). It provides an intergovernmental framework for cooperation and governance in the EU. Member states identify common objectives around which national policies can converge. OMC is grounded mainly in "soft law" mechanisms such as establishing guidelines and benchmarks, and by sharing best practices. The efficacy of the method is reliant on peer pressure, because member states evaluate each other's performance, often under the aegis of the Council. The EP and the ECJ have virtually no part in the process and the Commission is only charged with a monitoring role.

EP continue to be contentious: “this is reflected not only in the frequent criticisms made of Council initiatives, but also in repeated complaints about lack of information during the consultation procedure” (Lavenex and Wallace 2005:469-470).

Article 63 of the newly consolidated Treaty of the European Community specifies that five years after the Treaty of Amsterdam comes into force, the Council must adopt policies on asylum, illegal immigration, and return policy. The target date of May 2004 was to coincide with the EU enlargement.<sup>67</sup> In July 1998, the Cardiff European Council determined that these deadlines need to be more clearly stipulated. The European Council requested that the Commission and the Council of Ministers draft an “Action Plan” delineating how to implement the provisions of the Treaty of Amsterdam. This action plan was ratified by the European Council in Vienna in December 1998 and has since been known as the Vienna Action Plan.

### *The Tampere Presidency Conclusions*

The growing importance of the role played by the European Council in EU policymaking, posited in the intensive transgovernmentalism policy mode (Wallace et. al.

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<sup>67</sup> Historically, one of the areas of greatest contention during enlargement negotiations has been the right of all EU nationals to move freely within the countries that constitute the common market. This was especially the case with the accession of Greece, Spain, and Portugal which had all been predominantly labor exporting countries to the more developed core EU countries. Greece became a member of the European Community in 1981, although its citizens were not allowed labor mobility rights until 1988; Spain and Portugal joined in 1986, but were not granted free movement until 1992. Labor mobility has again become a problem with the enlargement of the EU to the East to include the Czech Republic, Poland, Latvia, Slovakia, Estonia, Lithuania, Slovenia and Hungary. In an effort to address the implications of the 2004 enlargement, several of the EU-15 member states supported instituting “transitional restrictions,” often referred to as the “2+3+2-year arrangement.” This plan requires the “old” member states to officially pronounce in May 2006, May 2009, and again in May 2011 whether they are prepared to open up their labor markets or are still committed to keeping mobility restrictions in place. The first two-year transition period ended on May 1, 2006, and only seven of the EU-15 states have agreed to open their borders.

2005), is particularly evident in the field of justice and home affairs. This pattern was firmly established by the time the European Council held its first summit in Tampere which specifically focused on JHA matters. The Amsterdam treaty may have laid the legal foundation, but the Tampere summit made a common immigration policy politically feasible. The Tampere European Council summit (October 1999) set out a very ambitious plan for realizing an area of freedom, security, and justice: it established both the policy objectives and a timetable for achieving them. Tampere radically expanded the agenda to include not only migration control but also the effective management of legal migration, social integration programs, policies to prevent discrimination, international protection of forced migrants, and development cooperation to remove the push factors driving illegal economic migration. A balance between security, economic admission and human rights was the objective of the deliberations. The Tampere Presidency Conclusions state: “The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third-country nationals who are lawfully resident in the Union.”

Immigration is no longer framed as an anomaly in European societies, or a “problem” that must be solved, but as a reality, which must be dealt with in such a way as to capitalize on its benefits and keep the negative aspects, for both migrants and the receiving country, to a minimum. The Tampere Conclusions attempted to address in a comprehensive way all the challenges confronting global migration. It asserted that the legal status and rights of third-country nationals should approximate that of member

states' nationals. In the final draft these expanded rights were applicable only in the member state in which the third-country migrant had resided legally on a long-term basis.

The Tampere Presidency Conclusions take the compromise position that the "legal status of third-country nationals should be approximated to that of Member States' nationals" rather than endorsing harmonization, so there would be no question of an evolving legal form of EU denizenship which might serve to challenge member-state nationality laws. The European Council also supported the goal of third-country nationals ultimately obtaining nationality of the member state in which they are resident (Geddes 2003).

In order to comply with the Tampere European Council conclusions, the Commission devised a scoreboard in March 2000 to monitor the implementation of the goals set by the Treaty of Amsterdam, Vienna Action Plan, and Tampere European Council conclusions. The scoreboard is updated during every EU Presidency. During the 2001 Belgian Presidency, the Laeken European Council first attempted to assess the implementation of the Tampere European Council conclusions. Since Tampere there had been a political shift to the right in many member-state governments. Those political developments have resulted in agenda constriction and the advent of new constraints being placed on the Commission's right of initiative. The agenda was further curtailed by the 9/11 terrorist attacks. Specifically, the European Council requested that the Commission reformulate its proposal for a directive on the right to family reunification. The most probable explanation for the "slow implementation of the Vienna Action Plan and of the Tampere manifesto certainly lies in the passive resistance of national authorities to normative convergence and supranational harmonization" (Pastore 2002:3).

Immigration, in particular illegal immigration, was also high on the agenda of the Seville Summit in 2002. Ministers from Spain, Italy, and the UK advocated for imposing aid sanctions on major sending countries. Most other member states favored less draconian measures. France pointed out that exacerbating any economic problems of sending countries would hardly serve to reduce the number of migrants (Banks 2002). In the end a compromise solution was reached to set a timetable for undertaking joint operations at external borders and common visa arrangements (Presidency Conclusions of the Seville European Council 2002).

#### A Proposed Directive on Family Reunification

The Commission issued draft directives in three key areas to meet the goals set at the Tampere summit: the condition of entry and residence for third-country nationals for paid employment and self-employed activities; the right to family reunification; and the status of third-country nationals who are long-term residents. Although the Tampere Presidency Conclusions also requested that the Council adopt legislation based on commission proposals in a timely fashion, Council deliberations on the family reunification and long-term residents directives were slow and labored. It also ultimately failed to reach a decision on a proposal for the admission of employed and self-employed persons proposed by the Commission in July 2001 (Peers 2004). In addition, the EP brought an action for annulment of the Directive on Family Reunification before the ECJ, claiming that its prerogative to comment on the final version of the Directive was infringed upon.

Some commentators (Schmidt 2006; Arturo 2005) contend that there was a *need* for a harmonized policy of family reunification. Disparities in treatment and differences in rules governing migration and family reunification for EU citizens and third-country nationals could work against member-state interest in integration in the long run. The consensus seemed to be that blatant discrimination against non-European long-term migrants could not stand up to scrutiny.

The sheer number of third-country migrants living in EU countries by the late 1990s dictated the practical importance of tackling the issue of continued family reunification head on. Since the 1970s, when family reunification became the predominant impetus for migration, it had become difficult to justify granting different rights to family members of EU member-state nationals and third-country immigrants; the image of the EU as a single economic space was called into question by such discrepancies. Partly not to appear hypocritical in light of the qualifications placed on the new countries of accession, member states agreed in principle that the rights of third-country nationals needed to be brought into line with those of EU citizens. “Since the EU took great interest in the treatment of national minority groups in the acceding countries, it could not ignore the inequalities present in the Union itself.” (Arturo 2005:42).

Harmonizing family reunification also was in the interest of member states to prevent a legislative “race to the bottom” in response to the perception that immigrants will settle in the country with the most favorable regulatory regime. Demographic concerns and the need for skilled labor in certain economic sectors were factors in clarifying the necessity for a common approach to family reunification.

Evidence and fear of growing social unrest also contributed to the argument that a harmonized family reunification policy is an essential part of a successful approach towards integration. In the explanatory memorandum that the Commission attached to its 1999 directive proposal it stated: “Beyond the purely quantitative importance of this form of legal immigration, family reunification is a necessary way of making a success of the integration of third-country nationals residing lawfully in the Member States. The presence of family members makes for greater stability and deepens the roots of these people since they are enabled to lead a normal family life” (CEC 1999). However, Niessen et al. (2005) contend that in current immigration debates, “family reunification is no longer considered as first and foremost an integration instrument (stable families promote cohesive societies), but as a less desirable form of immigration [than skilled economic immigration]” (10). As a result of this perception, the focus of discussion in many countries is on creating a more and more restrictive definition of family, and how to combat fraudulent claims for reunion (e.g., marriages of convenience).

### *The Hague Programme*

The EU has gained considerable competence in the areas of immigration and asylum since the Treaty of Amsterdam. The five-year Tampere agenda ended in 2004. In June 2004, the Commission prepared an appraisal of the success of the Tampere five-year agenda and proposed some future objectives for justice and home affairs (CEC 2004). In this communication the Commission proposed that the EU “develop an integrated border management system,” and “promote a genuine common policy of management of

migratory flows.”<sup>68</sup> Lavenex and Wallace (2005) write, “the tension between the Commission and the member states was evident in the cautious reactions of member governments to this ambitious programme, which would extend Community policies further over domestic law and order, rights of residence, even of citizenship” (478).

The resultant Hague programme developed by the European Council is not as ambitious or as far-reaching as the Tampere Conclusions. Prior to the Amsterdam Treaty, EU migration policy was uneven in the sense that migration control was given much greater emphasis than policies addressing legally resident third-country nationals. The most recent set of objectives, as set out in the Hague Programme, continue to focus on security and immigration restriction (Bendel 2005).

In November 2004, the European Council adopted the Hague Programme which specifies the EU objectives for ensuring “freedom, security, and justice” and lays out the political parameters for progress on immigration issues for the period 2005-2010. Establishing workable immigration and asylum policies for the EU was the primary objective of the Hague agenda. In accordance with Article 67 of the Treaty establishing the European Community, EU leaders committed to adopting qualified majority voting and co-decisionmaking measures in the fields of asylum, immigration, and external border control. However, all forms of legal immigration, such as labor migration and family reunification, remain subject to unanimous voting. Majority voting in this area will not begin until the EU Constitution comes into effect—a development that was strongly opposed by Germany and Austria (Lavenex and Wallace 2005).

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<sup>68</sup> Section 2.4 of the Communication reads: “There must be a realistic approach taking account of economic and demographic needs, to facilitate the **legal admission of immigrants** to the Union, in accordance with a coherent policy respecting the principle of **fair treatment** of third-country nationals” [boldface in original] (CEC 2004).

There has been considerable debate over which forms of immigration to legalize and how to go about it. The two major legislative accomplishments are the Council directives on family reunification and on long-term residence status for third-country nationals, both of which went through several revisions and were finally adopted in 2003. A commission proposal for a directive outlining the conditions of entry and residence of third-country nationals for the purposes of work and self-employment failed to gain any support in the Council and never advanced past the first reading.

Legal migration is a particular concern of EU countries in that they are interested in protecting their national labor markets. Denmark has opted-out of Title IV of the Treaty Establishing the European Community which covers all aspects of the free movement of persons, and Ireland and the UK have chosen to limit participation on a case-by-case basis. Germany, which finally passed its own contested immigration law in 2004, has been one of the most vocal advocates for retaining national control over labor migration policy. By retaining unanimous voting for all measures dealing with legal migration of third-country nationals, the Hague Programme both effectively maintains member-state veto power and curtails the role of the European Parliament. Because legal migration and hence family reunification measures are not subject to the co-decision procedure, the EP was forced to bring its objections to the Directive on Family Reunification on human rights grounds before the ECJ.

Paragraph 1.4 of the “Specific Orientations” section of the Hague presidency conclusions obliquely acknowledges the importance of legal migration in that it “will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contribute to the implementation of the

Lisbon strategy.”<sup>69</sup> But it fails to mention the Tampere goals such as comparable rights for third-country nationals (Peers 2004). By referencing the Lisbon Strategy numerous times, immigration policy is being framed largely in terms of economic imperatives.

The Hague Programme reaffirms that “the determination of volumes of admission of labour migrants is a competence of the Member States.” The Council invited the Commission to develop a policy plan on legal migration before the end of 2005; however, significantly, it did not request that the Commission propose formal legislation, nor was there a deadline put forward for the Council to adopt any legislation. The Commission did succeed in publishing a policy plan on promoting legal migration in December 2005 (CEC 2005). It was based on its previous green paper, entitled “On an EU approach to managing economic migration.” However, concrete legislative proposals will be issued beginning in 2007 to last through 2009.

### *A European Constitution*

On October 29, 2004 the twenty-five member states signed the treaty establishing a constitution for Europe. The Treaty will only enter into force when it has been adopted by each of the signatory countries in accordance with its own constitutional procedures. Given successful ratification of the treaty by the voting public in each of the signatory states, the constitution was intended to enter into force on November 1, 2006. Sixteen<sup>70</sup>

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<sup>69</sup> The Lisbon Strategy or Agenda is an economic growth plan for the EU developed by the European Council in Lisbon in 2000. It adopted a ten-year plan for formulating policy to make the EU “the most competitive and dynamic knowledge-driven economy by 2010.” For more information see, <http://www.euractiv.com/en/agenda2004/lisbon-agenda/article-117510>.

<sup>70</sup> Austria, Belgium, Bulgaria, Cyprus, Estonia, Finland, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Romania, Slovenia, and Spain. Germany and Slovakia are expected to ratify it in 2007.

states have ratified the treaty; however, the people of both the Netherlands and France have rejected the treaty. As a result of this situation, a period of reflection and discussion has ensued and the timetable has been adjusted to accommodate those states that have not as yet ratified the treaty. Germany, who holds the Council Presidency until July 1, 2007, when Portugal assumes the mantle, has been attempting to jump-start the Constitutional process and has proposed a 2009 deadline for a new European Union Treaty.

The proposed constitution reinforces the approach taken by the Hague Programme. In the Constitution, the pillar structure will be abolished, and JHA matters will be unified under the EU legal framework. Border control, asylum, and immigration policies become subject to the community method, (i.e., qualified majority voting and the co-decision procedure) and the Commission assumes the sole right of initiative in all areas except for legal migration. Germany would only agree to this reform if the right of individual member states to set admission quotas for economic migrants was included. Article III-267 paragraph 2(a) stipulates that European law will establish measures to address “the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion.” Article III-267 provides a legal foundation for further clarifying and strengthening the rights of legally resident third-country nationals; nevertheless, paragraph five states: “This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.” This paragraph upholds exclusive member-state competence in a crucial area of common immigration policy and indicates a continued restrictive approach to immigrant rights

overall. The draft constitution reflects a high degree of supranational cooperation over the last fifty years but this cooperation has practical limitations that are determined by national politics (Luedtke 2005).

## **Conclusion**

The legacy of European colonialism, as well as the dual processes of industrialization and global economic integration, contributes to the obsolescence of past forms of production and social relations. This serves not only to redefine the boundaries of states but also creates migratory pressures on the industrialized world. Demographic pressures from the south and the east of the EU are likely to build. Huge economic disparities between rich and poor countries contribute to the sensitive nature of the immigration issue and the sense of urgency associated with finding some sort of policy solution. Despite much rhetoric at the national level that openly opposes the deepening of the Union, and resists the EU strengthening its political and governing power in relation to the nation states, a gradual de facto coordination of immigration policies has proceeded apace. Even without the ratification of the EU Constitutional Treaty, EU institutions will continue to expand their involvement and powers.

The Maastricht and Amsterdam Treaties have been important steps in the direction of cooperation among the states; however, the issue of how to establish an acceptable balance between the human rights of immigrants and security concerns has not been solved. EU citizens also hold conflicting opinions when it comes to weighing the

relative merits of rights versus migration control.<sup>71</sup> For the most part the policy emphasis has been on internal security and the creation of regulatory measures: clarifying and tightening visa and admission policies, more closely monitoring all migratory movements, and combating illegal immigration.

Certainly EU and member-state legislators are cognizant of the growing significance of the issue of immigration. In 1997 eighty-two percent of European Parliamentary deputies stated that immigration will remain one of the most pressing problems in the EU for the foreseeable future (Lahav 1997). Despite this recognition of the need for a harmonized approach, all EU efforts at legislation have been met with national resistance. Since the late 1970s in Europe, it has become abundantly clear that isolated national policies that attempted to control international migration were no longer practicable. However, the reliance on networks of intergovernmental forums, reciprocal arrangements, and member-state initiatives for the development of policy has its shortcomings. In a policy domain where concerns over human rights and civil liberties are a major factor, intergovernmental methods leave a great deal to be desired in terms of democratic accountability and procedural transparency. Indeed, “the quality of the proposals put forward by Council presidencies, exporting their domestic agendas, has often been lower than those promoted by the Commission, which have emerged from a broader consultation with national experts” (Lavenex and Wallace 2005:479).

Immigration policy at the EU level has generally concentrated on controlling the

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<sup>71</sup> “A recent Eurobarometer conducted in December 2003 confirms the results of previous Eurobarometers. The citizens of European are clearly in favour of a common policy on asylum and immigration. 56% recognise the economic needs of immigrants and 66% want them to enjoy equal rights. At the same time, 80% are in favour of strengthening checks on persons from third countries at external borders” (CEC 2004).

numbers of incoming migrants and asylum seekers rather than developing measures to protect and expand the rights of migrants. The freedom of movement that EU citizens now enjoy in the single market is believed to necessitate more rigid controls at the external borders. Andrew Geddes (1995) writes: “The ‘positive ideology’ of Europeanness contrasts with the ‘negative ideology’ of immigration. It is this disjunction between these two ideologies which has helped generate the EU’s immigration policy paradigm”(205). It should not be overlooked that one of the main ingredients in this positive ideology of Europeanness is a commitment to international human rights. Patrick Ireland (1995) claims that the EU is unlikely to become a Fortress Europe by accentuating immigrant control and strengthening all external borders, not least because of its historical resolve to protect human rights: “Besides their public relations value, such pronouncements speak to the liberal and democratic ethos that underpins the Union, which should not be underestimated” (261).

## Chapter 4

### **Third-country Immigrant Women in the European Union**

An examination of the immigration policy context, which impacts the lives of third-country immigrant women, contributes to the testing of my second hypothesis that immigration policy, as it has evolved in Europe, is gendered and does not take the human rights of immigrant women into account. Another, often unrecognized, aspect of the securitization of immigration policy is the ways in which this reframing of the immigration policy discourse exacerbates the insecurity of migrant women's existence and infringes on their human rights. It adds another layer of uncertainty to a position already rendered vulnerable by an often dependent legal standing, susceptibility to individual and institutionalized forms of violence, and economic disadvantages caused by a lack of access to the labor market altogether, or by being employed in part-time, provisional, or unregulated labor, which offers no social protections (Freedman 2003).

Despite all the political and media attention to immigration matters, the varying and expanding populations of women who are migrating to Europe and the impetuses and mechanisms for their migration, as well as their experiences in receiving countries, are still relatively understudied. Women are significant participants in all the main forms of globalized human movements including labor migration, family reunification and formation, refugee and asylum-seeking, and study abroad. However, "women's ability to maneuver within a particular mode of entry often differs from that of men" (Kofman 1999:272). Women now comprise half, or nearly half, of migratory flows in all EU countries (OECD 2006; Kofman 2005; Ehrenreich and Hochschild 2003). Nevertheless,

migration is still viewed as primarily a male activity, and immigration policies in Europe have historically been based on a male model.

Migrant women in Europe cannot be viewed as a homogenous group; their exercise of rights will differ depending on form of entry, residency status, position in the labor market, marital status, socio-economic standing, and country of origin. The emphasis on immigration control in the EU has led to a progressively more complicated hierarchy of provisional rights which are applicable to different categories of migrants in different ways (Kofman 2005). Labor shortages in particular sectors and demographic concerns have encouraged a more candid discussion and harmonized approach to immigration policy among member states. However, political and popular apprehensions surrounding immigration have also led to greater discrepancies in the rights and security of status between those immigrants viewed as having desirable skills and those viewed as unskilled migrants, whose access to the territory and to the labor market it is believed needs to be controlled through a program of managed migration. All forms of migration have become collapsed under one framework geared towards migration control. Migration associated with human rights or recognized international norms such as asylum or family reunification is now linked, and in some ways equated, with economic migration.

### **Gender and the Feminization of Migration**

The introduction of an ideational framework which views gender as a social construct has allowed for a reorientation in immigration research over the last decade (Koser and Lutz 1998; Kelson and DeLaet 1999; Andall 2003). Two major questions

arise from much of this work: the first is how patriarchal power, both at the personal/family level, and at the societal/governing (e.g., policymaking) level in countries of emigration and immigration impacts women's decisions and ability to migrate. The second explores how the act of migration affects women's roles as well as gender relations in the family and in the larger community. Boyd and Grieco (2003) posit that a theoretical framework needs to be developed that is able to capture the gendered migration experience of immigrants of both sexes. This model delineates the three major stages of immigration in which power disparities generate different outcomes for women and men. The pre-migration stage takes into account individual, familial, cultural, and socio-economic factors present in the country of origin which motivate or hinder migration. The transition across state boundaries stage encompasses the examination of the legislation of both sending<sup>72</sup> and receiving countries, as well as the role of intermediary organizations that both legally recruit and illegally traffick women. The post-migration stage addresses the ways in which entry status affects women's ability to secure residency and establish themselves in their new host state, and considers gendered patterns of labor market incorporation.

The overarching focus of this dissertation is on the act of migration—or the transition-across-state-boundaries stage; within this stage, it looks at the evolution of EU immigration legislation as a harmonized version of the policies of receiving member states. However, this chapter will also delve into post-migration factors to give a broader

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<sup>72</sup> Oishi (2005) found that emigration policies in countries of origin are a major determinant of women's migration patterns. Some countries, while placing no controls on male migration, have restricted and in some cases banned female migration. For example, Bangladesh imposed a ban on unskilled female migration in 1998. Emigration policies in developing countries are not the result of a simple economic calculation; both political and popular attitudes toward female and male migration differ. The policies that pertain to women are "value-driven," whereas those that pertain to men are economically motivated.

understanding of the difficulties faced by, and rights accessible to, third-country immigrant women.

Provisional and permanent migratory movements are becoming more global, more diverse, and increasingly more female. Scholars have noted that a “feminization” of migration is underway (Phizacklea 1983; Castles and Miller 2003; Geddes 2003; Kofman 2004a).<sup>73</sup> Feminization implies that women are playing an increasingly important role, not only quantitatively, but also as social actors in all forms of migration. Nevertheless, statistics on immigration have just begun to be disaggregated by sex within the last decade; as a result reliable numbers are not always readily available (Freedman 2003; Kofman et al. 2000). It has been estimated that women comprise at least half of international migrant flows, particularly in the developed world. Among certain populations, female migrants outnumber males by quite a wide margin (Kofman 2004b).

It was not until quite recently that reliable and inclusive statistics estimating the level of female migration were available. In 2002, the United Nations Population Division released longitudinal data that made it possible to chart the progression of international female migration from 1960 to 2000. Female migrants now account for 51 percent of all migrants in developed countries (Zlotnik 2003). Although some estimates (Zlotnik 1995) still contend that more men than women are labor migrants, these figures do not take into account undocumented workers, e.g., women who may have entered as family migrants and who work in the grey economy, and “overstayers” who enter on student or tourist visas and remain to work, usually illegally (Freedman 2003). It is

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<sup>73</sup> Castles and Miller (2003) assert that feminization is one of five principal features of the post-1980s “age of migration,” the others being globalization, acceleration, diversification, and politicization (7-9).

because women have fewer avenues and opportunities for being admitted as legal workers that they are often more prevalent in unregistered flows (Phizacklea 1998).

The importance of the feminization argument is not simply to point out the growing numbers of women migrants in relation to men, but to acknowledge the “agency and independence” of women in migratory streams and networks (King et al. 2004). The perception of women migrants has changed from viewing them as marginal subjects to recognizing them as vital “social actors” (Campani 1995). Certain migratory streams are almost exclusively female as is the case for Philippine and Cape Verdean migrants in Italy (Andall 2000). The incidence of all-female migration streams in Europe is tied to the growing importance of live-in domestic work as a vital source of employment for immigrant women particularly in Italy, Spain, and Greece (Anthias and Lazaridis 2000).

Family reunification, which will be discussed in greater detail in chapter 5, continues to be the most common immigration pattern in advanced industrial nations. It is estimated that 65 percent of permanent migration in the EU is family related (Kofman 2005). Family reunification migration is prevalent particularly in countries which have comparatively low inflows of labor migrants. For example, in 1999 two thirds of first-time long-term residence permits in France were granted on familial grounds, and over 60 percent of new immigrants in Sweden were classified in the family reunification category. In addition, females comprise 80 percent of family migrants among non-French nationals in France (OECD 2001).

Nevertheless, given the growing number of women migrants of all types, public policy should begin to recognize all women migrants as economic and social actors rather

than automatically relegating them to the category of “tied”<sup>74</sup> or marginal migrants (Boyle, et. al. 1998). The labor migration of women and family reunification migration are typically discussed as separate analytical categories in immigration scholarship, and dealt with as distinct legal statuses in immigration legislation; however, in practice family migrants represent a significant proportion of female migrant labor (Kofman 2004b).

Despite the fact that contemporary immigration flows are characterized by their diversity and heterogeneity, the perception of migrant women as unskilled and traditional remains curiously indelible. Female migrants have typically been viewed as dependents operating mainly in the private sphere and only deemed worthy of consideration in the context of their capacity to adapt to western societal values. Sometimes, as a result of attempts at sympathetic “culturalist” thinking, the difficulties faced by immigrant women are attributed to their inability to negotiate the differences between European culture and their home cultures. Rather than being a helpful approach, this often “results in essentialised and stereotyped perceptions of migrant women as bearers of ‘traditional’ values,” and can lead to public fixations on tangential concerns such as on Islamic women who wear the veil as a way of avoiding addressing more fundamental social and economic inequalities.(Freedman 2003:12).

While migratory flows have become more diversified with respect to the countries of origin, skill-levels, gender, age, and length of stay, long-established sending countries have developed a sort of symbiotic relationship with their respective host countries over time and continue to provide the majority of immigrants (Castles and Miller 2003; Soysal 1994). In response to tighter restrictions on legal migration, much of the unskilled migration, which is not family related, is clandestine. More economic opportunities are

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<sup>74</sup> “Tied” migrants are family members who follow a primary male migrant.

opening for women globally; however, gender segregation in the labor market has created employment niches for women mostly either in domestic work, sweatshop labor, or the sex trade (Andall 2003; Anthias and Lazaridis 2000; Freedman 2003).

Several factors have contributed to the growing feminization of migration. The processes of economic and cultural interdependence that have contributed to the globalization of migration are a factor in the rise in female migration (Phizacklea 1998). The feminization of poverty provides a major impetus for women's decision to move to other countries in search of employment (Freedman 2003). Global economic disparities and draconian structural-adjustment programs combined with the lure of prosperity in affluent nations have made migration a "private solution to a public problem" for many women (Hochschild 2003:18). In addition, networks of female migrants exist in receiving countries which facilitate the process of finding a job and adapting to the new environment.

Kofman (2004b) contends, "economic and social transformations brought about by globalizing processes are drawing up new lines of selective inclusion and exclusion resulting in complex systems of stratification"(645) Member states in the European Union have set about devising a managed migration system with a complex classification structure for categorizing different statuses of migrants, each with varying access to certain rights and entitlements. The Commission Legislative and Work Programme for 2007 (CEC 2006) states: "The pressures of demography have added to the need for the European labour market to attract economic immigrants. A European regime for economic immigrants would give them a secure legal status making clear the rules attached and the rights they should enjoy. Specific attention needs to be given to the

position of highly skilled migrants, with a swifter response time to react to changing needs.” The disparity in power and resources among migrants both male and female in achieving mobility is partly a function of where the sending state is located in a global hierarchy of developed, transition, and least-developed-countries, but must also take into account the intersection of gender, race, and class.

The multiplication of migrant statuses and the related stratification of rights affect men and women differently because of the types of entry more commonly accessible to women and because of the gendered division of labor. The shortages in skilled labor are still largely found in sectors in which men are prevalent such as the sciences and information technology (IT). Although demand is great in the health and education sectors, these occupations are often more highly regulated than IT jobs found in the private sector. In some member states these female-dominated professions (e.g., nurses, teachers, and social workers) come under the aegis of civil service employment—a sector which is usually closed to non-citizens.

Kofman (2005) notes that “migrant women underpin the globalization of care and social reproduction” (7). A growing number of migrant women are involved in caregiving and social reproduction in individual homes, the community, and the private sector. With the exception of those recruited to fill vacancies in educational and health related fields who are considered skilled, the fact that third-country immigrant women, both legal and undocumented, are overrepresented in devalued caregiving occupations has serious implications for their access to rights.

Acquiring and retaining a legal status is often very difficult for lesser skilled migrant women, because the “failure to acknowledge the economic and social value of

women's work means that although their labor is in demand, [this situation] is not matched by official recognition in the form of work permits and proper employment contracts" (Kofman 2005:41). Both female labor entrants and women who migrate for family reunification often find themselves working under exploitative conditions in the informal sector. Migrant women fill many reproductive and service jobs in the economy; domestic labor is certainly one of the most prominent, but the importance of migrant women workers to the hotel and tourism industry, commercial cleaning and maintenance, and caregiving for children and elderly outside the home is undeniable (Andall 2003; Kofman 2005; Kofman et al. 2000).

Access to many of the rights that EU citizens take for granted is problematic for third-country nationals. Rights can have conditions placed upon them, be viewed as discretionary by officials, or be legally withdrawn; this curtailment of rights can also affect foreigners' access to welfare entitlements. For example, in Germany and the Netherlands, a dependence on social benefits can disqualify migrants for family reunification. The UK has progressively decreased the number of benefits that are available to the family members of migrants, denying them child allowances, disability compensation, housing benefits, and unemployment compensation.

Are the life experiences of third-country immigrant women useful or appropriate sources of information when interrogating the relevance of human rights law to EU policymaking? The answer to that question depends on how violations of human rights are delimited and defined. Audrey Macklin (1999) claims, "women as migrants often embody—literally—the absence, the breakdown, or the inequities of the international legal regime" (24). The absence of women of color from the standard human rights

agenda is partly attributable to the precedence given to civil and political rights and the relative marginalization of economic, social, and cultural rights. International human rights instruments in general do not recognize the human rights implications of the migration of women. Many of the daily violations of economic, social, and cultural rights of female migrant workers are seen as too “ordinary” to warrant serious attention; “the attention of most mainstream human rights organizations remains fixed primarily on the physical and sexual abuses associated with slavery and trafficking” (Lewis 2001:225).<sup>75</sup>

Allegiance to human rights norms is an essential component of the prevailing political discourse in the European Union. Compliance with the human rights contained in the ECHR, the Social Charter, and the constitutional traditions of the member states is affirmed in the preamble of the Single European Act<sup>76</sup> and Article 6(2) of the EU Treaty.<sup>77</sup> The European Court of Justice has reconfirmed these commitments so long as these rights conform to the ones granted in the Charter of Fundamental Rights of the European Union signed in Nice in 2000. This chapter examines the limits of this normative commitment in the context of the admission and treatment of third-country

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<sup>75</sup> The UN General Assembly passed three resolutions in 1995 (A/RES/49/165), 1997 (A/RES/52/637) and 2004 (A/RES/58/143) on the violence against women migrant workers acknowledging “the large numbers of women from developing countries and some countries with economies in transition who continue to venture forth to more affluent countries in search of a living for themselves and their families as a consequence of poverty, unemployment and other socio economic conditions, and acknowledging the duty of the countries of origin to try to create conditions that provide employment and economic security for their citizens.” However, as the title suggests, the resolutions were more concerned with violence perpetrated against migrant women and the links between migration and trafficking.

<sup>76</sup> “DETERMINED to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice” (SEA third recitation of the preamble).

<sup>77</sup> “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

immigrants, specifically immigrant women. My analysis contends not only that immigration legislation in Europe has been gendered to the detriment of migrant women, but also that the relevant human rights precepts—which are touted as the foundation for future EU policy—are themselves gendered.

### **Protecting the Human Rights of Immigrants in the European Union**

Governments view immigration policy as falling in the contested interstice between sovereignty and international human rights. There are competing interests between the state's obligation to respect individual rights and to control the numbers and categories of peoples who enter its borders—one of the most basic criteria for asserting state sovereignty. In order to contextualize the international human rights instruments that explicitly address the experiences of immigrant women, it is instructive to briefly summarize the international and EU instruments that are relevant to international migrants more generally.

The 1948 Universal Declaration of Human Rights upholds the right of everyone to leave any country and return to his or her own country (Art.13(2)). This right is reaffirmed in many other international and regional human rights instruments. Nevertheless, none of these instruments explicitly afford non-nationals the right to enter a foreign state. The right to leave is granted to prospective migrants, but states are not obliged to receive non-nationals on their territory and thus retain the prerogative to refuse entry. The freedom to leave without a corresponding right to enter entails that the

freedom of movement stands as an “incomplete” right.<sup>78</sup> Some limitations are placed on the state’s capacity to deny admission, however, and these are grounded in the right to family life, the welfare of the child, the right to non-discrimination, and the right to asylum. Despite these limitations, state sovereignty regarding this issue usually prevails (Ghosh 2000).

The Council of Europe (COE), founded in 1949 to ensure the protection of human rights and unify postwar Europe, has issued conventions that contain sections that pertain to migrant workers and their families.<sup>79</sup> The most important of these conventions are the European Convention on Human Rights (ECHR 1950), the European Social Charter (1961), the European Convention on Social Security (1972), and the Convention on the Legal Status of Migrant Workers (1977). The Social Charter is mentioned in the preamble of the TEC as setting a precedent for social rights in the EU. Article 19 of the European Social Charter is devoted to the right of migrant workers and their families to protection and assistance. Patrick Ireland (1995) writes that the various COE human rights instruments “have helped to blur the distinction between the foreign worker and the resident immigrant. But they, as well as other like-minded initiatives that have emerged, amount to ‘soft law...’ vaguely worded and with no real enforcement mechanisms” (247).

One of the four fundamental freedoms of the European Union is the freedom of movement of persons but this seeming right has always been inextricably linked to the

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<sup>78</sup> Although it has been argued at the UN that this right can be considered part of customary international law, there is some debate as to whether the right to leave any country and to return to one’s own country can be regarded as a fundamental right because it has been given little consideration by states (Mubanga-Chipoya 1987).

<sup>79</sup> All twenty-seven EU member states are members of the Council of Europe and have signed the ECHR, the provisions of which protect *inter alia*, migrants’ rights to be free from discrimination and their right to freedom of movement and settlement.

right to gainful employment. Article 48 [2] of the 1958 EEC Treaty guarantees the freedom of movement of labor in the Community and ensures “the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.” Since this treaty was signed, the EU legislation regarding the right to work and reside in another member state for EU member-state nationals has been made more inclusive largely due to ECJ rulings: family members, regardless of nationality, may now accompany EU citizens who choose to migrate within the community; member-state migrants and their families are free to remain in their chosen country of residence when they retire or if they have sustained a permanent disability; and the right of residence has also been broadened to include various categories of unsalaried people including students and pensioners.

Ireland (1995) points to the role of policy activist assumed by the European Court of Justice, and claims that the ECJ is progressively bringing into line the rights of EU and non-EU nationals. EU law has “direct effect” which indicates that it overrides national law and that domestic courts are responsible for ensuring that EU law is enforced. Through case law, the ECJ has provided for a more inclusive legal definition of *worker*, thereby expanding upon the right to mobility of all legal residents in EU member states. The ECJ has handed down several rulings that relate to immigration including enforcement of the association agreements regarding equal access to employment and education for immigrants, the extension of social security benefits to non-EC citizens, the upholding of family reunification policies, and the liberalization of the rules governing the renewal of work and residence permits.

The ECJ has clearly stated in its jurisprudence that, in principle, EU law applies only to member-state nationals and not to non-EU nationals (other than family members of EU citizens). Nevertheless, a number of cases have obliged the court to revisit this position to ensure that the rights of EU nationals were not jeopardized by EU law; “in the process the ECJ on occasion felt impelled to overturn features of nationality and immigration law in individual member states” (Philip 1994:174). For example, the ECJ overruled a policy which the UK instituted in 1980 which scrutinized for “primary purpose” the nature of all marriages between British citizens and non-EU nationals who wished to immigrate to the UK (Bhabha and Shutter 1994).

The activist stance of the ECJ has “propelled the Union forward on divisive migration issues,” and expanded the EU’s competence in the legal protection of migrants. Although, “the ECJ’s ‘judicial creativeness’ has broken several policy logjams, albeit at least initially at the cost of establishing ‘reactive’ rights that member states often fail to implement fully” (Ireland 1995:234). Garth (1986) contends that the influence of the ECJ over EU policymaking, in the realm of migrants’ rights, has been largely symbolic: “The rights that are extended to migrant workers... are not the product of a widely supported social program but instead reflect a response to criticism based on liberal values” (252). The ECJ, by definition, has no enforcement powers; as a result, many of its rulings have not been implemented.

Explicit reference is made to safeguarding the (human) rights of third-country nationals with the passage of The Treaty of Amsterdam in 1999. An essential aspect of freedom is the right to move freely and ensuring this right was one of the major challenges posed by the treaty. The Tampere European Council set itself the task of

further substantiating the “area of freedom, security, and justice” laid out in the treaty. The Tampere Presidency Conclusions plainly stated that the EU must develop common immigration and asylum policies. The third paragraph of the Conclusions states that the right to freedom of movement “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... These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union” (European Council 1999). The Tampere Council was very vague, however, about what these “traditions” and “principles” on which the common policies should be based are.

The Charter of Fundamental Rights of the European Union, which was adopted as a “solemn proclamation” in 2000, but will not become law until the EU constitutional treaty is ratified, does explicitly prohibit discrimination on grounds of nationality (article 21). It also entitles third-country nationals “who are authorised to work in the territories of the Member States to working conditions equivalent to those of citizens of the Union” (article 15), and specifies that “freedom of movement and residence *may* be granted to nationals of third countries legally resident in the territory of a Member State” [italics added] (article 45).

### **Protecting the Rights of Immigrant Women: International Instruments**

Women's basic human rights are protected through a variety of legal mechanisms that are both general and gender-specific. Several international human rights instruments exist which challenge the norm of nonintervention in family life. The Universal Declaration (UDHR) (art. 16[1]) and the Covenant on Civil and Political Rights (ICCPR) (art. 24[4]) guarantee equal rights between men and women when entering into marriage, during marriage, and in the event of its dissolution. The European Convention on Human Rights (ECHR) deals predominantly with civil and political rights and contains only nominal reference to aliens.

The centerpiece of the international women-specific documents is the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). The Women's Convention does require the state to actively protect women against discrimination by nonstate actors and proposes some measures to amend gender disparities in private life. Article 16 of CEDAW proposes an equalizing of power relations within the family—this probably explains why it is subject to numerous reservations by state parties. However, the Convention is founded on a principle of non-discrimination, not one of transformation. In the end, CEDAW only addresses formal equality: “the male-centered view of equality is tacitly reinforced by the Convention's focus on public life, the economy, the law, education and its very limited recognition that oppression within the private sphere, that of the domestic and family worlds, contributes to women's inequality” (Charlesworth 1994:64).

The *Declaration on the Elimination of Violence against Women* recognizes the vulnerability of migrant women in particular. The preamble states:

Recognizing that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men,

Concerned that some groups of women, such as women belonging to minority groups, indigenous women, refugee women, *migrant women*, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict, are especially vulnerable to violence...[italics added]

The definition of violence against women in the Declaration focuses on the location where the violence is perpetrated (e.g., in the family, within the community, or by the state) rather than on the nature of the damage inflicted on women. Efforts to eradicate violence against women are presented as legislative initiatives or policy programs. The body of the Declaration does not frame violence against women as a human rights violation, but as a distinct category of harm. This approach undercuts the normative impact of the document; the gendered nature of the human rights discourse is left intact.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC) extends human rights protections to a population that is unprotected by national laws. The MWC “views migrant workers as more than laborers or economic entities. They are social entities with families and have

rights accordingly, notably that of family reunification” (Hune 1991:808). The Convention explicitly acknowledges the active involvement of women in international migration and has made “strides toward recognizing the legitimacy of women as migrant workers in their own right, addressing many of their needs, and providing them with greater protection” (Hune 1991:814). Article 4 of the MWC reads,

For the purposes of the present Convention the term “members of the family” refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.

This article was a source of some disagreement during the drafting process. Certain delegates, mainly from western countries, advocated for a more proscribed concept of nuclear family, while others sought a broader definition that included members of an extended family. The resulting definition allows receiving states to be flexible when determining family membership (Hune 1991).

Due to a lack of awareness of the circumstances of lone women migrants on the part of the international community, there is also no specific recognition in the MWC of the sexual exploitation and ill-treatment of women migrant workers (Fitzpatrick and Kelly 1998). The MWC does not adequately take into account in its equality of treatment provisions that, in general, the work that men and women do is not the same. There is no protection from occupational segregation or inequity in wages. In addition, women are usually the main caretakers of children and other family members; this often requires that

they exit and reenter the paid labor force with greater frequency than men. This situation frequently leaves them underprotected and unable to access benefits linked to labor force participation. It should be borne in mind that the application of any international convention relies on national implementation and enforcement. Women immigrants will be better protected in states that have more progressive national policies in regard to the equality of women generally. The MWC entered into force on July 1, 2003. There are no European signatories.

The question of what influence international human rights law has on increasingly restrictive immigration policies is linked to the feminist examination of the efficacy of the law in serving the interests of women from developing countries, and women more generally. Is rights advocacy a useful tool of social change for women?<sup>80</sup> How receptive can hierarchical, adversarial, and exclusionary legal structures that are rooted in patriarchal societies be to women's concerns? The focus of human rights law on eliminating particular "core" violations and maintaining current gains,

limits the reach of human rights into structural inequalities and systematically embedded injustice. In practice, human rights is not a revolutionary movement that undertakes sweeping structural change; its methods are piecemeal and its goals are issue specific. Whatever the transformative capacities immanent in international human rights, the field is clearly governed by the standards

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<sup>80</sup> Radhika Coomaraswamy (1994) notes that in different societies empowerment emanates from within different contexts. The rights discourse empowers the individual but many women, particularly in non-Western societies, perceive their power to stem from their role as mother; it is a relational model of empowerment. The rights discourse is assumed to be accompanied by legal procedures that stress adversarial contests between the victim and the state. These legal strategies discount traditional relational sources of empowerment. The human rights discourse is unable to recognize and profit from many of the dynamic movements for social protest and change throughout the world because it is hampered by its procedural view of empowerment.

enshrined in instruments and law substantiated by the acts of a multitude of organizations at the local and international levels (Rao 1996:257).

If the definition of family contained in human rights instruments reinforces gender inequalities, challenging particular abuses will not change the fundamental patriarchal structures that allow the violation of women's rights and the disparities in power between men and women to exist. The legal struggle for the recognition and legitimation of the concerns of workers, women, racial and ethnic minorities has "resulted in important forms of formal equality whose significance should not be underestimated"; however, "substantive inequalities persist, even within national communities, and continue to affect the way in which formally acquired rights are interpreted and implemented in practice" (van Walsum 2003:3). For many female migrant workers, the violations inherent in transnational socio-economic disparities lead to vulnerability in the family and in the world. Human rights law must not only protect these women but also empower them to appropriate the human rights discourse and practice to meet their needs and to realize their goals.

### **Immigrant Women in Europe**

Immigration legislation has been a difficult and contentious topic in Western Europe throughout the twentieth century. And the international climate which raises fears of terrorist threats, as well as the civil unrest among socially and economically marginalized immigrant groups has once again placed immigration and naturalization policies high on the governmental agenda. Whether or not it is deemed of secondary importance in the larger debate that the immigrants who were firebombed in 1996

Germany were Turkish women and children and the ongoing source of political controversy and racist hyperbole in France revolves around whether Muslim public schoolgirls should be allowed to wear headscarves, the result of the ensuing public hue and cry has—if nothing else—highlighted the fact that women are very active and important members of the immigrant community. Despite the centrality of women in this debate, most of the policy formulation, and the scholarship that has informed it, has “assumed a male model with women’s contribution seen as marginal”(Kofman and Sales 1992:29). And the specific problems faced by immigrant women are rendered largely invisible.

Historically, the prevalent pattern of migratory flows in most of western Europe has been for men to outnumber women as economic migrants. Women often migrated later as dependent spouses or children of primary male migrants and as a result were nearly always viewed as secondary migrants. Typically, the original postwar waves of workers (particularly in rotation systems such as Germany) were comprised mainly of young men. The policies that dictated the migrant labor system prior to the general European immigration ban in the early 1970s, encouraged single workers only. Employers, who were looking for manual workers to fill labor-intensive positions, judged men as more reliable because of a presumption of fewer familial and social constraints. In addition, the employers, not to mention the host country, did not want to have to bear the burden of providing for any immigrants not in the labor force. As a result of this bias, all women were assigned the status of dependent, whether this was the case or not.

Women were also largely invisible in studies of international migration in Europe prior to the 1970s. Most of the scholarship focuses exclusively on the gendered “stages-

of-migration” model defined by successive linear-gendered stages in which men migrate first, followed by predominantly female family reunification migration. This model not only completely overlooks the migration of single women, but also discounts the important economic and social role that wives, mothers, and daughters play within the host country (Kofman and Sales 1992:30).<sup>81</sup>

The traditional-stages model of migration, developed to describe a pattern commonly associated with male guestworker regimes, needs to be reevaluated in light of varied gendered migratory processes. Interest in female migration has grown in recent years due to the increasing feminization of foreign populations in receiving states and the subsequent recognition of the economic importance of women immigrants. Since the 1980s, economic globalization, transformations in the international political economy, instability particularly in Eastern Europe and developing countries, the establishment and expansion of temporary forms of residence, and circular migration have all affected the migration patterns of women.

The most recent Eurostat statistics show that women immigrants comprise 54 percent of the total number of immigrants, a figure that represents nearly 4 percent of the total EU population (Thorogood and Winqvist 2003). Table 1 details the number of immigrant women in a selection of EU member states. The statistics reflect how “immigrant” is defined in each country. Most European countries collect data on the foreign population (or more accurately foreign residents) which include new migrants as well as second- and third-generation immigrants who have retained the nationality of

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<sup>81</sup> The German labor recruiting agencies did hire single female as well as male labor, although family immigration was actively discouraged. Until recruitment was suspended in 1973, most immigrant women entered Germany as independent workers (Phizacklea 1983: 99).

their country of origin. These numbers are in contrast to statistics for foreign-born populations (more commonly collected in “settlement” countries such as the United States, Canada, and Australia) which represent only first generation migrants; however, they do include both foreign and naturalized citizens. Therefore, in general, the statistics for foreign-born population includes only newer migrants (OECD 2006).<sup>82</sup>

**Table 1: Stock<sup>a</sup> of Foreign Population in Selected EU Member States, 2004<sup>b</sup>**

	Total Foreign Population (Thousands)	Percentage Foreign Population of Total Population	Number of Women in Foreign Population	Percentage Women of Total Foreign Population
Austria	776.8	9.5%	-----	-----
Belgium	870.9	8.4%	425.2	48.8%
Denmark	267.6	4.9%	136.5	51.0%
Finland	108.3	2.1%	53.9	49.7%
France <sup>c</sup>	3263.2	5.6%	1530.9	46.9%
Germany	6738.7	8.9%	3217.5	47.7%
Greece <sup>d</sup>	762.2	7.0%	346.6	45.4%
Ireland <sup>e</sup>	219.3	5.6%	109.3	49.8%
Italy	2227.6	3.9%	-----	-----
Netherlands	699.4	4.3%	349.6	49.9%
Portugal	449.2	4.3%	167.3	37.2%
Spain	1977.3	4.6%	908.2	45.9%
Sweden	462.9	5.1%	234.1	50.5%
United Kingdom	2857.0	4.9	1517.0	53.0%

<sup>a</sup>The *stock* is the population of foreign nationals measured at a single point in time. Another statistic is *flow*, which tracks additions or subtractions to the existing stock over a specified period of time. None of the OECD countries that supplied data on flows disaggregated these statistics by sex.  
<sup>b</sup>2004 statistics, unless indicated otherwise  
<sup>c</sup>1999 statistics  
<sup>d</sup>2001 statistics  
<sup>e</sup>2002 statistics

Source: Organization for Economic Co-operation and Development. 2006. *International Migration Outlook*. Paris: OECD.

<sup>82</sup> The few European countries that produce statistics on the foreign-born population and disaggregate by sex show larger numbers of women as percentages of the total foreign-born population than do the foreign resident statistics. For example, women comprised 53% of the total foreign-born population in Austria in 2004, 49.6% in Greece in 2001, and 50.7% in Portugal in 2001—all of these figures are larger percentages than were found for the foreign resident data (OECD 2006).

The significant numbers of non-European third-country immigrant women is also evident in the OECD<sup>83</sup> data. The statistics show that a quarter (25.4 percent) of all women immigrants in Germany are of Turkish descent; Turks are by far the largest single group of immigrants in Germany. Turkish and Moroccan women together comprise 27.5 percent of all women immigrants in the Netherlands. The four largest groups of third-country immigrant women in France (Moroccans, Algerians, Turks, and Tunisians) represent well over a third (38.9 percent) of all foreign women in France. There are also large numbers of Latin American women in Spain (OECD 2006).

Increasingly restrictive immigration policies have resulted in greater numbers of migrants falling into the undocumented category and have actually served to contribute to many of the worst problems associated with illegal immigration, namely an increase in human trafficking and smuggling. Kofman (2005) asserts, “the undervaluing of women’s labour, e.g., domestic labour, restrictions on their right to work, and involvement in activities that are deemed to be a criminal offence or against public order, i.e., prostitution, means that a higher proportion of women are or become undocumented” (10).

Throughout the 1990s, legal immigration into the EU15 reached a total of 850,000 per year; more recent figures from 2002 set the number of migrants at approximately one million (CEC 2004). While the EU puts the estimate for the number of migrants that

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<sup>83</sup> Of the fifteen Western European EU countries that have been members since 1995 and are members of the OECD, this table references fourteen. Of the more recent accession countries (e.g., the OECD members, Czech Republic, Hungary, and Slovakia, for which statistics are available) the numbers of foreign nationals is still very small and many are still countries of net emigration. I have not included Luxembourg in my statistical table—even though a stunning percentage (39%) of its tiny population is comprised of foreign nationals—largely because that number is made up almost entirely of citizens from other EU member states (many of whom are employed in the EU institutions based there).

illegally enter the territory of one of the member states at 500,000 every year (EP 2006), some estimates set the ratio of legal to illegal immigrants as high as 1:1, and the number of temporary clandestine migrants may be even higher (CEC 2004). Several EU countries, particularly in Southern Europe, have deployed regularization programs as a policy tool for addressing the problem of undocumented migration. Italy's last regularization program, implemented in 2002, drew in 700,000 undocumented migrants, 350,000 of whom reported being employed in domestic work (Kofman 2005; OECD 2004). Obtaining a residence permit through a regularization program is often more problematic for women migrants than for men. It may be difficult for the women that work in various forms of informal labor or perform domestic work with private homes to provide adequate proof of employment to meet the government's requirements. It is practically impossible for sex workers to qualify for regularization programs (Anderson 2000).

In 1995, the Parliamentary Assembly of the Council of Europe (a body of which all twenty-seven EU countries are members) stated in a Recommendation on the Situation of Immigrant Women in Europe, that "the Assembly is concerned by the situation of immigrant women, a large number of whom live on the margins of society and are confronted by more serious difficulties than those facing immigrant men."<sup>84</sup> Yet more than ten years later, the Parliamentary Assembly again noted that "the access of immigrant women to public, political and economic life remains limited." It went on to

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<sup>84</sup> In the same Resolution 1261 (1995), the Assembly also recommended that the Committee of Ministers of the COE invite member states to *inter alia*: "recognise the right to family reunion for immigrant women and men without distinction; adopt legislation giving immigrant women an independent and autonomous right of residence (not tied to the residence status of their husband); grant immigrant women the right to a work permit independently of their family situation" (paragraph 9).

denounce the “two-fold discrimination” they are subject to as both women and non-nationals and interestingly went on to observe that this discrimination occurred on the societal level in the host country as well as within the immigrant communities themselves.<sup>85</sup>

Women in different immigrant communities face different types and degrees of discrimination. The EP Committee on Women’s Rights and Gender Equity in the 2006 “Report on Women’s Immigration: The Role and Place of Immigrant Women in the European Union” underlines, in particular, the difficulties confronted by Muslim women. The report asserts that many Muslim women are isolated in their homes, or if they do work, often end up being employed in the “grey” economy, which does not afford them any autonomy or financial security. The same report states “it would seem according to the latest reports evaluating national policies for the integration of immigrants, that the gender dimension has not been systematically taken into account either at the level of harmonised policies or at the level of data collection” (European Parliament 2006).

### **Immigrant Women and the Labor Market**

*While immigrant women’s labor is desired, their reproduction—whether biological or social—is not (Chang 2000:10).*

It is commonly recognized that migrant women workers experience a “triple oppression” as women, workers, and foreigners (Andall 2003; Hune 1991; Phizacklea 1983). However, this analysis would go one step further to argue that many third-country immigrant women experience a quadruple oppression as non-European women of color.

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<sup>85</sup> Parliamentary Assembly Resolution 1478 (2006) on the integration of immigrant women in Europe, paragraph 1.

Patriarchal ideology confines women to the role of actual or potential wife and mother who is dependent on a male “breadwinner.” This assumption dictates the conditions under which all women sell their labor and is compounded by sexist and racist hiring practices which restrict their economic activity to certain sectors and types of work. In addition, the sorts of jobs in which immigrant women are generally employed are “largely unskilled, low-paid and insecure in terms of having little social or legal protection. The fact that many of these women are working illegally because they do not have the requisite work permits makes their conditions of work even more insecure” (Freedman 2003:10).

**Table 2: Unemployment Rates for Foreign Women (15-64) in Selected EU Member States, 2004**

	Unemployment Rate <sup>a</sup>	Unemployment Rate for Total National Labor Force <sup>b</sup>
Austria	10.7	5.2
Belgium	15.0	7.3
Denmark	12.7	4.8
Finland	25.3	9.2
France	17.4	9.4
Germany	15.2	7.9
Greece	19.1	11.0
Ireland	5.3	4.3
Italy	13.2	9.3
Netherlands	10.6	3.5
Portugal	9.6	5.2
Spain	17.1	10.7
Sweden	12.6	4.6
United Kingdom	7.3	5.1
<sup>a</sup> 2004 statistics		
<sup>b</sup> 2000-2004 average percentage		

Source: Organization for Economic Co-operation and Development. 2006. *International Migration Outlook*. Paris: OECD.

Foreign-born women in the EU have lower employment rates than women who are EU nationals (see table 2). On average, 44 percent of third-country immigrant women are employed and their unemployment rate is 19 percent (as compared to 68 percent employment and 10 percent unemployment rates for EU nationals) (Eurostat 2003). Thorogood and Winqvist (2003) note that the higher unemployment rate among third-country women is not due to a reluctance to work but is a result of difficulties in obtaining jobs due to personal and structural reasons such as cultural differences and the lack of affordable childcare for non-nationals.

There are variations in the labor force participation rates of women of different nationalities within EU member states. Third-country immigrant women have proportionally lower employment rates even relative to the rate for all immigrant women; this disparity is particularly marked in Ireland, Sweden, Germany, and Denmark (OECD 2006). In France, Turkish and Algerian women have much lower employment rates than other groups of immigrant women, whereas immigrant women from Southeast Asia are employed at a higher rate, or at levels comparable to, French women. In the southern European countries the labor participation rate of immigrant women is higher than that of nationals (Kofman 2005).

If one of the goals of European integration programs is to acculturate migrant women to “modernity” as opposed to oppressive tradition, gainful employ can be considered the first step on the road to incorporation and emancipation for immigrant women. A sensible course of action would be for host states to facilitate third-country immigrant women’s entry into the labor force; this has not been the case. Most (male) migrants are granted entry to a country on the assumption that they will be joining the

labor force, and continued residence is usually contingent upon proving oneself a useful and active member of the economy. It would seem only logical that immigrant women, particularly those from lesser-developed countries, who are viewed as having an unimportant economic role, would be in a more precarious legal situation from the outset (Phizacklea 1991; Kofman and Sales 1992). This phenomenon can be observed in the greater restrictions being placed on family reunification regulations.

Because the main form of immigration for women in recent decades has been family reunification, women's role in the labor market has often been discounted. Authorities simply assume that women are attached to a male relative on whom they rely for both legal residency and economic survival. As already mentioned, this attitude denies the reality that most female family migrants participate in the labor force in one form or another. It also implies some sort of necessary link between women's desire to migrate for any number of reasons—e.g., “to join a migrant from their own country of origin, move as a member of a family unit, especially in societies which have encouraged permanent migration, or meet someone in the course of education, work or tourism” (Kofman 2004b:647)—and her departure from the labor force. However, immigration policy shunts women into categories based on a single rationalization such as labor, family reunification, or asylum.

There are three common difficulties that immigrant women face in accessing the labor market. (1) Women that migrate as dependents have their economic activity legally curtailed by restrictive policies that prohibit the granting of work permits to women in some cases for years (Kofman 2005; Kofman et al. 2000, Lutz 1997). Kofman and Sales (1992) assert that this “insecurity of status keeps many women in informal sector

activities unprotected by trade unions or health and safety and employment protection legislation”(33).<sup>86</sup> (2) Cultural norms and patriarchal family structures can also limit women’s access to the formal labor market. Aside from being the main caretakers for children and relatives and responsible for household maintenance, immigrant women are often forced, out of economic necessity, to do piece-work at home, or perform unpaid sweat-shop labor in family-run businesses. Sometimes the male members of the family mediate all of the woman’s contact with society. Her ability to take advantage of job training or educational opportunities—even learn about openings in the job market—may be limited.<sup>87</sup> (3) Some immigrant women also have higher fertility rates, which is an impediment to full-time participation in the workforce. This can cause a problem because higher birth rates make the family income proportionately lower, and as a result, additional income is more sorely needed (Kofman and Sales 1992).

The position of immigrant women in the workforce is made even more marginal by the fact that the labor market is highly sexually segregated and migrant women become concentrated in a narrower range of occupations than indigenous women. Migrant women tend to be concentrated in the “lowest stratum of female-type jobs in modern technology industries or in those sectors which remained labor intensive and were obliged to turn to the cheapest workforce in order to remain competitive”

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<sup>86</sup> Shirley Hune (1991) remarks that “migrant women experience oppressive working conditions which threaten their health and safety. They receive lower wages than men for comparable work and are marginalized from opportunities for educational and occupational advancement. Their type of employment results in female migrant workers often working alone in isolation from others, making both unionization and integration into the larger society even more difficult” (805-806).

<sup>87</sup> “Nor will the right to social security be applicable when many women are employed ‘off the books,’ work out of their homes, work in private homes, and are otherwise outside the scope of recognized economic activities and social security schemes with no formal records available of their entitlement to social security” (Hune 1991: 812-813).

(Morkvasic 1991:71-72). When immigrant women are given “priority,” it is usually because they represent to employers a reliable source of cheap disposable labor. A study of immigrant women’s employment patterns conducted by Annie Phizacklea in the 1980s found that unskilled workers are in the most danger of losing their jobs during “structural or conjunctural crises;” this fact makes immigrant women particularly susceptible because they tend to be concentrated in the least-skilled, lowest-status jobs. Phizacklea (1983) concludes that, “there is little doubt that migrant women are a more vulnerable section of the workforce in terms of unemployment than either their male counterparts or indigenous men and women” (106).

The gendered division of labor still exists in the private and public spheres in both the developed and developing world; women either as biological or de facto “mothers” still perform the bulk of caregiving and labor within the home. Women are viewed as endowed with innate capabilities making them especially suited to work and caregiving in private homes. Yet domestic work is considered unskilled labor and holds a particularly low social status. Lewis (2001) attests that, “despite the tremendous need for, difficulty of, and importance of, the work women do in the home, domestic workers remain officially and socially classified as unskilled” (219). The devaluation of this type of labor, both in monetary and social terms, is linked to gender- and race-based discrimination. In some Northern European states, domestic labor is not considered an officially recognized form of labor eligible for a valid work permit. This denigration of one of the few avenues many third-country immigrant women have for entering the labor market, combined with the “racialization of migrant women, reifies them in an inferior

position which devalues their skills and portrays them as unskilled and only fit for domestic work” (Kofman 2005:27).

Migrant women’s employment patterns in the EU are influenced by changes both in the global economy, which affect the supply, and by the restructuring of the welfare state and society in Europe, which affects the demand. Migrant women are filling the caregiving gaps left by increasing numbers of European women joining and rejoining the paid labor force, and by a scaling back of state services for the care of children and the elderly. Most of these women on the move from poor and developing countries to rich countries are assuming the domestic roles that middle- and high-income working women in industrialized nations no longer have the time, energy, or inclination to fulfill. This subject has been overlooked partly because “many of the new female migrant workers are women of color, and therefore subject to the racial ‘discounting’” commonly encountered by Algerians in France or Asians in the United Kingdom for example. The racism is compounded by the “private ‘indoor’ nature of so much of the new migrants’ work...nannies and maids are often hidden away, one or two at a time, behind closed doors in private homes” (Ehrenreich and Hochschild 2003:3). Many immigrant women perform the work of “surrogate housewives” or “surrogate mothers,” caring for children and elderly and maintaining the home. Female migrant labor allows prevailing norms to persist, “thus racialized and class privileges are preserved as well as patriarchal structures and privileges” (King et al. 2004:36).

International migration can serve to reinforce the gendered division of labor. The demands of the labor market interact with the various avenues of entry which can include company sponsorship, professional recruitment, occupational and personal networking,

or individual wherewithal. The channels of migration which are open to individual migrants also vary depending on the employment sector and familial resources and arrangements. All these dynamics combine to “create highly gendered trajectories” (Kofman 2004b:655).

In addition to gender segmentation and racial discrimination, there are legal constraints that exacerbate immigrant women’s already limited access to the job market. Indigenous labor and EU nationals have priority in obtaining any available jobs, and work permits are usually only granted when no indigenous workers can be identified and secured. When this is the case, it is a good indication that these are jobs that are shunned by the native workforce. However, there are always employers who will hire aliens illegally under more exploitative conditions than the formal sector allows.

The main routes of entry for unskilled migrants (or migrants with skills that are not considered socially and economically valuable) are as contract laborers or guestworkers. These labor migrants have very few opportunities for transitioning to a more secure residency status or for family reunification. Gender also structures the admission of lesser skilled migrants. In some EU member states, the types of jobs that women often fill such as domestic laborer are not recognized as eligible for official work permits. Even in countries that have established quotas for domestic labor, the demand exceeds the number of valid permits and many women have an undocumented status (Kofman 2005).<sup>88</sup>

The most oft-cited problems associated with domestic work are low pay and long working hours. The very personalized and subordinate nature of the relationship with

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<sup>88</sup> In the EU, Italy, Spain, and Greece have instituted quotas for domestic labor, and a few other countries such as Germany are in the process of developing programs (Kofman 2004b).

their employers makes it difficult for many immigrant domestics to limit unpaid overtime, get time off, and receive prompt payment of wages. In many cases there are few health and safety provisions within the home, and if a worker does become sick or disabled, wages are withheld or she can be dismissed. Various forms of physical and psychological abuse are also common (Kofman 2005).

Across the EU, the numbers of people, mainly women, performing paid domestic work in private households has been on the rise. Based on 1996 data, Andall (2003) found that in Europe, on average, 46 percent of domestic labor was carried out by migrant women, and this figure increased to 70 percent when she looked at the domestic labor market in major cities. The importance of the domestic labor sector, as an employer of migrant women, varies among ethnicities; some groups of migrant women such as Filipinas are more heavily represented in this sector than women of other ethnic origins (Kofman 2005).

Different member states have different policies; for example, in southern Europe, where the domestic sector is by far the main employer of migrant women, domestic service is officially recognized as valid labor force participation. As mentioned earlier, Spain has established an annual quota, and Italy passed legislation in 2002 to regularize domestic workers. Migrant women employed in northern European countries such as Austria and Germany are more likely to be rotating migrants from Eastern Europe and the accession countries,<sup>89</sup> who are eligible for short-term three-month residence permits, whereas, domestic workers from South East Asia or Latin America are often undocumented (Morokvasic 2004). In 2002, Germany passed legislation allowing

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<sup>89</sup> Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Bulgaria, and Romania.

migrants from certain accession countries (Poland, Slovakia, Slovenia, the Czech Republic, and Hungary), who find employment in households caring for an elderly relative, to work and reside legally for up three years (Menz 2002). This situation leads to stratification among migrants across Europe: women migrants who seek employment in the domestic sector are differentiated according to nationality, race, religion, and language skills which can lead to significant variations in wages and working conditions. Filipinas, for example, are the most sought after domestic workers because they are generally well-educated and Christian, while Moroccans in Spain are deemed of lesser value, which can result in diminished bargaining power with employers and lead to lower wages and worse working situations (Anthias and Lazaridis 2000). The trend also seems to be emerging that caregiving for the elderly is more liable to lead to work permits and regularized status than care for children (Kofman 2005).

Skilled migrants are often portrayed as “unproblematic, easily assimilated and, of course, beneficial to the economy” (Kofman 2005:36). Aside from easier entry, the prospect of settlement and family reunification are defining features of skilled migration. International nurses that are recruited to work in the UK are given the option of being accompanied by family members. Spouses of skilled migrants can be given the right to work in certain sectors of the labor market. In some cases, discretionary limits are relaxed and skilled migrants are given greater freedom in choosing to bring in parents and other relatives in addition to spouses and dependent children (Kofman 2004b).

Skilled immigrant women are subject to the same patterns of gendered labor-market segregation as female nationals.<sup>90</sup> Many of the recruitment drives for skilled workers were directed towards the informational technology and scientific sectors and most of these work permits were awarded to men. As Kofman (2004b) contends, men are often cast as the “protagonists of knowledge-driven economies” (645). In 2000, Germany initiated a “green card” scheme for IT specialists, which granted work permits valid for up to five years. Although this program ended in 2004 and has been superseded by the 2005 immigration act, while it was in effect, 88 percent of these green cards were granted to men (Heine 2005). Women have tended to seek employment in the social welfare sector, e.g., education, healthcare, social work, community services—“the public face of the global chain of care and social reproduction” (Kofman 2005:29). And while the situation is now changing, many of these public sector jobs were formerly closed to migrant labor.

Similar percentages of immigrant women work in the health sector as native-born women. The number of immigrant women in this sector is particularly high in the Scandinavian EU countries: 29 percent of immigrant women in Sweden, 27 percent in Denmark, and 24 percent in Finland work in healthcare professions (OECD 2006). The severe nursing shortages, particularly in the UK and Ireland, have produced a global labor market, with the majority of the migrants coming from the Philippines and Africa. Despite being qualified and having been recruited, one UK study found that many international nursing recruits felt undervalued, that their skills were underutilized, and

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<sup>90</sup> When looking at the overall picture of the employment of immigrant women, “the image that emerges is essentially of a segmented labour market where foreign-born women tend to share the same characteristics of employment as women in general, but generally in a more pronounced fashion” (OECD 2006). And the situation of third-country immigrant women is even more critical.

that they were subject to racist and xenophobic attitudes (Kofman 2005). A significant proportion of immigrant women are employed in education in certain EU countries (15 percent in Sweden and 13 percent in the UK) as well (OECD 2006).

The entire discussion surrounding the sex industry is highly emotionally and politically charged. In 2001, the European Commission issued a strategy statement entitled “Trafficking in Women. The Misery Behind the Fantasy: From Poverty to Sex Slavery” in which it acknowledged the reasons behind both the supply and the demand for the commodification of women and the trade in human bodies.<sup>91</sup> However, this study is primarily concerned with the issue from the perspective of the larger circulation of female labor and their access to rights. While there are as yet few EU sources of data which provide numbers of trafficked women, one study found that these women were primarily single and divorced women who sought employment in Western Europe to support children and/or other family members (Uçarer 2001). Most EU initiatives have sought to curb sex trafficking with some more recent efforts to raise awareness about the particular difficulties migrant women face and to protect victims who come forward. However, repressive tactics have been “more in evidence than the protection of migrant sex workers’ human rights. Discourse on trafficking by recipient states has been couched in terms of migration control and organized crime, such that movements of migrant women have been restricted and deportations commonplace” (Kofman 2005:32).

Gender, nationality, and race/ethnicity all factor into the demand and the supply

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<sup>91</sup> “The underlying root causes of trafficking in human beings include poverty, unemployment and lack of education and access to resources. Clearly, if on the one side, people are ready to take the risk of falling into the hands of traffickers in order to improve their living opportunities, on the other side, there is a worrying trend in industrial countries to use cheap and undeclared labour forces as well as exploiting women and children in prostitution and pornography. In particular women are in a position of vulnerability to become victims of trafficking due to the feminisation of poverty, gender discrimination, lack of educational and professional opportunities in their countries of origin” (CEC 2001).

structure of domestic workers and female laborers more generally.<sup>92</sup> Arguably the EU has started to take responsibility for this aspect of the human rights of migrants by attempting to remedy the push factors of migration in recent legislation proposed since the Tampere European Council Summit. When the immigration of women is examined from a human rights perspective, how does the recruitment and trafficking of women to become domestic caregivers and sex workers affect a migrant woman's right to family and community life? Another set of factors that are just beginning to be addressed in human rights analyses of women's migration relate to the incentives for moving in the first place. A woman's reasons for migrating are usually tied to the failed realization of social and economic rights in her country of origin. Underdevelopment, unemployment, poverty, hunger, civil unrest, and lack of adequate healthcare all occur in a transnational context. In host countries in Europe or North America migrant women are often portrayed as seeking greater personal autonomy and escaping the cultural and economic oppression they experience in their home country. As Lewis (2001) argues:

The "enlightened" North can thus conveniently import migrant workers from the South when necessary. However, because such limited admissions are seemingly based on humanitarian considerations, Northern governments can also more easily exclude these workers when its "generosity" runs out. Northern economies can only "take care of" so many "victims" of the political, social, and economic conditions of the South for so long. (225)

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<sup>92</sup> Hope Lewis (2001) writes: "Sending countries may be economically or politically dependent on the commodification of identity as well. Remittances from migrant workers are likely to be one of the most important sources of private transfers to the national economy. Gender stereotyping may figure into the perceived value of the potential migrant on the international market as in the trafficking of women for sex work and household work. The resulting formal and informal arrangements between host countries and sending countries have enormous human rights implications for the migrant workers involved and the communities they enter and leave behind" (203-204).

### **Immigrant Women and the Law**

Historically, legislative questions surrounding women's migration into the EU were usually lumped in with family policies regarding the successful integration and welfare of immigrant families. The legal status and independent citizenship of foreign women was considered of marginal importance. To the extent that women have been recognized as participants in the migration cycle, they have generally been viewed as dependent on male migrant workers either when reuniting with spouses in the host country or patiently waiting for their spouses to return home. This belief that all women are reliant on male support, whether it is in the form of a husband or the state, "has defined the social, economic, political and legal positions of migrant women in the receiving countries" (Hune 1991:802; Morokvasic 1991).

The law can only address discrimination in cases for which it can be readily empirically ascertained and documented. Third-country immigrant women who hold household jobs face many risks: "low or unpaid wages; long hours; poor or dangerous working conditions; physical and sexual abuse; lack of benefits; long and forced separations from children, partners, and extended family; exposure to harmful chemicals or other dangerous conditions in the home; social isolation; arbitrary arrest, detention, and deportation" (Lewis 2001:219). Fixed-term, guestworker, and more conditional types of entry are becoming more common, which also entail a more limited set of rights. Establishing a factual record of the human rights violations of immigrant women is difficult, because these women often do not have adequate information or access to resources to make a complaint; in some cases, they are afraid of jeopardizing their

tenuous status in the host country. The history of police violence against immigrant communities and communities of color in many European countries makes it unlikely that immigrant women will turn to law enforcement for protection. Women's dependent legal status becomes a major source of insecurity (Freedman 2003).

Aside from more stringent entry requirements, one of the methods used by governments to discourage migration is the scaling back of domestic health and welfare benefits. These measures can have an inordinate impact on immigrant women because of the role women perform in the family: "when women are expected to provide for their family's welfare, the burden of cuts and restrictions in access to education, medical care and welfare benefits may have a specifically negative impact on them" (Freedman 2003:11). The implementing of these new restrictive policies also creates a stratification of rights between older and more recent immigrants. Not only entitlements but also obligations can be structured along gendered lines; this development is apparent in the integration contracts and exams being introduced in countries such as France and the Netherlands. As Kofman (2005) claims these contracts "have often been constructed as the basis of a gendered representation of problematic immigrant communities, composed of unruly young men and traditional females (generally Muslim), brought in from distant countries and unfamiliar with prevailing social and cultural values of the country in question" (39).

While migration can present an opportunity for increased autonomy, personal empowerment, and financial independence for third-country women, and it is important not to cast women as the victims of globalization (Phizacklea 2003), crossing international borders often succeeds in reinforcing their formal dependency on what are

assumed to be primary male migrants. From a legal perspective, “the rights of dependent migrant women are derived from the male in the first few years after their entry; sometimes this may last for the whole of their lives in the host country” (Kofman et. al. 2000:86).

Referring back to the separate spheres discussion in chapter 2, immigrant women are even more susceptible to abuse or violations of their rights in the private sphere because they are in a vulnerable position in relation to the state. An immigrant woman may not perceive that she has any societal support or legal recourse. They must “adapt themselves and their children to a new social and cultural environment, often without the support of an extended family and community structure and adequate state supported child care” (Hune 1991:805-806). The family life of an immigrant woman, which may include children she brought from her home country, is monitored quite closely, while the home life of the European family in which she is a caretaker or domestic worker usually is not. An immigrant woman’s choices can be assessed and circumscribed by the state in certain arenas in which she most actively exercises her agency, such as in how to care for her children. But her situation can also be ignored when she most needs protection or assistance. Linked to a government’s professed reluctance to intervene in the complicated sphere of domestic relationships, immigrant women may be left unprotected due to predetermined attitudes, based on racial stereotypes held by law-enforcement and government agents, who may even believe that, through non-enforcement, they are demonstrating cultural sensitivity.

### *Residency*

A conspicuous example of discriminatory legislation is that an immigrant woman's residency status is often directly tied to her position as a dependent on an employed male, who is considered the primary head of the household. An immigrant woman who wishes to leave her husband is subject to deportation particularly in the early years of settlement. The jobs available to migrant women in many EU countries such as nanny, live-in maid, prostitute, or sweatshop laborer are not a good fit with childcare, and are not the types of occupations which easily lead to a residence permit.

The residency requirement before becoming eligible for reunification for third-country migrants varies among EU member states. In Germany and the Netherlands, a dependence on social benefits can also disqualify migrants for family reunification. To cite the German example, on January 1, 2005 the Act for Controlling and Limiting Immigration (*Gesetz zur Steuerung und Begrenzung der Zuwanderung*) entered into force. This new policy seeks to streamline and simplify the migration process by collapsing the former system of separate residence and work permits into one application procedure. The new procedure grants a single residence permit which also allows an immigrant access to the labor market. Since this law came into effect it has been made easier for migrants who already have a relatively secure unlimited residency status to apply for permanent residence; however, it is still not classified as a right but a privilege.

An immigrant woman in Germany may now obtain her own residence permit independent of a husband or father; however, the new legislation mainly benefits second and third generation women. While a separate residence permit can lessen the dependency of families on a "primary" male, this complicates the process of fulfilling the

adequate living space requirement. A family risks expulsion if they have a baby, because the acceptable limits for sufficient living space may have been exceeded. Whether a trailing wife who is joining her husband is able to work or not is dependent on the type of residence permit her husband holds, and in some cases a woman can be denied legal employment for up to two years. Applicants are now required to have contributed to the social welfare fund for sixty months in order to qualify for unlimited residence. This is especially difficult for immigrant women whose access to stable and legal employment is limited (Heine 2005; Klusmeyer 1993).

In the Netherlands the gender bias present since inception in the legal discourse pertaining to national membership, “has not so much disappeared, as been recast in ethnic terms” (van Walsum 2003:4). In addition, it has become more difficult for an immigrant woman to regularize her status through marriage. While immigrant women are perceived as subject to oppressive foreign cultural norms, this alien condition is actually reinforced by Dutch immigration law. Immigrant women enjoy few avenues for achieving legal status outside of marriage. If they do decide to marry a Dutch citizen, in the first years of their stay they are denied the same level of autonomy granted to Dutch women because they must remain married and cohabitating for three years before they can qualify for residency independent of their husbands.

In 2004, France introduced the Welcome and Integration Contract (*Contrat d'accueil et d'intégration*) for recent immigrants. Migrants who wish to qualify for a long-term residence permit are required to sign this contract, which includes the stipulation that family reunification will only be permitted for those who can prove to have successfully integrated into French society. France adopted a new immigration and

integration law on July 25, 2006 which gives the government new powers to restrict illegal and family migration. The law makes it more difficult to obtain residency through marriage to a national. The time period that spouses of French citizens must wait before being eligible to apply for a ten-year residence permit has been extended from two years to three (Murphy 2006). A woman's autonomy can be severely limited as the result of a lengthy probationary period; it can also "mean that women are tied to failing and sometimes violent marriages, in order to maintain the legal right of residence and those of their children" (Kofman and Sales 1992:33).

As a result of increasingly restrictive policies and practices dictating the entry and stay of immigrants in France, many third-country migrant women have had no recourse but to adapt to living under very insecure conditions by joining the ranks of illegal immigrants or "*sans-papiers*" (Lesselier 2003).<sup>93</sup> A law passed in 1998 permitted the regularization of those *sans papiers* who met certain qualifications such as having lived in France for at least ten years and having family members living legally in France. One researcher found that for some immigrant women who had fought and won the right to obtain a legal residence permit, the local administration would only grant them a visitor's card which does not permit them to enter the labor market (Cissé 2000).

There has been a fair amount of public policy attention paid to the domestic violence in immigrant families that sometimes occurs during the initial years of settlement, when women are most vulnerable to deportation. Feminist campaigns in the UK have pressed for domestic violence to be taken into consideration when marriages

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<sup>93</sup> "*Sans-papiers* meaning literally those 'without papers,' is the term generally used to refer to those residing in France 'illegally,' without the necessary residence permits. Although some of these 'illegal' residents may have entered France outside of the legal channels, others may have been residing legally in France for varying lengths of time, and have seen their status 'illegalised' through changes in laws and policies which have led to non-renewal of their residence papers" (Lesselier 2003:35).

dissolve during this probationary period. However, this has also been used as a useful justification for extending the amount of time needed to qualify for permanent residence (Kofman 2004a). Low divorce rates among immigrant groups, namely Turks and Moroccans, are usually ascribed to the “traditional” cultural and religious practices of these groups. But they could just as easily be attributed to the legal fetters placed on individuals and families that require them to remain married for residency and employment purposes.

### *Naturalization*

Debates about and changes to naturalization laws often revolve around the following issues: *jus sanguinis* and *jus soli* regulations, dual citizenship, and residency qualifying periods. Formerly, children born in France automatically acquired French citizenship when they reached majority, whereas now a formal declaration of intent and fealty is required. Since 2000, children born of foreign parents in Germany are legally German and are able to retain the nationality of their parents; however, by the age of 23 they are forced to choose between their foreign citizenship and their German citizenship. Among the Western European EU immigration states Germany and Austria hold to a strict renunciation policy, while Sweden has quietly accepted dual nationality. One of the most common requirements for *de jure* citizenship in a host country is uninterrupted residence for what is deemed a sufficiently long period of time.

An immigrant’s decision to apply for naturalization is influenced by her desire to maximize the bundle of rights she will be able to enjoy. If an immigrant has a secure residency status and is able to access the labor market and benefit from welfare

entitlements in her country of residence, other factors such as emotional ties and the ability to return to and buy property in her home state may outweigh the benefits of naturalization. However, increasingly restrictive immigration laws can lead immigrants to take a more “instrumental attitude towards naturalization... Choices are further influenced by what can be analysed as imposed transaction costs in naturalisation. These include often substantial payments both for renouncing a previous citizenship and for acquiring a new one, as well as other aspects of the procedure which function as deterrents, such as long waiting periods, language tests, and the scrutiny of private lives” (Baubock and Cinar 1994:192).

A new naturalization law went into effect in Germany in 2000; nevertheless, naturalization is still a very difficult process. Among adult applicants, citizenship is restricted to those who are at least 18 years old and have been living in Germany legally for at least 8 years (this was reduced from 15-years residency). The applicant must have a solid mastery of the German language, demonstrate a basic knowledge of German law and history, be committed to the constitutional order, and be willing to renounce his or her former citizenship. There are also certain tangible factors taken into account such as the proven ability to support oneself and one’s dependents. The naturalization charges vary by *länder*, but in general, new application fees are five times more expensive than under the old law. The sixteen *länder* are responsible for receiving applications and adjudicating the process. Ultimately, naturalization is based neither on length of stay nor on level of productivity, but on more elusive considerations such as the degree of integration into German society—the determination of which is left entirely to the discretion of government officials. Because of these strict preconditions, Germany has

one of the lowest percentages of naturalized citizens in Europe (OECD 2001; Rathzel 1991).

Immigrant women in Germany are even less likely to become naturalized. This is due to the fact that a female immigrant's chance of finding employment in the formal sector is curtailed by the difficulties in obtaining a work permit and the segmented nature of the labor market. Women are usually confined to the least well-paying jobs, which makes their ability to prove themselves capable of supporting themselves and their dependents greatly reduced. Residence criteria for a woman may often be contingent on the status of her husband or father. These problems can be compounded by the situation in some immigrant communities (e.g., devout Muslim Turkish communities) in which the patriarchal family structure limits a woman's contacts and interaction with government agencies or civil society (Kofman 2005; Klusmeyer 1993).

A law that went into effect in France in November 2003 introduced new restrictions into the process of acquiring French nationality through marriage to a national. The number of years that a foreigner is required to be married to a citizen in order to be eligible for nationality by declaration was increased from one year to two. The spouses also have to provide proof that they are living together. The foreign spouse has to demonstrate a passable fluency in the French language and demonstrate knowledge of the rights and duties attendant on French citizenship (OECD 2006).

## **Conclusion**

A migrant woman's skill level, nationality, avenue of entry, and legal standing all decide her rights and access to entitlements. The immigration policies that were

formulated after World War II provide the basis for the increasingly restrictive controls that predominate in Europe today. This legislation has historically been discriminatory against women immigrants. This discussion takes as a premise that all women are economic and social actors, not just passive consumers of resources and entitlements within the state. Ethnic minority immigrant women in particular, usually because they enter the economy at the lowest socioeconomic level, must actively provide for their own livelihood and that of their families, whether as part of the formal or informal economy.

Human migration is increasingly being seen as a global policy concern. As women are taking a lead in redefining issues of social justice and global governance, policymakers are beginning to recognize that women's issues are not marginal or separate but central aspects of any constructively fashioned global agenda. The traditional-stages model of migration that has dominated the academic and political discourse has outlived its usefulness. A more useful model would take into account the variety of modes of gendered migration and their evolution and transformation over time as well as acknowledge national and cultural differences.

Immigration controls and discrimination affect all migrant workers; however, the root causes of insecurity "are reinforced in many cases for women, by an underlying public/private divide which assumes that their role will be a domestic one, and thus ignores their very real presence in the labor market and all that this entails" (Freedman 2003:9). Women hold a very special place in the rhetoric of immigration because they are nearly always perceived as actual, or potential, wives and mothers. In particular, Muslim women of color are viewed as subjugated, isolated, baby producers; "as racism increases the dominant stereotypes of migrant women take on a special significance" (Phizacklea

1983:101). As the birth rate of white Europeans continues to fall, we hear of the “Islamization of Europe.” And the terms immigrant and Arab become conflated to take on one negative connotation. Because of their marginalized legal and social status, racism and sexism interconnect in a unique way for immigrant women.

This chapter has attempted to illuminate the repercussions of having immigration policies across the EU member states be based on a male model of immigration and how this has affected the legal and economic status of immigrant women. There are obviously structural factors that have affected the flow of immigrant labor in the EU: war, economic expansion, and recession, to name the major ones. These constraints of the international system help to determine policies. But the main unifying aspect of their immigration policies is their myopic and reactionary nature. Most EU member-state governments failed to recognize that their countries were becoming fully multicultural societies until it was too late. If each of them had devised more coherent and cohesive policies when it first became obvious that large settled communities were being established, perhaps the worst of the current climate of terrorist fears and racism could have been avoided. Many women immigrants are left in a sort of legal limbo because of the gendered nature of these immigration policies, and this has a direct impact on their ability to be joined by family members, their labor market activity, and their rights.

## Chapter 5

### Family Reunification Policy in the European Union

The legal and political factors regulating immigration have a considerable influence over the magnitude and composition of family migration in the EU and are particularly salient for third-country nationals. This includes the gender balance of immigration flows (Battistella 1995). The European Women's Lobby<sup>94</sup> contends that the particular experiences of immigrant women are not taken into account in policymaking at the EU level. They state in their position paper on the topic: "by maintaining a 'gender neutral' approach to immigration, women's human rights and the experiences and needs of women are being ignored in the current debates and policies around immigration. As a consequence, the traditional and patriarchal gendered roles are usually reinforced, and immigrant women are often located within the traditional family roles" (EWL 2004). This gender neutrality is challenged in the context of the evolution of family reunification policy in the EU. Family migration brings to the fore the conflicting priorities of human rights norms and the territorial integrity of states. Migration for family reunification occupies a special place in this conflict between international norms and state priorities because of the centrality and importance of the family in society. Ostensibly, family reunification policies are designed to support the family and protect both women and children, but legislators have interpreted this mandate in a very restrictive manner.

One of the EU's stated goals as articulated by the 1999 Tampere European

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<sup>94</sup> The European Women's Lobby (EWL) is a nongovernmental organization founded in 1990 and is an umbrella organization for over 4000 women's groups across the European Union. It has a Secretariat in Brussels and is partially funded by the European Commission. It carries out lobbying and advocacy activities at the EU level. It monitors EU policy and legislation and produces analysis and position papers for its members, for the EU governance bodies, and for member-state governments.

Council Presidency Conclusions is to strengthen the rights of third-country nationals in order to make them comparable to the rights of citizens of EU member states. One of the legal instruments formulated to achieve this goal is the Council Directive 2003/86/EC of September 22, 2003, on the right to family reunification. The directive is the first instrument adopted in compliance with Article 63(3) of the TEC and explicitly establishes a “right” to family reunification for third-country nationals. This chapter will evaluate the directive on family reunification within the context of EU immigration policy and human rights legislation in order to determine if this particular policy can be considered as a step forward in strengthening aliens’ rights or if member-state prerogative renders the “rights talk” devoid of practical impact.

Does the Directive succeed in fulfilling its own internal mandate of granting third-country national rights comparable to those of EU citizens and does it fulfill its international human rights obligation of respecting the right to family life and the rights of women? This chapter will examine the rules laid out for third-country nationals and their family members in order to determine if they live up to international law. The external rationale of the Directive pledges adherence to international human rights norms; the internal rationale of the document advocates instituting more “vigorous” and effective integration policies by facilitating family reunification. There is also a gendered rationale for the Directive which pledges to respect the rights of women in particular. All of these rationales will be examined to see if the EU has succeeded in meeting its goals.

## **Framing the Debate**

Family reunification refers to the desire and effort on the part of a primary migrant to unite in his/her current country of residence with his/her immediate family members—usually consisting of spouse, dependent children, and sometimes parents and others when permitted by individual state laws. Another form of family migration, which is often treated as a subset of family reunification, is more accurately referred to as family formation or marriage migration. One type of family formation occurs when succeeding generations of children of migrants decide to bring in spouses from the familial country of origin. The other type of marriage migration comes about when permanent residents or citizens choose to bring in a spouse from abroad. International marriages also occur as a result of tourism, as well as educational and work-related interactions.

The prevailing hypothesis in family migration research is that women generally migrate as “tied migrants” who follow a primary male migrant and invariably make economic sacrifices so the family as a whole might benefit (King et al. 2004; Kofman 2004a). Boyle and Halfacree (1999) observe:

the implied institutional nexus of the “traditional” nuclear family in which “rational economic man” is embedded allows little space for migration to be interpreted in ways other than as a (male) response to employment factors. Indeed, the public/private dichotomy of husband, sphere of production and waged labour versus wife, sphere of reproduction and domestic labour has been a powerful organizing principle behind migration research, whether this is stated explicitly or, as more often, implicitly, as has been the case within almost all areas of social science. (6)

The assumption of dependent wife is based on the neoclassical “human capital model” of migration in which rational utility-maximizing individuals move when they expect better economic prospects and outcomes at the destination than they had at the point of origin. The ubiquity of the “wives’ sacrifice” argument negates women’s agency (Bailey and Boyle 2004). Not all women are tied migrants, not all women suffer as result of migration, and not all women migrate as a consequence of a cost/benefit analysis. Economic factors do not fully explain migration patterns; a large share of movement to industrialized nations is driven by family and ethnic ties that may not be related to economic conditions.

Much family migration research remains curiously mum on the power dynamics within families themselves. Gendered theories challenge the idea that migration decisionmaking results in a coherent and reasoned assessment of options, and contend that “decisionmaking processes and intra-household power relations may be influenced by the *relative* resources of the male and female partner.” Gender-role theorists’ “many attempts to recognize common systematic experiences have linked the roles partners assume to the operation of patriarchal power relations in the household” (Bailey and Boyle 2004:231-232). This focus on resources as power rather than simply as economic resources mitigates the ascribed gender-neutral logic of the human-capital model. However, both the human-capital and the gender-role accounts fail to capture the agency of women and men in the functioning of the household.

Family migration has been the subject of more nuanced methodological and empirical research over the last decade. Network-based and transnational approaches to the study of family reunification allow for a better understanding of the evolving types of

family migration as well as the differences in migration strategies which vary along class, ethnic and gender lines. Transnationalism is defined as “the processes by which immigrants forge and sustain multistranded social relations that link together their societies of origin and settlement” (Basch et. al. 1994:7). Due to expanding and improved communication and transportation options, many immigrants create and maintain social networks that traverse geographic, cultural, and political boundaries. Monica Boyd (1989) asserts that “studying networks, particularly those linked to family and households, permits understanding migration as a social product—not as the sole result of individual decisions made by individual actors, not as the sole result of economic or political parameters, but rather as an outcome of all these factors in interaction” (642). The agency of individual men and women as well as the family as a collective decision-maker is explored. The transnational family context is a very important factor in providing the motivation to migrate in the pre-migration stage. Family connections, resources, and informational networks can both support and impede women’s immigration. Immigration policies in both sending and receiving countries affect women’s ability to migrate and impact the gendered dimension of international migration processes (EWL 2004).

Family migration has typically been treated by policymakers as second-order migration with a negligible impact on the labor market—as distinct from male-led labor migration. The migration of women is identified with “dependency rather than work and autonomy” (Kofman 2005:16). However, female family migrants are a diverse population and can gain entry under the auspices of family reunification policies or as the spouses of skilled migrants. Given the increase in skilled migration and marriage migration, many

well-educated and highly qualified women find their careers derailed when their professional degrees and credentials are not recognized or when they are blocked from public-sector employment. Notwithstanding the importance of family migration, many issues have emerged that have not been given adequate attention by policymakers. These include the ways in which the composition of the family itself is undergoing changes, the gendered aspects of family migration, and the different repercussions policy measures have on men and women.

The discourse on family migration in early European scholarly literature zeroed in on the first years of family formation in the new country of settlement, when the reunited nuclear family was estranged from extended family and community ties. This scholarship tended to focus on the discord between husbands and wives and between generations brought on by alienation and isolation. The family was not used as a unit of analysis for the purposes of research and the policy formulation that has been informed by it for two main reasons: the economic cost/benefit theories of migration discount the family because the activities that take place in the home are often not conducive to measurement in monetary terms; and the view that migration is a formal arrangement between the individual and the state. This predisposition is strengthened by the focus on the primary applicant, generally assumed to be a male head of household (Zlotnik 1995).

Another reason for the oversight—a view which has been reinforced and perpetuated by immigration policy—is the assertion that family reunification is a derivative type of migration which associates “female migration and dependency rather than work and autonomy” (Kofman 2004a:245). According to this line of reasoning, family migration was simply an unintended consequence of the crackdown on labor

migration in Europe in the 1970s.<sup>95</sup> One of the outcomes of the treatment of female migration as secondary is to ignore the impact that family migration has on the labor market and the economic contribution of women. There is even an unfounded notion that migrant women do not seek employment. The patterns of family migration have evolved since the stoppage, but women's reasons for migrating were always more diverse than the dominant explanations accounted for.

The eligibility criteria for family reunification are among the main mechanisms states utilize to control the scale, direction, and composition of migrant flows. The subtext in family reunification policies reveals each state's aspirations for which groups and categories of people it deems desirable as citizens. Policies and criteria change as priorities change; family reunification policy has never been simply an open-ended humanitarian impulse. Policies adapt to exclude or admit what are perceived to be more or less desirable immigrants as migratory flows change in response to global social, economic, and political conditions.

### **International Protections**

International law provides states with a strong humanitarian and moral justification for allowing family migration, but has yet to establish a universal right to family reunification for either foreigners or citizens. International instruments, which contain provisions dealing with family migration apply to only a small fraction of the various categories of migrants and are often equivocally worded. States retain a great deal of freedom in asserting their interests not only due to the sovereignty principle but also

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<sup>95</sup> For example, Nicolas Sarkozy argues that the failure of France's immigration system "can be traced to 1974, when migration inflows shifted from being worker dominated to family dominated" (Murphy 2006).

because of the ambiguities and conditionalities contained in the international instruments themselves. A number of scholars have addressed the question of whether a right to family reunification can be extrapolated from international and regional conventions concerning the rights of migrants (Lahav 1997; Perruchoud 1989). Two sets of international legal principles are relevant to the discussion of family reunification: those that pertain to freedom of movement and those that deal with the family as a fundamental component of society.

All the main United Nations human rights instruments confer protections to families. The main categories are protection from arbitrary interference with the family and stipulations that prohibit discrimination in allowing and recognizing marriages. Article 12 of the UDHR states that, “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.” This right is also recognized by Article 17 of the ICCPR, and Article 10 of the ICESCR accords protection and assistance to the establishment of the family and care for dependent children. Article 16 of the UDHR reads: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.” Similar provisions appear in both Article 23 of the ICCPR<sup>96</sup> and Article 5d of the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966), which guarantees the right to marry and choose a spouse “without distinction as to race, colour, or national or ethnic origin.” All of these international instruments are widely endorsed and, with the exception of the UDHR, are binding on their substantial number of state signatories.

These international instruments inform family migration policies but they also allow states a great deal of latitude for a number of reasons: they do not specify to whom

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<sup>96</sup> The right of men and women of marriageable age to marry and to found a family shall be recognized.

they apply; are somewhat vague; defer implementation to the national level; address the obligations of states in relation to their citizens in general; and are not designed to aid individuals in challenging state authority. The only clear case in which human rights law is applicable to family reunification is when pertaining to state citizens. And even then, the state can assert its prerogative by placing restrictions on which relatives are considered “immediate” and thereby eligible for reunification migration. Finally, international human rights must be adopted into national-level policies in order to be realized. Lahav (1997) makes the important point that

regardless of definition, it may be argued that respect for the family unit is not tantamount to family reunification. The former is understood to be a principle, while the latter is considered a means of implementation of such a principle.

Thus, while in general it is agreed that the family unit should be protected, it does not necessarily follow that this should be achieved through migration.(360)

Some additional international legal instruments have dealt with the rights of foreigners to family reunification. Just as a citizen has the most incontestable legal case for being reunited with her family members, a foreigner’s legal status in her country of residence is the most important determinant of whether she will be able to be reunited with her relatives from another state. The debate surrounding family reunification mainly applies to documented foreigners who qualify for long-term residence.

The *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (MWC) extends human rights protections to a population that is unprotected by national laws. The MWC “views migrant workers as more than laborers or economic entities. They are social entities with families and have

rights accordingly, notably that of family reunification” (Hune 1991:808). Article 44.1 of the Convention stipulates that states must “ensure the protection of the unity of the families of migrant workers.” However, the following paragraph reads, “States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers” with their spouses and children (Article 44.2). The wording of this article does not put a very great onus on the state to make sure that this right is upheld. Article 4 of the MWC reads, “For the purposes of the present Convention the term ‘members of the family’ refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.”

The *Convention on the Rights of the Child* (1989) has been ratified by 193 states as of April 2007 (the U.S. and Somalia are the only two non-parties).<sup>97</sup> Due to this level of support, it is considered to enjoy a greater legitimacy than almost any other international instrument. Article 9.1 establishes that “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as...one where the parents are living separately and a decision must be made as to the child’s place of residence.” Further, Article 10.1 states, “applications by a child or his or her parents to enter or leave

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<sup>97</sup> For the status of the Convention, see the Office of the United Nations High Commissioner for Human Rights website at <http://www.ohchr.org/english/countries/ratification/11.htm#N6>.

a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.” The strength of this Convention is in its general applicability; the welfare of the child is foremost regardless of the residency status of the specific parent.

Another context in which the right to reunification is left vague, and which mainly affects women, is in the marriage of foreigners with citizens. Article 1 of the *Convention on the Nationality of Married Women* (1957) stipulates, “that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife.” In general, states respect the right of persons of different nationalities to marry; however, where the resulting family may be allowed to reside is not guaranteed. Lahav (1997) comments, “based on the international conventions on marriage, virtually all countries allow the admission of the foreign spouse of a citizen to enter. Nevertheless, administrative discretion has always been paramount. Skilled personnel are generally more apt to be granted the right to be accompanied by immediate family members, whereas unskilled workers, asylum seekers, students, trainees, and domestic workers face more restrictions in being joined by family members” (362). Thus, the qualified nature of rights granted under international instruments reinforces the stratification of rights thesis advanced in the last chapter in regard to EU member-state immigration policies. Status and type of entry determine the rights of immigrant women.

One of the main aims of the Council of Europe (COE) is to strengthen European cooperation on migration and a number of texts containing policy guidelines have been generated over the years to facilitate this cooperation. The ECHR adopted in 1950

essentially restates the rights and protections for families laid down in the UDHR.

However, the European Convention allows for a great deal of conditionality in the implementation of these rights. Article 8 echoes the UDHR in that “everyone has the right to respect for his private and family life, his home and his correspondence.”<sup>98</sup>

Nevertheless, it qualifies this statement by citing occasions when authorities are free to disregard this right “such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” Article 12 of the ECHR allows that “men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

While these passages ostensibly support the formation and preservation of families, states are at liberty to adopt and implement these guidelines in any way they choose and with any restrictions they deem necessary.

The European Social Charter was signed by the members of the COE in 1961. It was designed to fill the gap left by the European Convention which protects mainly civil and political rights. Article 19.6 of the Charter, which addresses the right of migrant workers and their families to protection and assistance, obligates contracting parties to “facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory.” This clause is binding; however, states are given the latitude to impose qualifying criteria by the phrase “as far as possible.”

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<sup>98</sup> Article 7 of the Charter of Fundamental Rights of the European Union is nearly identical to Article 8(1) of the ECHR. Article 7 of the EU Charter reads: “Everyone has the right to respect for his or her private and family life, home and communications.”

Another Council of Europe instrument specifically drafted to address immigration concerns is the *European Convention on the Legal Status of Migrant Workers*, which was opened for signature in 1977 by the COE, but did not enter into force until 1983. Article 12 stipulates, “the spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the unmarried children thereof, as long as they are considered to be minors by the relevant law of the receiving State, who are dependent on the migrant worker, are authorized...to join the migrant worker...provided that the latter has available for the family housing considered as normal for national workers in the region where the migrant worker is employed.” This provision allows for a worker to be joined by his family but only under very stringent conditions.

A general right to family reunification has not been established; nevertheless, international human rights instruments have generated and reinforced the widely accepted principle that states should admit to their territories the close family members of citizens or documented foreigners who have established long-term residence. It is in this normative sense that international human rights have most likely influenced domestic policies and bilateral agreements. International instruments place moral pressure on states to allow citizens and documented foreign workers to reunite with their families; however, for the application and enforcement of their stipulations, they defer to the judgment of states.

While many international instruments guarantee a right to “family life” this does not necessarily connote a right to family reunion. Family migration is a fraught subject because the inviolability of the family unit is defensible from a human rights standpoint, but from a receiving-country’s perspective, family reunion also lays the foundation for

permanent settlement, which is precisely what many countries are trying to discourage. This is evident in that reunification is often made contingent on migrant workers meeting certain economic or household requirements. The provisions are often subject to restrictions grounded in concerns for national security or public order and reinforce disparate treatment based on categories of migrants, e.g., documented migrant, refugee, or citizen.

In addition, many definitions are left intentionally ambiguous such as the nature of protection and the composition of the family. There is no single model of the family that is applicable across cultures and societies; religious, social, and economic factors all affect the forms families take. As Lahav (1997) asserts, “the nuclear family, constituted by husband, wife, and their minor children is neither *de facto* nor *de jure* the most common family configuration” (360). The definition of protection is also left vague. The prohibition against “arbitrary interference” leaves open the possibility for the imposition of forms of intrusion and restrictions deemed non-arbitrary. There is also no distinction made between the family as a unit and its component parts. The family as a socially desirable collective cannot be safeguarded at the expense of its members such as in the case of spousal or child abuse. In these circumstances the state may be required to intervene to protect individuals. The question arises of whether legal and juridical processes, such as the promulgation of international human rights law, affect national policy outcomes. International legal developments often function less as constraints on state policymaking than as guarantors of state sovereignty (Lahav 1997).

### **Some Trends in Family Migration Policies: The European Context**

As mentioned in chapter 3, most receiving countries in Europe had always conceived of their inflows of labor migrants as temporary. In temporary migration regimes there was no need to articulate a family reunification policy because workers were expected to return home and reunite with their families in their country of origin. This misapprehension about the permanence of their “temporary” workers has had long-term residual effects in attitudes to family reunification in Europe.

In postwar Europe family migration as well as illegal immigration was tolerated as long as labor markets could absorb the migrants. It can be argued that this relatively favorable period for family reunification is attributable to a perception on the part of European governments of economic and demographic need—rather than normative commitment to the rights of the family. In the 1970s and 80s as global economic recession and stagnation took hold, anti-immigrant attitudes became more pronounced and the migration patterns themselves changed. Because this created both political pressures and economic reasons for limiting immigration, the benevolent acceptance of humanitarian principles became less sustainable. Family networks continued to draw migrants in numbers that could no longer be supported by economic or political conditions. During this period, “statist policies to limit all forms of migration coalesced; in practice, they were sanctioned by international rules” but were instituted “at the expense of individual migrants, humanitarian interests, and open borders” (Lahav 1997:354).

Because many women arrived after the immigration bans were instituted in the early 1970s and because the wave of family reunification they represented was largely

unanticipated by the host countries, women were often the ones who had to bear the brunt of the new restrictive policies. It is no accident that as countries began to crack down on immigration, particularly from lesser developed countries of emigration, they targeted family reunification regulations, which many opponents of immigration decried as immigration by stealth (Geddes 2003). For example, in the late 1970s, both Germany and France tried to institute extremely stringent policies aimed at restricting family reunification, as a way of halting all immigration. Interestingly these policies were rejected on constitutional and legal grounds (Hollifield 1992). This outcome lends credence to the argument that domestic level constraints caused policymakers to seek out new venues for more restrictive policymaking at the European level. Below I will briefly outline developments in family reunification policy in three EU member states. I have chosen Germany, France, and the Netherlands not only because historically they are all countries with major inward migration flows and large settled third-country immigrant populations, but also because they have been extremely influential (particularly Germany and France) in determining the parameters of EU immigration policy.

### *Germany*

Much like other EU member states with a long history of immigration, immigration for the purposes of family reunification is one of the most important avenues of entry for legal immigrants. In 2003, 76,077 (41.6 percent of all legal migrants) people migrating for the purposes of family reunification or formation obtained visas (Cyrus and Vogel 2005; OECD 2006)

Owing to great demand and competition for labor all over Europe during the impressive period of growth during the 1960s, Germany was compelled to renegotiate the bilateral agreements with many of the main countries of emigration to include more favorable conditions for the immigrants, including stipulations guaranteeing family reunification. Government and industry often found themselves operating at cross-purposes. During times of severe labor shortage immigrants were easily able to renew their work contracts, and many had started sending for their families. Major manufacturing concerns found it more efficient to have a “trained and skilled workforce, not a high turn-over of unskilled, short-term workers” (Webber 1991:13). The German administration, afraid of acquiring a new population of welfare dependents, specified that immigrants could only bring in their families after a period of one year, provided that they could prove they had adequate housing and financial resources.

In Germany, bilateral agreements and the rotation system were premised on a distinctly male model of immigration. The guestworker policies were developed purely to reinforce and give legal status to the temporary presence of migrant workers. The immigrants were housed in hostels and dormitories that were provided by the employers. The goal was to keep them physically separate and politically marginalized. For the German government, the creation of a restrictive environment and the agreements with the migrants’ country of origin has served to “underline the provisional character of their stay. The aim has been to prevent the integration of foreign workers and their families into German society” (Kastoryano 1991:54).

During the 1970s and 80s when many families were being reunited and racial tensions were increasing, the view that Turkish migrants posed a potential cultural threat

to Germany had infiltrated the popular media and consciousness. Guestworkers had always been kept separate, and many Germans feared they were unassimilable. Often the arrival of women and family members marked a return to forms of interaction and social organization based on home country patterns. Full family and community networks enabled the Turks to retrench and form their own spheres of activity within German society. Women were seen as the harbingers of traditional, hence, divisive tendencies. The German government reasoned that if it could prevent family reunification, not only would cultural isolation be less feasible, but men might decide to go home (Kofman and Sales 1992).

In Germany, in the 1970s, family migration was tacitly discouraged by the restrictions placed on residence permits. A law on the books specified the concentration of immigrants deemed supportable in particular geographical areas. Any city that declared its population of foreigners exceeded twelve percent could restrict further immigration. This policy is based on the principle that large immigrant populations cause undue strain on the social infrastructure. Foreign workers were required to wait one year and provide proof of adequate residence before being joined by family members; in light of the settlement bans the residence requirement was made much more difficult.

Movement was also curtailed by work permits that tied the immigrant to a particular industry or job. Many immigrants who wished to reunite with their families found themselves compelled to move, which in many cases required changing jobs, which is not possible for three years under many contracts. Immigrants may have to move out of an established immigrant community and be forced to move to an area which is more discriminatory and in which the costs of housing are higher. All of this could be

compounded by the fact that the spouse may not be able to obtain a work permit; this would make family reunification economically unfeasible and in some cases culturally undesirable (Rist 1978:79-82). Reinmann and Reinmann (1979) state that, “a wife who desires to work and accompany her husband must go through the same procedure as he, and her application may be refused if there is no suitable work for her in the locality of his employment”(68). Many women entered the country as tourists, and were forced to find illegal employment. It would seem that women who immigrated with the intent of rejoining their husbands were expected to remain completely dependent. With the number of bureaucratic obstacles that were placed in the immigrant’s way, family reunification was often achieved “in spite of official pronouncements by the government, rather than because of them” (Rist 1978:82).

In 2000, the German government appointed a commission to develop immigration policy proposals. The commission presented its report entitled, “Structuring Immigration, Fostering Integration,” to the government in July 2001. The report stressed the looming demographic crisis linked to low birth rates, increased life expectancy, and an aging workforce. Given these conditions, the commission advocated for a managed immigration program for skilled migrants and a stepped up effort to integrate foreigners, with language education being a central component of this effort. In 2001, Germany also reduced the period from four to two years that spouses, who migrated under family reunification regulations, must remain dependent on the primary migrant for legal residency (Kofman 2005).

In November 2001, the ruling Social Democrat Party introduced a bill which incorporated many of the commission’s recommendations, and it was passed in March

2002. However, the conservative opposition filed a lawsuit in the federal court and successfully blocked the law's entry into force. A compromise was finally reached in 2004 which allows highly skilled migrants to obtain an unlimited residence permit, although only if there are no Germans or EU nationals able to take on the proposed position. The Christian Democrats also successfully inserted provisions into the law that facilitates the deportation of foreigners based on a "threat prognosis" (Oezcan 2004).

Not until January 1, 2005, did the Act for Controlling and Limiting Immigration finally come into effect. The constitutional foundation for sections 27 to 36 of the Immigration Act which deals with family reunification is article 6(1) which protects marriage and the family. Under the new law, only highly qualified migrants are permitted entry, the ban on unskilled workers is still in effect (with some exceptions in specific sectors). Given that the only new legal migrants to Germany are the most desirable and highly skilled, the law has been changed to accommodate their family members. Rejoining family migrants are allowed the same labor market access as their relative—previously there was a waiting period of one year. For example, spouses of highly skilled migrants who enter at the same time as the primary migrant or who emigrate subsequently are permitted to seek employment immediately.

In general though, for all other migrants, the new law has changed little. Under the Immigration Act, only "core" family members, defined as spouses and dependent children, are permitted to migrate to join foreign residents. The foreigner seeking reunification must hold a settlement or residence permit and must provide proof of a secure income and adequate living space. The subsequent familial migrants are granted a temporary residence permit. The upper age limit for children who wish to rejoin a parent

is 16 years. In some cases a child who is 16 or older may be allowed to migrate if s/he can demonstrate a command of the German language and seems capable of successfully integrating into German society based on his/her educational and social background. The new law also has instituted compulsory “integration courses” and language requirements on family members. If family migrants fail to complete these, it can become difficult for them to extend their residence permits (OECD 2006; Heine 2005).

### *France*

The huge wave of family reunifications that occurred after the 1974 ban was unanticipated by the French government; they mistakenly assumed that the restrictions would encourage return migration and decrease the number of new immigrants. An extensive package of new immigration legislation was passed in 1974 which can be characterized by the “dual-policy” discussed in chapter 3. Restrictive measures were introduced first, to limit the number of new immigrants and second, to stabilize the social conditions of the already resident immigrants, in order to encourage their integration into French society. There was also a short-lived attempt to curtail family reunification, as this trend seemed to be gaining momentum.

Family reunification was suspended in France by the government in 1974, and then officially acknowledged as a legal right by the courts and reinstated in 1975. Because the administration was afraid that large numbers of family members were immigrating illegally, financial incentives were offered to encourage family reunion to be arranged through official government channels, so that it could be monitored. In 1977, family reunion regulations underwent further restrictions: spouses and children were

denied entry for three years unless they agreed not to enter the labor market. In 1978 this legislation was annulled, and the basic human right to family reunification was reasserted. The interesting aspect of these restrictions is that they were never applied to Portuguese or Spanish spouses or children, only to the immigrants of African descent (Kennedy-Brenner 1979:30-31).

Family reunification policies are always a prime target when the government is trying to restrict immigration, and in 1984 the legislation concerning family reunification was revised again. Catherine Wihtol deWenden (1991) writes,

Although reaffirmed as a principle, the reunification of families was thereafter subjected to stricter conditions: these included the requirement of *resources stables* and of prior authorization to enter and reside in France, which can be denied if ‘the accommodation that the foreigner has in mind for his family is inadequate; or if the presence in France of the family member means a threat to public order, public health or public security.’ These new measures revealed the contradictions of a policy torn between the recognition of a person’s fundamental right to family life, the concern with the successful social integration of families and the will to eliminate what is seen to be a source of illegal migration. (324)

The scheduled transposition of the family reunification directive into member state law on October 3, 2005, raised further concerns as to the protection of the rights of third-country nationals. This new law may be one example of policy convergence at the bottom made possible by accommodations at the EU level. Nicolas Sarkozy, the French Interior Minister, justified the changes to the law by claiming that it was fulfilling its

European obligations and bringing French immigration policies more into line with that of other EU countries (Schmidt 2006).

One of the main objectives of France's new immigration and integration law, adopted on July 25, 2006, is to place greater restrictions on the right to family reunification. Sarkozy attributes the failure of France's immigration system to the unrestricted entry of family migrants after the general ban in 1974. Current statistics show that family reunification still accounts for over 64 percent of immigration into France, and three-quarters of reuniting spouses are women (OECD 2006; Lesselier 2003). For this reason the government wants to exert control over the numbers and qualifications of family migrants. The new limitations on family reunification and stricter requirements for the regularization of illegal immigrants has inspired public outrage and elicited criticism from immigrant-rights organizations and African leaders. Even political leaders are divided on a variety of aspects of the law, which was subject to 300 amendments in the National Assembly and the Senate before being adopted.<sup>99</sup>

The French government's reforms to the family reunification policy reflect three main imperatives. Immigrants must demonstrate that they respect the values of the Republic, and they must work actively towards successful integration into French society. Lastly, the law seeks to abolish forced and polygamous marriages.

The probationary period that a resident must wait before applying to bring a family member into France has been extended from twelve to eighteen months. In addition, the law defines the new conditions for family reunification: a family member

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<sup>99</sup> Murphy (2006) notes that this political "unrest illustrates that France will not have an easy transition to a selective immigration system that emphasizes employment-driven immigration at the expense of the 113,000 immigrants who arrive in France annually for family-related reasons."

must demonstrate that he/she acknowledges the legitimacy of the secular state, respects the equality between men and women, and practices monogamy. The law also seeks to prevent immigrant families from becoming dependent on the state. Accordingly, an immigrant is required to prove that he/she is capable of independently supporting (i.e., is earning at least minimum wage and is not receiving public assistance) any and all family members who have applied to come to France. Of particular relevance to third-country immigrants is the new provision limiting government assistance to EU citizens (Murphy 2006).

One extremely important condition for family reunification requires that family members be living abroad when the primary migrant applies for reunion. However, in the majority of cases, women have traveled to Europe on a tourist visa and then seek to be regularized when the visa has expired. Lesselier (2003) notes, “family reunification ‘sur place’ (once the family members have already arrived in France) is allowed only in very exceptional circumstances at the discretion of the prefecture” (37). Undocumented women immigrants who marry a French national are in a similarly difficult position.

Third-country spouses of French nationals are now required to wait three years, rather than two, before being eligible for a ten-year residence permit, and must complete four years of marriage with proof of continuous cohabitation before applying for citizenship. This last prerequisite can cause severe difficulties for women in cases of separation or domestic violence. Marriages between foreigners and French citizens are often viewed with skepticism by French officials who have been known to refuse to authorize such marriages on the grounds that they suspect them to be marriages of convenience (Lesselier 2003). Any immigrant who is proven to be practicing polygamy is

subject to having his/her visa revoked. Finally, all immigrants are obliged to sign a “welcome and integration” contract and complete mandatory language and civics courses. The burden is on the immigrant to show that he/she has successfully integrated into French society before applying for permanent residence (OECD 2006; Murphy 2006).

### *The Netherlands*

One case study examining the gendered implications of current immigration policy in Europe study was carried out by Sarah van Walsum (2003) who looked at the effect Article 8 of the ECHR has had on reforming restrictive family reunification policies in the Netherlands. Article 8 of the European Convention on Human Rights that protects the right to private and family life is “one of the most dynamically interpreted provisions in the Convention” both by the European Court of Human Rights and in member-state courts (Guiraudon 1998:50; Feldman 1997). This is probably why the Council Directive on the right to family reunification is the pioneer proposal in the field of EU immigration law. Van Walsum explores the difficulties faced by single and divorced third-country immigrant women trying to reunite in Europe with children they were compelled to leave behind in their countries of origin. In Dutch immigration law an arbitrary time limit labeled the “effective family bond” criterion is placed on the presumably measurable authenticity of parental affection and responsibility. The state was essentially defining what it considered to be legitimate familial arrangements. The assumption is that the bond between mothers and children is dissolved after a designated

period of time when the children are living with another family, and therefore there are no grounds for admission for purposes of family reunification.

In research looking at the immigration of women from Surinam to the Netherlands, van Walsum found that childcare in Surinam was conceived of as a shared responsibility between both nuclear family members and a complex network of extended family and friendship ties; arrangements in which children stay with relatives or close friends for longer or shorter periods of time is quite commonplace. As a result, given the pervasiveness of shared childcare, both fathers and mothers often prefer to leave their children with relatives until they are settled in their country of destination.<sup>100</sup>

Historically Dutch family reunification policy benefited Dutch male citizens with foreign wives. Family reunification was actively discouraged when employers began to recruit foreign labor in the 1950s. The state did allow wives and children to follow beginning in the 1960s, but foreign-born women working in the Netherlands were denied permission to bring over family members until 1974. And even then, only married women could have their families join them; single and divorced mothers were excluded. By 1979, Dutch immigration law stopped differentiating on sexual grounds—both husbands and wives were allowed admission on the same terms (van Walsum 2004:7-9).

By the mid-1980s, if an immigrant woman married in the Netherlands, it was judged that she had started a new family. The law considered the children the immigrant woman conceived with a different father before her marriage to a Dutch citizen to be of

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<sup>100</sup> Van Walsum makes the case that this form of shared childcare is not necessarily culturally determined: “In any society where schools and health centres are widely scattered, where publicly financed childcare is virtually non-existent and where there are little or no provisions to compensate for loss of income while caring for a child, similar caring arrangements will be made for the simple reason that they are necessary” (2003:6).

two different families. Ties were effectively severed between mother and children because they were no longer considered to be part of her current family. This law came into conflict with the family law pertaining to Dutch nationals that was expanding the rights of divorced and unmarried fathers. Dutch men gained the right to share custody and parental authority for children born out of wedlock or resulting from adulterous relationships. These children could seemingly belong to more than one family at once. Finally, the contradiction became so glaring that the rulings regarding immigrants were forced to adapt.

By the 1990s the effective-family-bonds argument took on a new dimension. Formal marital status was no longer considered as important as an immigrant's level of involvement in the daily care of his or her children remaining in the country of origin. Starting in 1998,

all parents who did not apply for family reunification immediately upon arriving in the Netherlands but who, for whatever reason, left their children to the care of family members abroad, were assumed to have broken the family bond with those children unless they could prove otherwise. The longer the separation had lasted, the heavier the burden of proof became. This shift in interpretation reflected an implicit assumption that a true parent would not delegate caring responsibilities, but would personally look after his or her children on a day-to-day basis at all times. Since by then most of the cases that came before the courts no longer involved divorced fathers, but women who had come to the Netherlands as single or divorced mothers, most conflicts in effect centered around the question of who was a true mother. (van Walsum 2004:13)

In Dutch family law, to avoid policies that could potentially discriminate against fathers, effective day-to-day care was de-linked from parental rights. There are two precepts underlying current Dutch family law: First, there is no such thing as a clean break in Dutch family law; regardless of who the primary caretaker is, it is believed that the maintenance of ties with biological parents is necessary for the psychological development of the child. Second, parents should not have their parental responsibilities dictated to them by the state; fathers and mothers as mature adults should be given the freedom to determine the type of care that best serves their children's interests. Apparently these precepts do not apply to immigrants as evidenced by the establishment of the "effective-family-bond" criteria and the persistent intervention of the state in the family life of immigrants. Biological parentage is not considered as binding for immigrants, and "where policing the actual involvement of parents in the care of their children has been rejected in Dutch family law as an unacceptable invasion of the privacy rights of those involved, Dutch immigration law actually requires immigration authorities to do just that" (van Walsum 2004:14-15).

In current Dutch immigration law, both men and women are granted admission to the Netherlands for purposes of family reunification, and both non-marital and marital relations can, in principle, provide permissible ground for entry. Nevertheless, gender and family bonds have continued to have an effect on Dutch family reunification policies. The present policies affect women in more complicated although less glaringly discriminatory ways. For example, strict income requirements make family reunification easier for men than women because women tend to earn less than men overall, in addition to usually being relegated to poorly paid, traditionally female, often illegal, occupations.

In spite of the introduction of formal legal equality, most single and divorced immigrant women still must marry a Dutch man to achieve a secure status for themselves and any children they might have.

The requirements for qualifying for family reunification are becoming even more rigorous in Dutch law, partly as a result of transposing the EU family reunification directive into national legislation. The income requirement has been raised to 120 percent of the minimum wage, the age of family formation (marriage) for migrants has been raised from 18 to 21 years old, the administrative fees that must be paid by applicant is nearly seventeen times higher (from 50 to 830 euros), and third-country nationals seeking reunification must pass a mandatory integration test before being allowed to travel to the Netherlands (Marinelli 2005; OECD 2006). The official rationale for increased restrictions on family formation migration is based in the belief that limiting migration, particularly of third-country immigrants, facilitates the integration of migrants already residing in the Netherlands. Marinelli (2005) asserts, “the fact that a majority of—even second generation—Dutch Turks and Moroccans (two out of the four largest immigrant groups in the country) still find a partner from their country of origin, is viewed as a significant hindrance for a successful integration policy” (5).<sup>101</sup> The policy trend in the Netherlands which emphasizes security, control, and social cohesion often makes it virtually impossible for families to reunite and is at variance with the fundamental right to family life.

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<sup>101</sup> “In 2004, 2,900 Moroccans entered the country compared to 4,900 in 2003, and the number of Turkish immigrants fell from 6,700 to 3,900. In the first three months of 2005, the IND [Immigration and Naturalisation Service] received 7,600 applications (mostly from Turks and Moroccans), compared to 10,800 in the same quarter in 2004. The Immigration Service attributes this decrease to the changes in family formation regulations” (Marinelli 2005: 5).

The discourse surrounding family reunification policy has shifted from being one concerned with the right to family life to one primarily concerned with immigrant integration and social cohesion with both sexist and racist implications. Van Walsum (2003) argues that despite attempts to ensure legal equality between men and women in Dutch immigration law, “gendered assumptions relating to perceived ethnic differences have become more prominent” (16). While single motherhood among native-born women is starting to be valorized in the Dutch popular consciousness “there has been a growing concern for a specific category of unwed mothers, namely young single mothers among the immigrant communities in the Netherlands... They are deemed incapable of bringing up their children to become responsible citizens and are thus seen as a threat to the moral cohesion of Dutch society” (van Walsum 2003:16).

In 2000 the Dutch government modified the “effective family bond” measure to align it with integration concerns. Children of immigrants must be admitted within five years of their parent’s departure. After that period the child is assumed to be an assimilation risk. This demonstrates the Dutch state’s desire to curtail an individual immigrant’s right to define for herself the appropriate ways of caring for and raising children, and arguably also violates her right to family life grounded in article 8 of the ECHR. This policy also disproportionately discriminates against single and divorced mothers. Van Walsum writes, “as gendered marital norms give way to gendered determinants of ethnicity in marking the gates of the Dutch nation, legal focus seems to be shifting from family life to social cohesion, placing appeals to article 8 of the European Convention within a new, and for migrant parents possibly less advantageous, political perspective” (23).

Most immigration legislation in Europe is very carefully worded to be gender neutral, but this belies the reality of the situation. Currently, 90 percent of migrants joining family members in EU countries are women or girls. This situation has implications in itself because trailing spouses are subject to legal restrictions which reinforce their dependency on their sponsor (Schmidt 2006). Even formally neutral provisions have a gendered impact due to the reality of migration flows. Annie Phizacklea (1983) questions the assertion that family reunification can be considered a right for long-term resident migrants. She argues that “it is a very perverse sort of ‘right.’ In practice it means immigration control differently applied to different categories of people. Once a category of workers has been stamped with the ‘unwanted’ label then every obstacle and indignity will be put in the path of families wishing to join them” (100).

### *The European Union*

The collision of supranational and national priorities over the issue of migration in Europe illustrates a persistent contradiction in the aims of liberal democracies: the desire to control the movement of people across its borders and the desire to promote free markets and liberal democratic norms. The founding treaties of the EU all uphold the right to freedom of movement; however, as the impetus behind these early agreements was to facilitate economic efficiency and prosperity, free movement was only considered applicable to member-state nationals as workers or self-employed persons and did not consider any other motivation for migration—and certainly did not include any provisions addressing the rights of third-country nationals. Even family reunification for

migrant workers who are citizens of a member state was only gradually established through Council directives and European Community regulations.<sup>102</sup>

In the EU immigration policymaking is marked by two trends:

the first is the formal willingness of member states to shift immigration issues to the Union level with the view towards their better management... The second trend is the actual reluctance of most member states to cede too much power in the most sensitive immigration policy areas, which remain the core of national sovereignty. (Oliynik 2004:1)

The first trend is demonstrated by the passage of the formidable Tampere goals and the shift of immigration policymaking to Community competence thereby strengthening the relevant supranational institutions. However, immigration policy is subject to unanimous decisionmaking and member states' resistance to compromise has hampered substantial progress in this area. Barriers to economic and family migration exist that belie the optimistic single-market-mindedness of the framers of the EU. These "barriers are both imagined and real, but are often hidden because they involve (trailing) partners or children of those who seek and obtain jobs in countries other than their own" (Bailey and Boyle 2004:230).

Due to the gendered basis of immigration policy that assumes a male model, family reunification is generally understood as the process of the wife and children joining the husband. While the children can be viewed as a problem in terms of integration and education policies, the woman, who is assumed to be unskilled, traditional, and passive, is viewed as a black hole for welfare entitlements. Women also

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<sup>102</sup> See Council Regulation (EEC) No 1612/1968 on freedom of movement for workers within the Community.

inevitably symbolize settlement and permanence, which is what most of the immigration countries are trying to prevent.

Migration theorizing in the European Union and the policy that has arisen from it has had a very economic bias. The EU, which evolved from a common market with political ambitions, adopted the human-capital understanding of the motives for migration, which has in turn led to gendered policymaking. Policymakers in Europe, at the prompting of family migration researchers, have tended to focus on the “tied migrant” model. More recently policy agendas have evolved that attempt to eliminate gender disparities in family migration outcomes. Indeed, Bailey and Boyle (2004) endorse the idea that “such [policy] agendas are stymied by...entrenched normative constructions of male-female roles...and that “the old dichotomies of male and female experiences of home, work, and migration—dichotomies that underpin much family migration scholarship—should be interrogated” (238).

National discrepancies in attitudes towards foreigners and the resultant diversity in family reunification policies are the consequence of the distinct immigration histories of each of the EU member states. Historical ties between sending and receiving countries, and formal bilateral agreements also delimit the immigration policies of receiving states. However, there are several general topics which required a harmonized approach: the required length of stay before applying for family reunification; the rights of relatives in the ascending line; the rights of non-minor children; the type of residence permits issued (independent versus attached to that of the married partner) and the duration of those permits; as well as the definitions of suitable accommodations and sufficient resources (Lahav 2004). Member-state policy differences “are found less in the general conditions

of family reunification policies, as in the way in which they are interpreted” since state laws are subject to significant administrative interpretation when they are being implemented at the local level (Lahav 1999:14).

Family migration resists systematic classification because it takes on many forms and involves varied and overlapping categories of migrants. EU policy must acknowledge changing migratory patterns, such as increasing numbers of international marriages, the complications brought about by large second generation populations, and the advent of a rapidly aging population producing relocating retirees (Ackers 1998). EU policymakers also need to recognize the transformation of the family that is implied in part by this expanding number and variety of family members on the move.

As stated earlier, since the late 1970s, migration for the purposes of family reunification and formation has been a primary avenue for legal entry into the countries of the EU and remains so today (see table 3). In contrast to the traditional countries of settlement, Australia, Canada, and the United States, in which family reunification was encouraged and a fairly liberal conception of family developed, in European states, a very restrictive definition of family, based on the nuclear family, was employed as a condition for entry. By developing restrictive criteria and definitional limitations, European states protect their interests in immigration matters. National laws differ with respect to the treatment of parents, siblings, adopted children, illegitimate children, stepchildren, adult children, common-law spouses, and same-sex partners. Lahav (1997) notes, “some receiving countries find it difficult to accept families whose composition does not correspond to their own norms. ‘Family,’ for example, is increasingly based on Western notions of limited family—a nuclear family... These types of narrow definitions of family

function almost as a selective mechanism to monitor the flow of certain migrant stocks, whose concept of family differs, and who constitute the majority of migrants in Europe (i.e., third world migrants)” (363).

**Table 3: Family Migration Inflows of Foreigners in Selected EU Member States, 2004**

	Total Inflows of Family Migrants (Thousands)	% Distribution of Total Long-Term Migration Inflows <sup>a</sup>
Austria	34.4	63.5
Belgium	-----	-----
Denmark	6.7	39.7
Finland	2.9	52.1
France	112.6	64.3
Germany	90.4	44.7
Greece	-----	-----
Ireland	-----	-----
Italy	96.5	61.7
Netherlands	28.4	49.8
Portugal	4.7	36.2
Spain	-----	-----
Sweden	27.6	67.8
United Kingdom	100.8	37.8
<sup>a</sup> The other categories of migrants tracked to comprise the total are: work, humanitarian, and others.		

Source: Organization for Economic Co-operation and Development. 2006. *International Migration Outlook*. Paris: OECD.

Certain host states honor individual familial and marital relationships as established by foreign laws, but still choose to adhere to their own criteria for defining the legal composition of the family unit as a whole. It is commonly recognized that European family forms and familial relationships have undergone a fundamental restructuring and rethinking in recent decades; indeed, “immigrants have ‘imported’ family models from their home countries that often are being transformed because of the

situation of exile and because of the confrontation between these models and the other models that exist in Europe” (COORDEUROPE 2003:2-3). Even when the families concerned hail from societies that are socially, culturally, and legally different from the prevailing western model, migrants are expected to conform to the traditional mold of marriage and family as the prerequisite for admission into most European states.

However, it must be acknowledged that immigration can be a liberating experience for women. Even the westernized nuclear family can serve for many immigrant women as a way of escaping the panopticon of extended families and social control present in some countries of origin. Marriage can also be liberating for women who seek to migrate from rigidly patriarchal societies (Kofman 2004a). It is also interesting to note that another configuration of the modern western family explicitly includes immigrant women: female domestic workers—maids and nannies—many of them undocumented aliens have become an indispensable part of more than a few European families.

Another type of family structure with implications for both human rights norms and immigration policy that must be considered when proposing defining characteristics of the family is the polygamous marriage. France has acknowledged the legitimacy of various provisions of the private law of other nations; however, in 1993 it limited legal admission, for purposes of family reunification, to one wife from a polygamous marriage. This situation has had particularly severe implications for any additional wives: “many women entered on tourist visas and stayed without any residence, employment or social rights” (Kofman et. al. 2000:88). Under these conditions, it is possible for these women

never to regularize their position and effectively become non-persons in the eyes of the state.

Demographic factors including low birthrates, aging populations, and international migration are central to the discussion of the transformation families are undergoing. The construct of family is “becoming less uniform and homogenous, as cohabitation, separation, divorce, delayed childbirth, ‘reconstituted families,’ and same-sex couples continue to increase” (Bailey and Boyle 2004:232). Nuclear families may no longer be as relevant to the study of family migration, which necessitates that research move beyond a focus on the impact of migration on women’s social and economic position. Family reunification research and the resultant policy need to come to grips with new understandings of family. The “limited conception of the family leaves little consideration for problems generated by caring at a distance, cultural differences in familial relationships, and the role of grandparents or other collateral relations in providing nurturing and support for different members of the family” (Kofman 1994:246; Ackers 2004).

A legally binding definition of family is not codified in international law because the law must be mindful of the differing societal and cultural traditions among states; for example, the European Court of Human Rights chooses to interpret the concept on a case-by-case basis. Reproductive technologies, evolving social mores, and differing cohabitation arrangements are also causing the types of family configurations to grow. The European Committee of Social Rights, which monitors state conformity with the European Social Charter, emphasized the need to protect new family forms that are particularly vulnerable to exploitation, such as single-parent families (Apap and

Sitaropoulos 2001). As one Turkish scholar cogently points out, “various definitions of family found in such international standards are actually nothing more than further restrictions on the right to family migration, as migrant workers cannot determine for themselves the persons who constitute the family” (Cicekli 1999:333).

Similar to the necessary recognition that there is not only one type of family formation, it should also be recognized that the social conditions in sending and receiving countries do not remain constant. The concept of family in both domestic welfare policies and immigration policies is more constructively dealt with as an infinitely adaptable construct capable of being constantly restructured and renegotiated to meet economic, social, and caring needs as well as international exigencies (Bryceson and Vuorela 2002).

### **Third-country Immigrant Women and Family Migration in the EU**

Before examining the new Council directive on family reunification in detail, it is useful to make a few general observations about the impact gendered family reunification policies have had on women in the past.

As mentioned earlier, although no automatic right to family reunification for non-citizens exists in the EU, it continues to dominate as the primary form of legal entry for most migrants into Europe. States have imposed many preconditions to entry, which have been maintained in some form in the new Directive including a minimum period of residence prior to eligibility for reunification; spouses being subject to probationary periods of residence; and requirements regarding the acceptable levels of income and adequate housing of the primary migrant. Another policy measure used to control family reunification is to progressively lower the maximum age at which children may be

allowed entry. The standard age cited in most international instruments is eighteen; however, recent legislation in Germany lowered this age to twelve years. As Eleonore Kofman (2004a) states, “it is undoubtedly more difficult for women, who wish to bring in family members, to meet all the necessary [income and housing] conditions, especially if they cannot call upon their family to contribute resources” (255).

In present day Europe, a request for reunification with a husband or wife is subject to intensive scrutiny by immigration authorities; the authenticity and purpose of the marriage and the reasons for the subsequent migration are tested and the burden of proof is placed on the applicant. A notable development in family formation migration is the rise in the number of men who enter as fiancés and spouses. This is one outcome of the leveling in the gender balance in the second generation, as well as social and cultural changes in countries of origin (Kofman 2004a). In 1980, the UK established a “primary purpose rule,” which required a British national, who married a spouse from overseas, to prove that the primary purpose of the marriage was not to circumvent migration controls in order to settle in the United Kingdom (it was repealed in 1997). While no other EU countries ever adopted such an explicit law, many aspects of it have been implemented in other member states to determine if a spouse should be allowed entry. In the Netherlands, suspicions of a marriage under false pretenses are raised if too wide an age gap exists between the partners. Probationary periods of one or two years are imposed on the joining spouse before any form of independent status is conferred. Women who are nationals of a European country may also “become racialised in that their legal and social position is determined by the nationality and ethnicity of their spouses intersecting with their gender. As with second-generation migrant women, they may be seen as

participating in bogus marriages to allow men to migrate for economic purposes” (Kofman 2004a:252).

This use of marriage as a gatekeeper in immigration law not only imposes a single definition on a relationship that serves as the axis around which an infinite number of familial permutations revolve and preserves inequalities between both indigenous and immigrant men and women, but also “contributes—on an ideological level—to the reinforcement of static perceptions: immigrants are bound to traditions whereas the ‘native Europeans’ are increasingly shaking off the yoke of repressive old fashioned lifestyles” (Lutz 1997:105).

### **The EU Directive on Family Reunification for Third-country Nationals**

If the favorable stance taken on family reunification by member-state governments in the postwar period was intended to meet demographic and economic exigencies rather than to adhere to human rights norms, then the Directive on Family Reunification follows this pattern. Although the Directive frames the entire policy in terms of strengthening the rights of third-country nationals, the material reality of the Directive reveals a lowest-common-denominator approach to a shared problem rather than an express commitment to human rights.

The main question to be addressed in this section is whether the provisions in the family reunification Directive comply with international standards and do they succeed in fulfilling the stated goals of respecting and enhancing the rights of third-country immigrants as defined at the Tampere Summit and reaffirmed at the Laeken European

Council in December 2001.<sup>103</sup> While the preamble of the Directive expressly states the directives adherence to article 8 of the ECHR, closer inspection has left this in doubt.<sup>104</sup> The Directive will be analyzed to determine if it accords with international human rights law, if it succeeds in granting third-country nationals rights comparable to those of EU citizens, and finally the ways in which the Directive specifically discriminates against women immigrants.

There is an internal rationale to the Directive—the goal of approximating or making the rights of third-country nationals comparable to those of EU citizens—<sup>105</sup>an external rationale of adherence to international human rights law, and a gendered rationale which must be highlighted and clarified. It is possible to determine from the final Directive whether EU legislators took the specific situation of women into account when formulating the policy.

Family reunification was the first form of migration for which the EU set out to develop binding legislation, in part because it seemed to be the best understood and least contentious form of migration. Community law had not addressed family reunification of third-country migrants or refugees until this point. Despite recognition of the significance of the family reunification of third-country nationals as one of the main modes of immigration over the last thirty years, this directive is the first attempt to articulate the rights of third-country nationals in this context although the rights of freedom of

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<sup>103</sup> The Presidency Conclusions of the European Council Meeting in Laeken held December 14 and 15, 2001, can be found at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/68827](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/68827).

<sup>104</sup> Recital 2 of the Preamble reads: “Measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. This Directive respects the fundamental rights and observes the principles recognized in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union.”

<sup>105</sup> See Tampere Presidency Conclusions para 21 and Directive preamble recitation 3.

movement for third-country nationals who are family members of citizens of an EU member state have been dealt with in several pieces of legislation.<sup>106</sup>

After years of discussion within the Council of Ministers, the directive on family reunification (Council Directive 2003/86/EC of 22 September 2003) is the only legislative proposal to be adopted which addresses issues of legal immigration. The object of the directive is to clarify the parameters of the right to family reunification of third-country nationals who are residing lawfully in an EU member state, and to specify the conditions under which family members of the primary migrant can gain entry and establish residence in the state in order to preserve the family unit. With the entry into force of the Amsterdam Treaty, the EU was given competence in the arena of immigration policy and a legal basis for family reunion was established under article 63(3) of the EC treaties. As mentioned in chapter 3, as an outcome of the Tampere European Council Summit in 1999, the Commission issued draft directives in three key areas: the condition of entry and residence for third-country nationals for paid employment and self-employed activities; the right to family reunification; and the status

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<sup>106</sup> See the Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. This directive amended Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on Freedom of Movement for Workers within the Community and repealed Council Directive 64/221/EEC of 25 February 1964 (on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health), Council Directive 68/360/EEC of 15 October 1968 (on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families), Council Directive 72/194/EEC of 18 May 1972 (extending to workers exercising the right to remain in the territory of a Member State after having been employed in that State the scope of the Directive 64/221/EEC), Council Directive 73/148/EEC of 21 May 1973 (on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services), Council Directive 75/34/EEC of 17 December 1974 (concerning the right of nationals of a member state to remain in the territory of another member state after having pursued therein an activity in a self-employed capacity), Council Directive 90/364/EEC of 28 June 1990 (on the right of residence), Council Directive 90/365/EEC of 28 June 1990 (on the right of residence for employees and self-employed persons who have ceased their occupational activity), and Council Directive 93/96/EEC of 29 October 1993 (on the right of residence for students).

of third-country nationals who are long-term residents.

The European Commission's proposal for a Directive on the right to family reunification was submitted to the Parliament and Council on December 1, 1999 [COM(1999) 638 final]. As per procedure, the Commission submitted the proposal to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions. The Economic and Social Committee tendered its opinion in May 2000. The opinion of the European Parliament, which approved the proposal but suggested certain amendments, was adopted on September 6, 2000. The European Commission consequently presented a revised version of its proposal on October 10, 2000 [COM (2000) 624 final]. Following ongoing difficulties in reaching agreement on the text—in particular with respect to the definition of family—the Laeken European Council summit of December 2002 asked the Commission to prepare a further revised version to resolve the contested issues and renew impetus in this area.

On May 2, 2002, the European Commission presented its third proposal for a Council Directive on the right to family reunification [COM(2002) 225 final]. On February 27, 2003, the Justice and Home Affairs Council reached “political” agreement on this draft Directive. As a result, the Directive was officially made public by being published in the *Official Journal of the European Union* in spite of the fact that the EP had not yet had an opportunity to examine the revised proposal or formulate its observations. The Parliament later issued its Opinion (adopted April 9, 2003), in which the Council is requested to amend a number of the provisions in order to incorporate eligibility for more categories of people who may benefit from reunification. The EP Opinion was ignored, and on September 22, 2003, the Council of Ministers formally

approved a final version of the Directive.

The European Parliament subsequently lodged a complaint with the European Court of Justice, calling for the annulment of several provisions in the text (ECJ number: C-540/03). The final paragraph of the action brought by the Parliament reads:

The right to family life as recognised by Article 8 of the 1950 European Convention on Human Rights (ECHR) and interpreted in the case-law of the European Court of Human Rights can be restricted only for certain reasons and each case calls for a balancing of the interests of the third-country nationals concerned and those of the host State. Derogations from the right to family reunification which are expressly authorised by the aforementioned provisions of the directive go beyond the permitted restrictions and violate the fundamental right to family life and the right not to be discriminated against as guaranteed by the ECHR.

The transparency of the legislative process has been compromised because the EP has been stymied in its role as co-legislator. Earlier, on February 10, 2004, the European Court of Justice rejected the European Parliament's application for an accelerated procedure to deal with this case. This decision, unlike others denying the accelerated procedure, has not been published. The Directive entered into force October 3, 2003, and the member states were required to transpose it into national law by October 3, 2005; due to the controversy surrounding the Directive, the likelihood of most member states meeting this deadline has been called into question. In a motion for an EP resolution on "Women's Immigration: The Role and Place of Immigrant Women in the European Union" tabled in September 2006, the Committee on Women's Rights and Gender Equity

chastised the member states for not satisfactorily implementing the directive (European Parliament 2006).<sup>107</sup>

The question is whether the Directive is violating international law. The European Parliament has claimed that it is. Nevertheless, on June 27, 2006, the ECJ delivered a judgment dismissing the action brought by the EP challenging the Directive on the grounds of violating the fundamental right to respect for family life, the obligation to have regard for the best interests of children, and the principle of non-discrimination on the basis of age. The court found that the Council was not violating human rights by permitting member states to adopt legislation modifying certain aspects of the right as defined by the Directive. Hence national prerogative was maintained.

*Adherence to International Law: the external rationale*

The strength of the Directive is grounded in its compatibility with international law; it fails to establish any new rights. Despite its professed commitment to the human rights, its provisions must be judged on their own terms. The Directive has been challenged on the grounds of its legality and compatibility with Article 8 guaranteeing the right to family life found in the ECHR. Article 8 does not implicitly guarantee a right to family reunification but can, under certain circumstances—using the justification of protecting “family life”—functionally result in the exercise of such a right. Legal

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<sup>107</sup> The European Parliament: “Stresses that Directive 2003/86/EC has not yet been satisfactorily implemented by all Member States, leaving substantial scope for discriminatory treatment of women immigrants; calls on the Commission, in the context of the evaluation report which it is required to submit, to put forward proposals for amendments to the relevant articles aimed at reducing significantly (if possible within one year of their arrival) the time required for a partner to acquire autonomous and independent status of that of their spouse, ensuring that they retain it in the event of their bond with their spouse being broken (separation, divorce, widowhood, etc.) and eliminating the possibility of imposing restrictions on access to the labour market and all social services.”

scholars and human rights advocates fear that the Directive will result in intensified discrimination against foreigners during a time of heightened security anxieties (Apar and Carrera 2005; COORDEUROOP 2003).

The European Court of Human Rights has ruled that a refusal of the claim to the right of family reunification is not necessary a violation of Article 8. Signatory states are required to protect the family but are not obligated to honor the decision of families regarding where they prefer to live. The argument often used when denying family reunification is that the law on the right to family life does not guarantee persons the ability to enjoy that right in any country of their choosing. The case is made that if an immigrant strongly desires to be reunited with her family members, she can always return to her country of origin. To some extent this argument is counterintuitive though; in order to even be eligible to apply for family reunification the primary migrant must demonstrate a considerable level of integration and embeddedness. The ability to have a viable application for family reunification necessarily implies rootedness in the host state. The economic and social application criteria demonstrate that the family is fully established in the host state. Often immigrants who are requesting reunion have started new families in the host state. The implication that it is very easy to pick up and establish a new home at will is dubious.

While recognized in the preamble,<sup>108</sup> family reunification as a right is not secured in any of the Directive's provisions, thereby continuing to leave the conditions for family reunification to the discretion of the member states. Several restrictions dictate that the

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<sup>108</sup> Recital 6 of the preamble of the Directive reads, "To protect the family and establish or preserve family life, the material conditions for exercising the right to family reunification should be determined on the basis of common criteria."

right of family reunification need only be exercised in a very limited way. Some examples of these conditions are the potentially unlimited amount of time permitted to consider an application; the unnecessarily long waiting period before family members can join an applicant; the arbitrary prohibitions placed on entering the labor market; and the refusal of entry on grounds of public policy, public security, or public health.

The standards as laid out in the final Directive are more restrictive than those in the original 1999 draft proposed by the Commission. There are many references to national law and derogations in the Directive, which is indicative of the inability of the member states to reach a consensus on certain issues. The second amended Commission proposal even contained a standstill clause. The Commission elaborated in the explanatory memorandum that accompanied the revised draft that the clause was inserted “to limit the use made of the flexibility or exceptions introduced in certain provisions of the proposal.” Member states “cannot, when amending their national legislation, weaken the common core of provisions put in place by this proposal.” This provision was deleted from the final Directive.

Member states seem to have no compunction about instituting restrictive measures at the expense of human rights. They demonstrate an unwillingness to admit family members who are not viewed as contributing to the state and the economy. This, of course, has obvious gendered implications because women who immigrate as wives, particularly from developing countries, are often perceived as non-economic migrants.

Article 4 limits family reunification to spouses and the natural or adopted minor children of the sponsor or sponsor’s spouse. It effectively reduces the family unit to the nuclear family model. Only the spouse and minor children (biological or adopted) are

eligible for family reunification. No other family configurations are acknowledged. For parents, adult children, and unmarried, non-heterosexual partners there exists only the possibility of eligibility for reunion at the discretion of the member state. As only three states—Belgium, the Netherlands and Spain—permit same-sex marriages, EU law does not yet recognize the term spouse as applicable to same sex couples (ILGA-Europe 2003). In the ECHR, family is left undefined; therefore it allows for greater flexibility in interpretation.

Paragraph 13 of the preamble reads: “The right to family reunification should be exercised in proper compliance with the values and principles recognized by the Member States, in particular with respect to the rights of women and of children; such compliance justifies the possible taking of restrictive measures against applications for family reunification of polygamous households.” Polygamy is explicitly condemned, only one spouse and his or her children can benefit from the right to family reunification. Member states also reserve the right to restrict the admittance of the children of an additional spouse (Art. 4.4). Arguably, this is one case in which western conceptions of women’s rights are viewed as more defensible than the right to family life.

Many of the objections to the Directive have come from children’s rights advocates. They decry the freedom that member states are given to derogate from the right to family reunification by setting age limits for children. From the perspective of children’s rights, the Directive is problematic in three respects: limiting entry to children over the age of 12 unless an integration criteria is met (Article 4[1]); establishing 15 as the age limit for minor children eligible for family reunion (Article 4[6]); establishing lengthy waiting periods before family reunion can occur (Articles 5[4] and 8). The EP’s

action for annulment of the Directive brought before the ECJ is grounded largely in these arguments. The EP claims these provisions are in violation of ECHR Article 8.

Article 5 of the original 1999 Commission proposal essentially defers to national legislation and places no conditions on the family reunion of unaccompanied minor children. Article 4(1)(d) of the final Directive allows member states to limit the entry of minor children by requiring an integration tests.<sup>109</sup> This concern over successful integration is also reflected in recital 12 of the preamble.<sup>110</sup> However, the expectation that young teenagers often coming from situations of economic deprivation in underdeveloped countries will have access to cultural and language education is at best unrealistic and at worst disingenuous.

Article 4(6)<sup>111</sup> in effect sets limits on the admission age of minor children that did not exist before. Legal scholars contend that the right to family life ensures the protection of the family from interference by the state. This can imply that from a legal perspective an identifiable family unit has to exist before a state can be accused of violating it. This is problematic in the case of family reunification because in many cases the children were never resident in the host state; therefore, no family unit in a physical sense existed before the child applied for reunion (Schmidt 2006). In the case of children 15 years old

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<sup>109</sup> “By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.”

<sup>110</sup> “The possibility of limiting the right to family reunification of children over the age of 12, whose primary residence is not with the sponsor, is intended to reflect the children’s capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school.”

<sup>111</sup> “By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification.”

and older, the argument is that they have either lived so long apart from their parents or are so fully engaged in their own living situation (with their guardians) in their home culture that no effective family unit can be said to exist.

The right to family reunification is made subordinate to the “reception capacity” of the member state. The Directive allows member states to impose long waiting periods. Article 5(4)<sup>112</sup> allows states nine or more months before reaching a decision on an application, and Article 8<sup>113</sup> institutes waiting periods of two or three years. These provisions cast doubt on member states’ concern for the right of parents and children to live together and for the overall vitality of the family life of third-country migrants. The ostensible goal of the Directive is to preserve and protect families but many of the provisions actually serve to undermine family life. In a worst case scenario a child would be forced to wait four years before being reunited with his parents. If member states are worried about the integration capacity of older children it would seem to be in their best interest to lower the waiting period. What amounts to a forced separation can be said to contravene the right to family life guaranteed in Article 8 ECHR.

These waiting periods also apply to spouses and can undermine the cohesiveness of young families. In the original 1999 Commission proposal, the member state was required to grant the family member a renewable residence permit of the same duration as

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<sup>112</sup> The competent authorities of the Member State shall give the person, who has submitted the application, written notification of the decision as soon as possible and in any event no later than nine months from the date on which the application was lodged.

In exceptional circumstances linked to the complexity of the examination of the application, the time limit referred to in the first subparagraph may be extended.

<sup>113</sup> Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her.

By way of derogation, where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.

that held by the applicant; in the final Directive a residence permit of only one year is specified (Art 13.2).

The restrictions imposed on spouses' right to family reunification are also problematic. The first family member specified in the Directive as warranting a right to reunion is the sponsor's spouse. The relationship of marriage arguably carries the greatest legitimacy. That there are very few limitations placed on the right of reunification for a spouse makes the ones that are specified take on a new importance. Article 4(5) states: "In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her." In effect, member states can require third-country immigrants to be 21 before their union is considered legitimate enough to apply for family reunification or migration. This measure is justified on the grounds of ensuring better integration and thwarting forced marriages. This seems contrary to the logic of reunification for dependent children which endorses the idea that younger children (below the age of 18) are more desirable because theoretically more receptive to integration measures. No member state prohibits their own nationals from marrying until they are 21. This provision gainsays the goal found in the preamble of granting third-country nationals "rights and obligations comparable to those of citizens of the European Union" (Para. 3).

This minimum-age condition can also be considered ethnocentric. It elides the distinction between arranged marriages and forced marriages. It can be argued that it makes the assumption that many marriages of non-European immigrants are forced (Schmidt 2006). The ECHR entitles all men and women of marriageable age to marry. To

place an additional burden of proof on the immigrant regarding the validity of his or her marriage, rather than simply accepting their legal relationship, is an instance of unfair treatment and can be said to be in violation of Article 8. Imposing an age limit can put a strain on young couples who may be forced to wait several years before they can be reunited. The question arises of whether the waiting period observes the interest of the young couples' right to family life.

All of these provisions are too restrictive in the sense that they do not allow for the consideration of special circumstances. There must be the consideration of a fair balance of interests when ruling on conflicting rights: the right of the state to control who enters its territory and the right of the immigrant to family life (Schmidt 2006; Arturo 2005).

*Granting Third-country Nationals Comparable Rights: the internal rationale*

Recital three of the preamble of the Directive states: "the European Union should ensure fair treatment of third-country nationals residing lawfully on the territory of the Member States and that a more vigorous integration policy should aim at granting them rights and obligations comparable to those of citizens of the European Union." Does the Directive meet its goal of granting rights to third-country nationals comparable to those of EU citizens? Does its internal logic hold? The goals set out at Tampere, reaffirmed at the Laeken summit in 2001, and codified in the preamble of the Directive are ambitious. However, the aim of establishing rights comparable to EU citizens fails on several fronts.

The provision that allows states to limit spouses who are under 21 from migrating is potentially discriminatory. Each member state has a minimum age limit to be eligible

for marriage and it should apply to all legal residents. Third-country immigrant spouses have more requirements to fulfill and fewer rights than member-state nationals (Schmidt 2006).

Unmarried and same-sex partners are not included in the definition of spouse contained in the Directive. In Article 5(1[a]) of the 1999 proposal unmarried and same-sex partners were included in the same category as spouses insofar as they are treated equally under the law in member states. Given that Article 13(1) of the TEC,<sup>114</sup> as amended by the Treaty of Nice, explicitly states that the Council may take action to combat discrimination based on sexual orientation, the Directive can actually be considered a step backward in the recognition and equal treatment of unmarried and same-sex partners.

Article 7(1) of the Directive requires that applicants provide evidence of “normal” housing, sickness insurance, and “stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned.” It can be argued that those family members who are sick and/or living in reduced circumstances are the one who are most in need of familial comfort and support. In addition, the sufficient resources criteria can become all the more difficult to fulfill as Article 14 sets limits on certain family members access to the labor market.

The Directive does not succeed in realizing its stated purpose of granting third-country nationals “rights and obligations comparable to those of citizens of the European

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<sup>114</sup> “Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

Union,” given that many of the provisions fall short of the rights given to EU nationals in the 1968 Council regulation on the free movement of EU workers in the Community (Council of the EU 1968).<sup>115</sup>

*Women as Family Migrants: the gendered rationale*

Recital 15 of the preamble states: “The right to family reunification should be exercised in proper compliance with the values and principles recognized by the Member States, in particular with respect to the rights of women and of children.” The Directive does attempt to take into account the particular hardships that some women immigrants confront. Despite a substantial body of European legislation and jurisprudence that attempts to redress sexual discrimination, immigration law is generally considered to be gender-neutral. It can be claimed that the Directive is formally gender-neutral because the same restrictions apply to men if they are the trailing spouses; however, the reality is that the overwhelming majority of migrants who are reunifying with sponsors are women. As a result, even if the language of the Directive is formally gender-neutral, practically it discriminates against female migrants because the particular situation of female migrants has not been taken into account by lawmakers.

The Directive can have very serious discriminatory repercussion for women. It is left up to the judgment of member states to decide whether particular family members will be allowed access to the labor market. Women who emigrate as wives are legally and

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<sup>115</sup> The preamble of Regulation 1612/68 reads: “Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker’s right to be joined by his family and the conditions for the integration of that family into the host country.”

economically dependent on their husbands. They can be denied employment for up to one year thus putting stress on the family's financial viability. Article 14 specifies that "Member States may decide according to national law the conditions under which family members shall exercise an employed or self-employed activity." Family members have an unconditional right to education and vocational training but not to employment, which seems perverse. It also seems ill-advised on the part of the host state to prevent access to the work place if the main concern is successful integration. Limiting women to laboring in the domestic sphere also serves to reinforce traditional gender roles. Family members will have a better chance of socially and culturally adapting to the host society working in the public domain than being confined to the familial sphere. Financial dependency can also contribute to an uneven power relationship between husband and wife and lead to additional forms of subordination.

Member states are given a year to deliberate whether their economies and labor markets can accommodate new family members. However, more than 90 percent of the spouses benefiting from family reunification are women, who as a result of this provision are denied the ability to achieve financial self-sufficiency (Schmidt 2006). They become dependent on their husbands for their livelihood. Member states can prohibit family members from obtaining (legal) employment for up to twelve months—or altogether for parents or adult children of immigrants—on the grounds of projected national labor market capacity, yet in Article 16 they also are given the right to withdraw the residence permit if the sponsor lacks sufficient resources to support a family.

The tenuous economic situation of women could be further exacerbated if her spouse carries on an extended relationship with another person resulting in a potentially

lengthy separation (Art. 16.1[c]). Article 16(1) allows member states to withdraw or refuse to renew a family member's residence permit in cases "where the sponsor and his/her family member(s) do not or no longer live in a real marital or family relationship, or where it is found that the sponsor or the unmarried partner is married or is in a stable long-term relationship with another person." If such a situation comes to light "a veritable right of repudiation is established in that by losing their residence permit, these women lose all the rights that are supposed to protect them in the case of separation and divorce" (COORDEUROOP 2003:4).

Article 15(1) entitles the spouse or family member, after no longer than five years of residence, to an autonomous residence permit independent of the sponsor. It is plain to see that this puts the dependent family member in a very uncertain position during these first five years. Article 15(3) directs member states to set down provisions for granting autonomous residence permits "in the event of particularly difficult circumstances," due to the breakdown of family ties. Domestic violence is implied but not specified. In cases of widowhood, separation, divorce, or in situations of domestic violence women can apply for an autonomous residence permit on humanitarian grounds, but again, the criteria for this is left to the discretion of the member state.

An arbitrary restriction on family reunification is still sanctioned by the new Directive, namely in Chapter 7 on penalties and redress. Migrants must prove that their marriage, partnership, or adoption is genuine and was not "contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State" (Art. 16.2[a]). This can be argued as a way of introducing a "primary purpose rule." Migrants are required to verify the quality of their relationships through interrogation methods that

can be very personally invasive. A marriage can be declared illegal if deemed to be based on false material motives; this has obvious implications for arranged marriages which do not conform to a western model (Bhabha and Shutter 1994).

### **Conclusion**

As demonstrated, the Directive on a Right to Family Reunification for Third-country Nationals does not succeed in fulfilling its external rationale of observing and protecting international human rights due to its incompatibility with the spirit of the ECHR; it fails to grant third-country nationals rights comparable to EU citizens, and it also fails to fulfill its self proclaimed goal of protecting the rights of women. As one scholar puts it: The proposed right of family reunification for third-country nationals “is in danger of being effectively rendered redundant” by the restrictions or qualifiers attached to the “right” in the Directive (Cholewinski 2002:273).

For EU legislative purposes, family reunification policy is framed as an integration policy;<sup>116</sup> however, it functions as an immigration control policy. Member states have their own motivations for encouraging or discouraging family reunification based on the desire for the successful integration of existing immigrant communities and the maintenance of domestic security. The Directive neglected to consider the role of women in migration to the detriment of the whole policy because they are essential to successful integration.

It is possible that family reunification seems safer and more legitimate than

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<sup>116</sup> Recital 4 of the preamble of the Directive states: “Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third-country nationals in the Member State.”

individual labor migration in part because the right to family life is an established human right with a long history in Europe, and in part because most policymakers assume the new migrants will be relatively harmless women and minors capable of being successfully integrated before they can become disruptive. With that in mind, is it possible to assert that the primary impetus behind the EU's decision to legislate family reunification is grounded in the desire to ensure human rights principles: the right to found and maintain a family? And if so, why do legislative and structural limitations on family reunification continue to increase despite the human rights justifications?

EU policy has gone some length in resolving the differences among member states in settling on a single definition of family. And European efforts to harmonize family reunification policy "suggest that contradictory international principles and competing national interests may be reconciled at the regional level" (Lahav 1999:10). European family reunification accords are more developed and explicit than those found in any other legal regime. As two noted human geographers observe, "the unique legal framework of the Community, which is designed to encourage labour mobility, but is less satisfactory in dealing with the 'messiness' of family dissolution, provides a context in which new forms of family migration should appear" (Bailey and Boyle 2004:238). However, the Directive neither adequately protects the human rights of women third-country nationals (or immigrants more generally for that matter), nor successfully harmonizes member states' legislation in this area when the number of derogations and open-ended provisions are taken into account. EU policy strengthens the argument that all family reunification policy is necessarily conditional and not likely to be enshrined as a universal human right.

The system of officially sanctioned modes of entry and settlement should be designed to benefit immigrants and not limited to imposing increasingly restrictive conditions. EU immigration “mechanisms must present a continuum enabling immigrants to improve their status in the EU. These flexible mechanisms shall allow a shift from one purpose of staying to another” such as an evolution from family formation to education and education to employment (EWL 2004). The fact that the immigration laws keep changing, in some cases every year in certain member states, is only one practical difficulty immigrant women face when they are braving the bureaucratic morass of regulations as they try to create a better life for themselves and their families. And this situation shows no signs of stopping any time soon as member states endeavor to transpose the provisions outlined in the Directive into national law.

As progressively determined by the jurisprudence of the European Court of Human Rights, it is the prerogative of states to stipulate, within the parameters of article 8, the conditions under which the right to a private family life can be enjoyed. Nevertheless, “placing conditions on such a right should not mean ‘emptying’ it of its meaning. Yet this is what the directive does. In several points, in a more or less explicit goal of ‘controlling migratory flows’ rather than promoting integration, the Council sets conditions that will not at all allow for the full exercise of this right to family reunification” (COORDEUROP 2003:4). It appears now that only a very minimal level of communitarization will occur and it will be a convergence at the bottom. Although ostensibly the motivation behind drafting the document, the human rights dimension of immigration becomes secondary to the management of migration. The evidence is mounting (e.g., in France and the Netherlands) that the Directive, in its current

formulation may result in a general decline in family reunification standards throughout the EU.

## Chapter 6

### Conclusion

In 2005 the European Commission published a green paper on an EU approach to managing economic migration. Member states in the European Union have set about devising a managed migration system with a complex classification structure for categorizing different statuses of migrants, each with varying access to certain rights and entitlements. This EU policy program is part of a move on the part of “many bureaucrats and politicians in the developed world [who] would have us believe that the movement of people between States is as manageable as fast food or any production line” (Goodwin-Gill 2005:4). The discourse of managed migration posits that the most effective way to address transnational migration flows (e.g., regular and irregular labor migration, family reunion, and refugee migration) is by developing better mechanisms of control and coercion, such as more rigorous and invasive border controls, private carrier sanctions, quotas and ceilings, prosecution of traffickers, and return agreements.

The managed migration approach is shortsighted because it views migration as a “deviant behavior” which can be corrected through foreign investment and “partnerships with countries of origin” as the Tampere Presidency Conclusions and various other EU documents endorse (Kleinschmidt 2002). This position neglects to take into account the fact that human migration has been a persistent feature—and that migrants have remained a constant percentage of the world population throughout the twentieth century (UN 2004). The view that migration is an anomalous condition rooted in desperation or opportunism leads to the political conviction that migration “can be managed by a combination of economic (or military) interventionism at the source and fine tuning at the

destination. But what the *constancy* of migration should surely show is that it will go on regardless, and that there will always be a percentage of the world who values their mobility above their present situation” (Goodwin-Gill 2005:6). Managed migration programs are rooted in the principle of national sovereignty, and emphasize the disjuncture between necessary economic migrants who are simply taking advantage of the globalized economy and “those having humanitarian needs or other value based claims” (Goodwin-Gill 2005:11). We all have the right to move—to leave our country and to return. “If migration is recognized as a normal, not a deviant behaviour, migration policies that impose constraints and hardships upon migrants in service to the sovereign state are violations of human rights” (Kleinschmidt 2002:11). I have already delved into the (non)observance and the legislative attempts to protect and/or curtail the human rights of immigrants in the EU; in order to round out the discussion, it is useful at this point to outline the evolution of human rights more generally in the EU.

### **Human Rights in the European Union**

*The practices of human rights law offer concrete examples of shifting understandings of the limits of sovereignty (Sikkink 1993:141).*

An internationally accepted ideational formulation known as human rights was one of the building blocks of the European Union. Acceptance of this normative framework allows the EU to conceive of itself as a community of liberal states characterized by a dedication to peace, democracy, and the rule of law. EU member states would not exist in their current incarnation as liberal democratic welfare states in the absence of the international ideational structure of human rights. Thus, a functional

materialist argument for embracing human rights norms is that it indirectly fosters an ideological climate in which “European” economic and security interests can flourish. Human rights norms do not necessarily need to compete or stand in opposition to economic and security concerns; to the contrary, a human rights normative structure lays the foundation for convergence on economic and security concerns.

Human rights gained significance in the global political and social discourse after the Second World War. Sikkink (1993) claims this was a period in Europe when “ideas had a direct impact on policy” (140). The new worldview that was emerging led to the creation of the European human rights regime and a robust regional human rights legal machinery. For Europe, the urgency attached to the human rights issue was explicitly linked to the horrors of the war and the Holocaust and the desire to prevent such atrocities from ever recurring (Lauren 1998).

The evolution of the European human rights system was a parallel process to the development of a United Nations norms promotion regime: both were motivated by the need to distinguish the rights guaranteed by western democratic states from the concept of rights endorsed by Soviet bloc states. The West had both an ideological and an instrumental investment in human rights norms. After the UN Universal Declaration of Human Rights was ratified in 1948, the Council of Europe<sup>117</sup> adopted the most comprehensive system of monitoring and enforcing human rights in the world. The

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<sup>117</sup> Part of the challenge of examining the protection of human rights in Europe is the complexity of the regional arrangements. Both the Organisation for Security and Co-Operation in Europe and the Council of Europe have jurisdictions that overlap with the European Union. The European Human Rights Commission and the European Court of Human Rights which are arms of the Council of Europe are generally acknowledged to be the most effective formal institutions for the promotion and enforcement of human rights norms. The Council of Europe operates according to intergovernmental cooperation whereas the EU combines both intergovernmental and supranational cooperation. Niessen (1992) contends that “the Council of Europe’s activities are directed toward the promotion of civil, political, cultural and social rights, whereas the European Community’s policies are directed toward economic integration and only toward other areas insofar as they serve that purpose” (677).

European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) came into force in 1953, and the European Court of Human Rights started hearing cases in 1959. The European Court was unprecedented in that it had international jurisdiction over human rights and its rulings were binding on signatory states (Weston et al. 1992).

The evolution of an international human rights regime and the process of European integration were both contemporaneous and linked.<sup>118</sup> Human rights became implicated in the project of building a unified Europe; “support for human rights policies was intensified by the widespread belief that the unification process depended on a normative agreement, and such an agreement was embodied in the European human rights documents” (Sikkink 1993:169). EU supranational institution building created a window of opportunity for human rights ideas to infiltrate policymaking. While the international and regional momentum may have been strong, national institutions for enforcing human rights protections did not receive as much attention.

Given this history, it is not surprising that human rights—usually framed in terms of the “social dimension”—have long been a policy concern at the EU level. A 1975 European Council initiative, the Tindemans Report, “advocated rights of European union citizenship through the protection of individual rights (including consumer rights); the protection of the environment; and the general recognition of fundamental economic and social rights with redress through the European Court of Justice” (Geddes 1995:203). However, this report was shelved until the integrative impulse again gained momentum in the mid-eighties.

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<sup>118</sup> The Treaty of Paris, which created the European Coal and Steel Community, was signed in 1951 and the Treaty of Rome which established the European Economic Community was ratified in 1957.

The Belgian presidency of the Council of Ministers proposed in 1987 that some minimum standard of guaranteed social rights should be established. At the Strasbourg summit in 1989 the Community Charter of Fundamental Social Rights of Workers or Social Charter was adopted as a “solemn declaration.”<sup>119</sup> The Social Charter was an attempt to integrate a comprehensive social dimension into the EU institutional configuration “by establishing a set of rights systematically applicable to all workers and to certain groups of marginalized people across all member states” (Gold 1993:10). The amendments contained in the Maastricht Treaty that encompassed the social dimension came to be known as the Social Chapter. Mutual intransigence over social policy led to the compromise that the UK would be allowed to opt out and that the Social Chapter would become the Protocol on Social Policy, annexed as a separate agreement to the Treaty on European Union.

Since the election of the Labour government in the UK in May 1997, all member states now subscribe to the EU’s “social provisions” which have been fully incorporated into the TEC (TEC title XI, Chapter 1). The social provisions empower the EU, in conjunction with the member states, to formulate and implement measures in the following fields: (a) workers’ health and safety, (b) working conditions, (c) social security and social protection of workers, (d) protection of workers when their employment contract is terminated, (e) the information and consultation of workers, (f) representation and collective defense of the interests of workers and employers, (g) conditions of employment for third-country nationals legally residing in Community

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<sup>119</sup> The preamble of the 1989 Charter of the Fundamental Social Rights of Workers states: “it is for the Member States to guarantee that workers from non-member countries and members of their families who are legally resident in a Member State of the European Community are able to enjoy, as regards their living and working conditions, treatment comparable to that enjoyed by workers who are nationals of the Member State concerned.”

territory, (h) the integration of persons excluded from the labor market, (i) equality between men and women with regard to labor market opportunities and treatment at work, and (j) the combating of social exclusion (TEC Title XI(1)(137)(1)). The Council may adopt directives in some of these areas according to the co-decision procedure. However, a few of these policy matters, including social security and conditions of employment for third-country nationals, fall under the consultation procedure, and passage of any proposal requires a unanimous vote in the Council (TEC Title XI(1)(137)(2)).

Title 1, Article 6(1) of the 1997 TEC (which incorporates the amendments approved in the Amsterdam Treaty) stipulates: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” The treaty also obliges member states to respect their commitment to the European Convention on Human Rights and Fundamental Freedoms. The main objective of the 1999 Tampere European Council summit was to negotiate the creation of an area of freedom, security, and justice based on the parameters set out in the Treaty of Amsterdam. The Tampere Presidency Conclusions demonstrate a high level of rhetorical commitment to human rights. The first paragraph states: “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”.<sup>120</sup>

Respect for human rights is a fundamental component of the EU’s self-perception. Europe is a normative community, unified around the UDHR, the ECHR, and now the Charter of Fundamental Rights of the European Union. The drafting of the EU Charter

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<sup>120</sup> See [http://europa.eu.int/council/off/conclu/oct99/oct99\\_en.htm](http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm)

was considered closely connected to the realization of an area of freedom, security, and justice. The Charter was officially adopted as a “solemn proclamation” by the Presidents of the Commission, the EP and the Council of Ministers in Nice on December 7, 2000. The EU Charter draws on already existing human rights documents, mainly the ECHR, the Geneva Conventions, and various United Nations Documents. During the time of its drafting, the European Women’s Lobby issued an advisory statement noting not only that very few women were involved in the elaboration of the Charter, but that the gender dimension is not integrated into any part of the Convention’s work. There is no mention of equality between men and women—only prohibition of discrimination on the grounds of sex included in a general anti-discrimination clause. The European Women’s Lobby contends that women suffer from multiple levels of discrimination, which is more far-reaching and complex than other forms of discrimination (EWL 2000).

The Laeken European Council held in December 2001 adopted the “Laeken Declaration on the Future of Europe” calling for a European convention to be held to drafting of the Treaty Establishing a Constitution for Europe. The Declaration set out as one of the main tasks of the European Convention to decide “whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights” (Laeken European Council 2001). In 2003, when the draft constitution was presented, the European Charter was incorporated in full in Part II of the treaty. The Charter will become law when the constitutional treaty is ratified.

### **The Role of EU Institutions in Establishing the Rights of Third-country Migrants**

*The coexistence of conflicting discourses that do not speak to one another, competition among like-minded actors, diverse modes of decision-making (depending on their level of supranationalization), in a period of numerous and rapid EU constitutional changes explains the adhococratic and contradictory character of law-making in EU immigration-related policies. (Guidaaron 2003:277)*

Integration on immigration policy occurs not as a result of functional spillover; rather it evolves to correspond with the definition of the national interest promulgated by particular political actors. Integration is the result of political actors and government agencies with shared interests that make a strategic decision to pursue policymaking at the European level as a way of ensuring that they are able to exert control over the framing of the issue and the formulation of policy solutions. In the final analysis it seems that human rights norms matter so much in the formulation and enforcement of immigration policy that immigration-control-minded policymakers at the member-state level pursue novel avenues of influence in order to circumvent their influence.

When establishing an institutional overview of the recognition and adoption of immigrants' rights in the EU it becomes clear that since the inception of the European Community, the Commission had made numerous attempts to introduce measures addressing the rights of legally resident third-country nationals into EU legislation: by leaving vague the definition of worker in the original Treaty of Rome, then in 1974 with the *Action Programme in Favour of Migrant Workers and Their Families*, in 1985 with the *Guidelines for a Community Policy on Migration*, and again in its 1994 white paper

on European social policy. The Commission attempted to expand the rights of resident foreigners in the proposed External Frontiers Convention in 1993 and in the 1997 proposal for a convention establishing common rules for the admission of third-country nationals to the member states (Larsen 2004).

The member states, as represented by the Council, had different priorities when it came to ceding authority to the EU over who could live on their territory and under what conditions. Partly due to the end of the Cold War and changing international conditions, the member states finally agreed that immigration policy and the integration of third-country nationals were appropriate and necessary issues to be addressed at the European level, and as a result immigration and asylum policy was included in the Maastricht framework and strengthened in the Treaty of Amsterdam. However, the Council continued to protect its prerogative in this area by functionally excluding the EP and the ECJ. The member states did not want to stymie progress in this area but they also did not want to relinquish control over outcomes. The Tampere Summit was an attempt to set some acceptable common goals for immigration and asylum policy. One of the main proposals to emerge out of this summit was the Council Directive on the Right to Family Reunification.

Rather than strengthening the international human rights of immigrants as might have been expected from a supranational political entity, EU immigration policy may actually serve to undermine migrants' rights. In addition to the continued strength of member-state governments, this situation is can be attributed to a number of institutional factors: the limited role of the ECJ, which has issued rulings in the past protecting the family life and residency status of third-country nationals based on international law; the

circumscribed role of the EP, which has traditionally been a pro-immigrant body; and the increasingly circumspect role of the Commission, which has endeavored to expand the rights of third-country immigrants in many of its proposals concerning migration and social policy in the past.

International human rights interests are often vulnerable to the imperatives of state interests. The protections granted in international and regional instruments are left somewhat ambiguous, and therefore states retain their sovereign right to control migration across their territorial boundaries and exercise considerable discretion in placing normative limitations on the different categories of migrants (Cholewinski 1994). Lahav (1997) argues that scholars who emphasize the influence of human rights norms and international instruments more generally on migration policy formulation “fail to consider changing domestic constraints and interests in an evolving international order” (351). But I would argue that international norms and human rights instruments are not as static as this statement implies. Domestic interests may seem to have an upper hand at times, particularly during times of heightened security concerns. However, this engagement and dialogue among the variety of EU governmental and nongovernmental actors in the process of grappling with and attempting to accommodate international norms contributes to and transforms member-state identity and interest-formation (Slaughter et. al. 1998).

### **Postnational Rights?**

The growing numbers and diversity of migrant flows has led to the development of dual, transnational, and some would argue “postnational” forms of identity and

belonging. Human rights discourse and law has the potential of being more relevant in these new heterogeneous societies. The rights discourse and the practical pursuit of rights has been very useful and empowering strategy for oppressed people internationally. Membership and residency rights could be reformulated and ultimately the conception of citizenship broadened.

One of the oft-cited studies of the evolution of immigrants' rights in Europe is Yasemin Soysal's *Limits of Citizenship* (1994). Her contention is that postwar international human rights discourse has had a significant impact on policymaking at the domestic level. In her account, the norms embodied in various human rights charters and conventions have measurably influenced state behavior by providing guidelines for the treatment of non-citizens residing in their territories. This raises the question of whether a theoretical and practical basis for a model of political membership that extends beyond national borders could be uncovered (Martiniello 1995). Soysal (1994) posits a postnational discourse of membership which operates at a transnational level:

In the postnational model, universal personhood replaces nationhood; and universal human rights replaces national rights. The justification for the state's obligations to foreign populations goes beyond the nation-state itself. The rights and claims of individuals are legitimated by ideologies grounded in a transnational community, through international codes, conventions and laws on human rights independent of their citizenship in a nation-state. Hence, the individual transcends the citizen. This is the most elemental way that the postnational model differs from the national model. (142)

In this postnational model of citizenship the boundaries of membership in nation-

states are fluid. There is no longer a necessary correlation between membership and territory. Immigrants can live in one state, benefit from its economic advantages and social programs, while continuing to maintain citizenship in another state. This explains why many immigrants, even when they were no longer needed as workers, have been incorporated into the social, economic, and political structures of their European host society. Indeed, Guiraudon (1998) claims, “similar changes in foreigners rights occurred across European states regardless of their respective immigration histories, traditions of incorporation, or nationality laws, thereby suggesting that a supra-national dynamic was at work” (1).

While this postnational model suggests that a form of citizenship is evolving that grants similar rights to both migrants and EU nationals, the diversity and size of migrant communities have created new “hierarchies of civic stratification” (Kofman et al. 2000:79). Different categories of individuals have varying levels of access to rights. More restrictive immigration policies have actually led to an increasing stratification of rights among the various migrant groups (e.g., EU citizens vs. third-country migrants, skilled vs. unskilled labor migrants, legal vs. illegal migrants, refugees vs. asylum seekers). This stratification of rights leads to increased insecurity for certain groups more than others (Freedman 2003).

Does this “universal personhood” embodied in the international human rights discourse also serve to undermine sexual discrimination and the disparities in wealth and quality of life caused by global capitalism? One of the difficulties with Soysal’s argument is that, although guestworkers are her prototypical postnational citizens, she views them only from the perspective of civil and political actors—not as workers and not as

gendered individuals. Additionally, in Soysal's account the causal mechanisms by which the human rights discourse leads to new forms of state membership are unclear. Hers is a simple correlation of "the emergence of human rights arguments and the new conception of state membership that came with the evolution of foreigners' rights" (Guiraudon 1998:7). Soysal's work is suggestive but this research differs along several lines. She is looking at human rights norms incorporation at the member-state level, whereas, this project looks specifically at EU policymaking. She also is completely uncritical of the human rights discourse itself and neglects to uncover which rights are being utilized and how have these rights been framed to address policy goals.

So, why is a human rights approach still useful, despite its limitations? It is not helpful simply to dismiss human rights discourse as being state-centric, being legalistic, and having a western individualistic bias when so many social movements continue to find the language to be conceptually and practically useful as way of framing resistance and liberation. Human rights are not a fixed set of tools for redressing injustices, but are a dynamic discursive construct subject to renegotiation: "By invoking human rights claims, we do not position ourselves *outside* the power relations of global capitalism, markets, and their institutional bulwarks. Rather, we ourselves, as the very human rights claims we assert, are inevitably conditioned and 'contaminated' by these same forces; we exist within them even as we work to transform them" (Petchesky 2003: 23).

### **Summing Up**

Although deeper economic integration and general support for the norm of the right to family life has led to increased EU competency in the immigration policy arena,

an issue area which historically has been fundamental to the notion of national sovereignty, this evolution of EU competence has not diminished member-state discretion in determining migrants' rights in this area. Indeed, "the EU's expanded competencies have allowed the member states to transnationally define the immigration issue and the rights of third-country nationals not as a human rights concern but as a national security concern" (Larsen 2004:132).

I have engaged in an empirical application of social constructivist theory, and a feminist critical appraisal of the socially constructed international environment itself. The research contributes to a theoretical debate occurring in the social sciences, and in international relations in particular, which questions the effect of norms and ideas on state action. This study examines the European Union, a multilevel governance entity with competences divided among its institutions compounded by the sometimes conflicting interests of each of the twenty-seven member states. Looking at a specific set of norms and a specific group of people to which they apply enabled me to investigate the gap or overlap between rhetorical commitment and actual policy outcomes.

This project examined how international human rights norms have affected the evolution of immigration policy in the EU and the proposed rights expansion of third-country nationals. By applying the case study method to the Council Directive on the Right to Family Reunification, I explored the gap between human rights rhetoric and practice in the development of EU immigration policies. The venue-shopping model does not explain why immigration has become an EU policy concern overall, but it does illuminate why the policies have taken on the form and content they have. One could contend that the residual human rights language is a vestige of the postwar liberalizing

impulse, but a more realist security-centered approach has gained dominance since then.

The EU holds up its family reunification policy as a tool for achieving the successful integration of all third-country residents; however, it functions as an immigration control policy. While recognized in the preamble of the Directive, family reunification as a right is not secured in any of the Directive's provisions. This makes it possible for the conditions for family reunification be left to the discretion of the member states. Several restrictions dictate that the right of family reunification will only be able to be exercised in a very limited way. These restrictions include the potentially unlimited amount of time permitted to consider an application; the unnecessarily long waiting period before family members can join an applicant; the arbitrary prohibitions placed on entering the labor market; and the refusal of entry on grounds of public policy, public security, or public health. The Directive neither adequately protects the human rights of women third-country nationals, nor successfully harmonizes member states' legislation in this area when the number of derogations and open-ended provisions are taken into account. EU policy strengthens the argument that all family reunification policy is necessarily conditional and not likely to be enshrined as a universal human right.

The research has synthesized a broad range of scholarship from international relations theory, feminist theory, EU governance and decisionmaking literature, cross-disciplinary immigration studies, and international law. It addresses several lacunae in the literature concerning the impact of international norms on state interests and action. First it looks at how norms impact policymaking at the EU level rather than the domestic level, treating the EU as an extremely complex political entity. While most of the prior constructivist scholarship on norms analyzes the norm-propagating role of non-state

actors and how norms are internalized at the domestic level, this research has focused on the role of decision makers acting within EU institutions and traced how norms are internalized at the regional level. It is also the first attempt to combine a gendered analysis of human rights norms in the European context, in an effort to propose an inclusive and transformative approach to immigration policy. Because the EU “is a young system of governance in which structures are fluid, experimental and changeable” (Peterson and Bomberg 1999:31), human rights norms, which are inclusive of the human rights of women, could become enshrined in a European constitution—not merely a normative force that is constantly trying to break into entrenched practices.

Third-country women immigrants are increasingly visible participants in the family mobility that “represents the interface between the individual and the social, in other words of public and private spaces” (Kofman 2004a:248). Family reunification migration exists at the intersection of human rights advocacy for women, children, ethnic and racial minorities and state control. The actions taken by nation states and supranational entities such as the European Union implicitly incorporate the recognition that family migration is creating a proving ground for negotiating the multiple affinities and identities that are beginning to characterize Europe; this reality necessitates that family reunification continue be a priority for policymakers.

Immigration has become an established feature of EU policy agenda, yet, as the example of the final family reunification directive demonstrates, this fact does not necessarily entail that member states are willingly relinquishing their national sovereignty to a supranational authority. A static conception of sovereignty can lead to an overly simplistic and potentially discriminatory model for immigration policy such as those

proposed by managed migration regimes. Scholars have claimed that the history of immigration policy is largely a story of its own failure (Castles 2004; Kleinschmidt 2002). It represents a failure to appreciate the changing social dynamics of the migratory process, to adequately address the growing socio-economic disparities between North and South, and to anticipate the influence of various political forces within governments and policymaking systems. Goodwin-Gill (2005) remarks that policy responses dictated by concerns over national sovereignty are destined to be both unsuccessful “because laws and regulations divorced from the human dimension of migration have little or no effect on what is an established constant in human behaviour; and harmful, because protection will be denied to those who need it and have a right to it” (8).

## Appendix

### Council Directive 2003/86/EC

#### of 22 September 2003 on the right to family reunification

##### THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63(3)(a) thereof,

Having regard to the proposal from the Commission<sup>121</sup>, Having regard to the opinion of the European Parliament<sup>122</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>123</sup>,

Having regard to the opinion of the Committee of the Regions<sup>124</sup>, Whereas:

(1) With a view to the progressive establishment of an area of freedom, security and justice, the Treaty establishing the European Community provides both for the adoption of measures aimed at ensuring the free movement of persons, in conjunction with flanking measures relating to external border controls, asylum and immigration, and for the adoption of measures relating to asylum, immigration and safeguarding the rights of third country nationals.

(2) Measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. This Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union.

(3) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, acknowledged the need for harmonisation of national legislation on the conditions for admission and residence of third country nationals. In this context, it has in particular stated that the European Union should ensure fair treatment of third country nationals residing lawfully on the territory of the Member States and that a more vigorous integration policy should aim at granting them rights and obligations

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<sup>121</sup> OJ C 116 E, 26.4.2000, p. 66, and OJ C 62 E, 27.2.2001, p. 99.

<sup>122</sup> OJ C 135, 7.5.2001, p. 174.

<sup>123</sup> OJC204, 18.7.2000, p. 40.

<sup>124</sup> OJ C 73, 26.3.2003, p. 16.

comparable to those of citizens of the European Union. The European Council accordingly asked the Council rapidly to adopt the legal instruments on the basis of Commission proposals. The need for achieving the objectives defined at Tampere has been reaffirmed by the Laeken European Council on 14 and 15 December 2001.

(4) Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.

(5) Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.

(6) To protect the family and establish or preserve family life, the material conditions for exercising the right to family reunification should be determined on the basis of common criteria.

(7) Member States should be able to apply this Directive also when the family enters together.

(8) Special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification.

(9) Family reunification should apply in any case to members of the nuclear family, that is to say the spouse and the minor children.

(10) It is for the Member States to decide whether they wish to authorise family reunification for relatives in the direct ascending line, adult unmarried children, unmarried or registered partners as well as, in the event of a polygamous marriage, minor children of a further spouse and the sponsor. Where a Member State authorises family reunification of these persons, this is without prejudice of the possibility, for Member States which do not recognise the existence of family ties in the cases covered by this provision, of not granting to the said persons the treatment of family members with regard to the right to reside in another Member State, as defined by the relevant EC legislation.

(11) The right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States, in particular with respect to the rights of women and of children; such compliance justifies the possible taking of restrictive measures against applications for family reunification of polygamous households.

(12) The possibility of limiting the right to family reunification of children over the age of 12, whose primary residence is not with the sponsor, is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school.

(13) A set of rules governing the procedure for examination of applications for family reunification and for entry and residence of family members should be laid down. Those procedures should be effective and manageable, taking account of the normal workload of the Member States' administrations, as well as transparent and fair, in order to offer appropriate legal certainty to those concerned.

(14) Family reunification may be refused on duly justified grounds. In particular, the person who wishes to be granted family reunification should not constitute a threat to public policy or public security. The notion of public policy may cover a conviction for committing a serious crime. In this context it has to be noted that the notion of public policy and public security covers also cases in which a third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations.

(15) The integration of family members should be promoted. For that purpose, they should be granted a status independent of that of the sponsor, in particular in cases of breakup of marriages and partnerships, and access to education, employment and vocational training on the same terms as the person with whom they are reunited, under the relevant conditions.

(16) Since the objectives of the proposed action, namely the establishment of a right to family reunification for third country nationals to be exercised in accordance with common rules, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved by the Community, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(17) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community and without prejudice to Article 4 of the said Protocol these Member States are not participating in the adoption of this Directive and are not bound by or subject to its application.

(18) In accordance with Article 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive,

and is not bound by it or subject to its application,

**HAS ADOPTED THIS DIRECTIVE:**

## **CHAPTER I**

### **General provisions**

#### **Article 1**

The purpose of this Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

#### **Article 2**

For the purposes of this Directive:

- (a) “third country national” means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty;
- (b) “refugee” means any third country national or stateless person enjoying refugee status within the meaning of the Geneva Convention relating to the status of refugees of 28 July 1951, as amended by the Protocol signed in New York on 31 January 1967;
- (c) “sponsor” means a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her;
- (d) “family reunification” means the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident’s entry;
- (e) “residence permit” means any authorisation issued by the authorities of a Member State allowing a third country national to stay legally in its territory, in accordance with the provisions of Article 1(2)(a) of Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third country nationals(5);
- (f) “unaccompanied minor” means third country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied

by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of the Member States.

### Article 3

1. This Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status.

2. This Directive shall not apply where the sponsor is:

(a) applying for recognition of refugee status whose application has not yet given rise to a final decision;

(b) authorised to reside in a Member State on the basis of temporary protection or applying for authorisation to reside on that basis and awaiting a decision on his status;

(c) authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States or applying for authorisation to reside on that basis and awaiting a decision on his status.

3. This Directive shall not apply to members of the family of a Union citizen.

4. This Directive is without prejudice to more favourable provisions of:

(a) bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other;

(b) the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987 and the European Convention on the legal status of migrant workers of 24 November 1977.

5. This Directive shall not affect the possibility for the Member States to adopt or maintain more favourable provisions.

## CHAPTER II

### Family members

#### Article 4

1. The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:

(a) the sponsor's spouse;

(b) the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations;

(c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement;

(d) the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement.

The minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married.

By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.

2. The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the following family members:

(a) first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin;

(b) the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health.

3. The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons.

Member States may decide that registered partners are to be treated equally as spouses with respect to family reunification.

4. In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse.

By way of derogation from paragraph 1(c), Member States may limit the family reunification of minor children of a further spouse and the sponsor.

5. In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her.

6. By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification.

## **CHAPTER III**

### **Submission and examination of the application**

#### **Article 5**

1. Member States shall determine whether, in order to exercise the right to family reunification, an application for entry and residence shall be submitted to the competent authorities of the Member State concerned either by the sponsor or by the family member or members.

2. The application shall be accompanied by documentary evidence of the family relationship and of compliance with the conditions laid down in Articles 4 and 6 and, where applicable, Articles 7 and 8, as well as certified copies of family member(s)' travel documents.

If appropriate, in order to obtain evidence that a family relationship exists, Member States may carry out interviews with the sponsor and his/her family members and conduct other investigations that are found to be necessary.

When examining an application concerning the unmarried partner of the sponsor, Member States shall consider, as evidence of the family relationship, factors such as a common child, previous cohabitation, registration of the partnership and any other reliable means of proof.

3. The application shall be submitted and examined when the family members are residing outside the territory of the Member State in which the sponsor resides.

By way of derogation, a Member State may, in appropriate circumstances, accept an application submitted when the family members are already in its territory.

4. The competent authorities of the Member State shall give the person, who has submitted the application, written notification of the decision as soon as possible and in any event no later than nine months from the date on which the application was lodged.

In exceptional circumstances linked to the complexity of the examination of the application, the time limit referred to in the first subparagraph may be extended.

Reasons shall be given for the decision rejecting the application. Any consequences of no decision being taken by the end of the period provided for in the first subparagraph shall be determined by the national legislation of the relevant Member State.

5. When examining an application, the Member States shall have due regard to the best interests of minor children.

## **CHAPTER IV**

### **Requirements for the exercise of the right to family reunification**

#### **Article 6**

1. The Member States may reject an application for entry and residence of family members on grounds of public policy, public security or public health.

2. Member States may withdraw or refuse to renew a family member's residence permit on grounds of public policy or public security or public health.

When taking the relevant decision, the Member State shall consider, besides Article 17, the severity or type of offence against public policy or public security committed by the family member, or the dangers that are emanating from such person.

3. Renewal of the residence permit may not be withheld and removal from the territory may not be ordered by the competent authority of the Member State concerned on the sole ground of illness or disability suffered after the issue of the residence permit.

### **Article 7**

1. When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has:

(a) accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned;

(b) sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family;

(c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.

2. Member States may require third country nationals to comply with integration measures, in accordance with national law.

With regard to the refugees and/or family members of refugees referred to in Article 12 the integration measures referred to in the first subparagraph may only be applied once the persons concerned have been granted family reunification.

### **Article 8**

Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her.

By way of derogation, where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.

## **CHAPTER V**

### **Family reunification of refugees**

#### **Article 9**

1. This Chapter shall apply to family reunification of refugees recognised by the Member States.
2. Member States may confine the application of this Chapter to refugees whose family relationships predate their entry.
3. This Chapter is without prejudice to any rules granting refugee status to family members.

#### **Article 10**

1. Article 4 shall apply to the definition of family members except that the third subparagraph of paragraph 1 thereof shall not apply to the children of refugees.
2. The Member States may authorise family reunification of other family members not referred to in Article 4, if they are dependent on the refugee.
3. If the refugee is an unaccompanied minor, the Member States:
  - (a) shall authorise the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line without applying the conditions laid down in Article 4(2)(a);
  - (b) may authorise the entry and residence for the purposes of family reunification of his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced.

#### **Article 11**

1. Article 5 shall apply to the submission and examination of the application, subject to paragraph 2 of this Article.

2. Where a refugee cannot provide official documentary evidence of the family relationship, the Member States shall take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking.

### **Article 12**

1. By way of derogation from Article 7, the Member States shall not require the refugee and/or family member(s) to provide, in respect of applications concerning those family members referred to in Article 4(1), the evidence that the refugee fulfils the requirements set out in Article 7.

Without prejudice to international obligations, where family reunification is possible in a third country with which the sponsor and/or family member has special links, Member States may require provision of the evidence referred to in the first subparagraph.

Member States may require the refugee to meet the conditions referred to in Article 7(1) if the application for family reunification is not submitted within a period of three months after the granting of the refugee status.

2. By way of derogation from Article 8, the Member States shall not require the refugee to have resided in their territory for a certain period of time, before having his/her family members join him/her.

## **CHAPTER VI**

### **Entry and residence of family members**

### **Article 13**

1. As soon as the application for family reunification has been accepted, the Member State concerned shall authorise the entry of the family member or members. In that regard, the Member State concerned shall grant such persons every facility for obtaining the requisite visas.

2. The Member State concerned shall grant the family members a first residence permit of at least one year's duration. This residence permit shall be renewable.

3. The duration of the residence permits granted to the family member(s) shall in principle not go beyond the date of expiry of the residence permit held by the sponsor.

#### **Article 14**

1. The sponsor's family members shall be entitled, in the same way as the sponsor, to:
  - (a) access to education;
  - (b) access to employment and self-employed activity;
  - (c) access to vocational guidance, initial and further training and retraining.
2. Member States may decide according to national law the conditions under which family members shall exercise an employed or self-employed activity. These conditions shall set a time limit which shall in no case exceed 12 months, during which Member States may examine the situation of their labour market before authorising family members to exercise an employed or self-employed activity.
3. Member States may restrict access to employment or self-employed activity by first-degree relatives in the direct ascending line or adult unmarried children to whom Article 4(2) applies.

#### **Article 15**

1. Not later than after five years of residence, and provided that the family member has not been granted a residence permit for reasons other than family reunification, the spouse or unmarried partner and a child who has reached majority shall be entitled, upon application, if required, to an autonomous residence permit, independent of that of the sponsor.

Member States may limit the granting of the residence permit referred to in the first subparagraph to the spouse or unmarried partner in cases of breakdown of the family relationship.
2. The Member States may issue an autonomous residence permit to adult children and to relatives in the direct ascending line to whom Article 4(2) applies.
3. In the event of widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line, an autonomous residence permit may be issued, upon application, if required, to persons who have entered by virtue of family reunification. Member States shall lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances.

4. The conditions relating to the granting and duration of the autonomous residence permit are established by national law.

## CHAPTER VII

### Penalties and redress

#### Article 16

1. Member States may reject an application for entry and residence for the purpose of family reunification, or, if appropriate, withdraw or refuse to renew a family member's residence permit, in the following circumstances:

(a) where the conditions laid down by this Directive are not or are no longer satisfied.

When renewing the residence permit, where the sponsor has not sufficient resources without recourse to the social assistance system of the Member State, as referred to in Article 7(1)(c), the Member State shall take into account the contributions of the family members to the household income;

(b) where the sponsor and his/her family member(s) do not or no longer live in a real marital or family relationship;

(c) where it is found that the sponsor or the unmarried partner is married or is in a stable long-term relationship with another person.

2. Member States may also reject an application for entry and residence for the purpose of family reunification, or withdraw or refuse to renew the family member's residence permits, where it is shown that:

(a) false or misleading information, false or falsified documents were used, fraud was otherwise committed or other unlawful means were used;

(b) the marriage, partnership or adoption was contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State.

When making an assessment with respect to this point, Member States may have regard in particular to the fact that the marriage, partnership or adoption was contracted after the sponsor had been issued his/her residence permit.

3. The Member States may withdraw or refuse to renew the residence permit of a family member where the sponsor's residence comes to an end and the family member does not yet enjoy an autonomous right of residence under Article 15.

4. Member States may conduct specific checks and inspections where there is reason to suspect that there is fraud or a marriage, partnership or adoption of convenience as defined by paragraph 2. Specific checks may also be undertaken on the occasion of the renewal of family members' residence permit.

#### **Article 17**

Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.

#### **Article 18**

The Member States shall ensure that the sponsor and/or the members of his/her family have the right to mount a legal challenge where an application for family reunification is rejected or a residence permit is either not renewed or is withdrawn or removal is ordered.

The procedure and the competence according to which the right referred to in the first subparagraph is exercised shall be established by the Member States concerned.

### **CHAPTER VIII**

#### **Final provisions**

#### **Article 19**

Periodically, and for the first time not later than 3 October 2007, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose such amendments as may appear necessary. These proposals for amendments shall be made by way of priority in relation to Articles 3, 4, 7, 8 and 13.

#### **Article 20**

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by not later than 3 October 2005. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

#### **Article 21**

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

#### **Article 22**

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 22 September 2003.

*For the Council*  
*The President*  
F. FRATTIN

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