The Europeanisation of migration policy  
– the normative issues

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Abstract

In the field of migration policy we can witness an Europeanisation in the last decades: European legal guarantees increasingly constrained national policymaking, and states in Europe, in several configurations, started to work together in coordinating national policies in this field. A special marker in this process was the agreement between member states of the European Union that resulted in the Treaty of Amsterdam (effective as of 1999). Decision making in matters of refugee protection and migration regulation are to a large extent brought under a supranational regime. The factors explaining this Europeanisation, but also its actual effects for national autonomy are broadly investigated within Political Science. Among lawyers the consequences for the position of migrants has become a prominent issue of research. In this essay we explore the implications of this Europeanisation for the normative field of research. Which new questions have to be addressed as ‘Europe’ is becoming a major player in migration policy?

To answer this question, first an overview of recent developments is presented, using the abundance of studies in Political Science and Jurisprudence. Major trends are distinguished: institutional unification, the development of policies of collective restrictivism and the securitisation of this policy field, and the realization of forms of ‘remote control’ in the implementation of migration regulations. The grid of existing normative research on migration is laid over these trends. These studies on migration-issues concentrate on the position of states and on national instruments of migration regulation. By using this grid a series of new issues is traced. In the final section these new issues are systematized in an agenda for further research.
I. Introduction

‘Europe’ is a miraculous entity. In public debate ‘Europe’ is the solution to many problems, and at the same time we hear it is the cause thereof or, at least, that it blocks the solving of these issues. ‘Europe’ already exists – and has been there since times immemorial – and its now time to construct ‘Europe’. ‘Europe’ is something with a particular shape and clear distinguishing marks, and at the same time it is a project with a universal quality.

The debate on ‘Europe’ since WWII concentrates on the continuing co-operation of countries that in geography commonly are reckoned to the same part of the world. This ‘Europe’ in the beginning was a matter of economic co-operation on a single terrain (Cole and Steel), then of one market and a Monetary Union. Nowadays ‘Europe’ often seems to be a matter of migration and security issues.

In recent years ‘Europe’ did get a role in the development and implementation of regulations and policy in the field of migration and exclusion. The establishment of an European Union-citizenship in the Treaty of Maastricht (effective as of 1993) and the introduction of a chapter on asylum and migration in the Community Treaty (Amsterdam 1999) are clear markers of this process. A gate-keepers role developing at the European level seems to be a natural course of affairs. After a shift in the 19th and 20th century from the local to the national level in migration control (LEENDERS 1993), the transfer towards an even more encompassing level seems to be a logical one.

The logic of this development is object of broad research within Political Science and Public Administration. To what degree may we actually speak of any Europeanisation in the field of migration policy? In which directions does European regulation develop? How might the Europeanisation in this field be explained? What exactly does it mean for states and other actors? Are the goals aimed at in fact realised? What consequences do these developments have for other fields of (European) policy making? (GEDDES 2003; GUIRAUDON 2001; GUIRAUDON 2003; JOPPKE 1999; SASSEN 1999; SOYSAL 1993) Researchers of jurisprudence took an interest in the development of migration law in Europe earlier. But the attention for European migration law increased enormously in recent years. The central questions in legal research deal with the competence of and the relations between the actors involved. Scholars in jurisprudence also ask whether European law offers firmer guarantees for the rights and liberties of migrants. (GUILD 2001; NOLL 2000; SKRAN 2003; SPIJKERBOER 1993; VERMEULEN 2002)

Remarkably, within normative disciplines – political theory, philosophy of law, ethics – there has been far less attention so far for the Europeanisation of migration policy. The development of European institutions and the legitimacy of European governance is broadly discussed. Also national migration policy has found a firm place on the research agenda of these disciplines. The ‘border era’ between these two fields of research, however, is relatively unexplored. Are the developments then not that fundamental, is there no need for further reflection? Does the Europeanisation of migration policy not enforce new questions upon us: because of the nature of the newly involved community, because of the changing positions of national states, because of the new opportunities of steering and control in the European setting, etc.? Are the issues that are taken on in existing state-oriented studies simply transferable to a Europeanised setting? The aim of this paper is to develop a systematic indication of new normative questions that the Europeanisation of migration-policy entails.

This exploration will start by sketching the Europeanisation of migration policy. What is it all about? Which tendencies can be distinguished when concentrating on developments in regulation and in actor-involvement? By using studies from Political Science and Jurisprudence, in section II some basic trends will be pointed out. Section III will focus on the questions that are prominent in state-oriented normative studies on migration policy. We then combine these two survey’s in order to trace new issues and to get suggestions how they could be approached. Eventually we will systemise our findings in a research agenda.

This explorative paper has the ambition to describe and connect two fields of research. Some notes on the central concepts, therefore, are in place: especially on ‘Europe’ and ‘migration policy’.

Above, by putting Europe between quotation marks we already emphasised the multitude of meanings it has. Conceptually the unity (or identity for that matter) of Europe might take many forms. But also institutionally Europe has many guises: ‘Europe’ can be the EU (with roots in the ECSC, the EEC, the EC; with a growing number of member states – 25 as of May 2004), ‘Europe’ can be the Council of Europe (40 member states), it
can be the OSCE, but it can also be the Benelux, the EFTA or, for instance, the Schengengroup. In this paper we take ‘Europe’ to be the continent that in geography commonly is understood under that name. We will concentrate on the forms of co-operation between states in that region concerning migration policy. The diversity in institutional configurations and the changes therein are part of the issue we want to address in this paper: what changes can we point out and what do these imply? The concept of ‘migration’ also is a fuzzy one. Migration policy often is discerned from integration (or immigration) policy. The latter is used for activities aiming at furthering the participation (of migrants) in political, social and economic spheres. The former involves admission to a territory. This way of putting things, however, often proofs to be too simple. Measures aimed at integration often have effects on migration and admission. (The condition, for instance, that one can only join one’s spouse if one is able to speak the countries language.) And migration policy often is not an issue of granting residence rights, but of granting rights of a specific kind, with specific possibilities of participating in societal spheres. Migration policies, moreover, not only aim at selecting among those that request entrance at the states’ borders. Instruments having the effect to hinder people or to discourage them to travel to this region or country also seem to be part of it. The different ways in which migration policy is understood, and the changes therein, are relevant for this study. Does, for instance, the relation between migration policy and other policy fields change along the Europeanisation? Does the idea of ‘admission to a territory’ remain unchanged? Our understanding of migration policy and admission, therefore, must not be too rigid. As a starting point we satisfy ourselves with: the policies and regulations that are used to steer and control the entrance of non-citizens to the territory and thereby to the political and societal spheres.

II. The Europeanisation of migration policy

In order to get a grip on the normative dimensions of European migration policy we first have to get an idea of the major developments in this field: what is the Europeanisation of migration policy actually about? This Europeanisation has two aspects: a development of institutions (existing and new institutions getting roles) and a development of rules and regulations. The intentions of this section is not – and of course cannot be – to picture all developments. We will try to point out tendencies on which there seems to be a reasonable degree of unanimity among political scientists and lawyers and that are of relevance for further judgement. To structure our material two commonly discussed developments will be taken as guidelines: European integration and European enlargement.

1. European integration: the institutions

In attempts to point out the growing importance of Europe, often reference is made to the accumulation of policy fields in which co-operation is sought or to the growing body of European regulations. But such accumulation in itself offers us but little insight into the actual Europeanisation of governance. To what degree does Europe really matter? Does the co-operation imply real transnational fusion in decision making and control? Factual European integration presupposes the development of European institutions (intergovernmental arenas of decision making, supranational bodies) and the Europeanisation of national institutions (implications of European law). (GEDDES 2003)

It is tempting to describe the institutional history of European policymaking on migration as a continuous process of loss of national autonomy, taking place in several steps: starting from full national discretion in this field, via informal and later formal intergovernmental regulation, up to a certain supranationality. If we take the Treaty of Rome (1957) as our starting point, we begin at a moment the framework for an internal liberalisation of labour migration is already present. From there a regime of free mobility of citizens of European member states could develop – at least for the economically active. The effectuation thereof, however, did not get shape under the umbrella of the European Community. The Benelux-partners started to co-ordinate their aliens-control as to open the ‘interior borders’. Later also France and Germany joint the Benelux-partners. This lead to an agreement dealing with matters of control on movement of persons. (Schengen, 1985). In the years following all EC-member states started to participate in this intergovernmental association – with the exception of Ireland and the UK. The character of decision making within this Schengen-group was ad hoc and not transparent. Before 1996 the Schengen-regulations weren’t even made public. As a result some regulations were legally binding, others were at the most politically binding. In 1990 the Schengen-partners agreed on
regulations concerning the dealing with asylum applications. (Dublin agreement) It brought de issue of asylum formally within the reach of this co-operative partnership. In 1993 the Maastricht Treaty brought the agreements among European member states in the field of migration and asylum eventually as a third pillar in the Community’s Treaty. Decisions in this field were brought under the discretion of the Council of Ministers and had to be taken in unanimity. In reality, however, it proved to be difficult to come to agreement in this setting. Also under this regime many decisions remained of a non-binding nature and the process did not gain much in transparency. The European Parliament, moreover, did not have a say in the process, and the European Commission did only have a constrained right of initiative. Also the role of the European Court of Justice was limited.

It was not until the Treaty of Amsterdam (1999) that the discretion of the European Community was actually extended to issues of migration, asylum and the residence of third country nationals. To the Community-treaty was added a Fourth Chapter on visa and other issues concerning the movement of people. It was agreed on that within five years measures should be taken as to the removal of internal border controls, co-operation in the control of the outer borders, and the harmonisation of visa requirements and asylum policy (including criteria for determining the responsible state, minimum standards for refugee protection and due process). The Schengen Acquis was included without amendments. Decision making in this field, so was agreed upon, will follow the rule of qualified majority.

We can witness, then, a process of centralisation in decision making and policy development in the field of migration. The discretion of member states of the European Community seems to dissolve in this process into supranational authority. A process, by the way, that followed an earlier development of centralisation within national contexts. (GEDDES 2003; GROENENDIJK 1999b; GROENENDIJK 1999c; GUILD 1999; VINK 2003) The tendency towards supranational decisionmaking is apparent. We must, however, not neglect aspects that show a (continuing) national discretion in this field.

- the member states still have veto power, since for the time being unanimity is required. Moreover, some countries included an opt-out clause or made specific reservations.
- many issues still are not conclusively dealt with. On issues agreements already have been reached, states still have a considerable amount of discretion, for instance on dealing with family (re)unification. (CHOLEWINSKI 2002)
- The treaty of Amsterdam incorporated regulations on migration and asylum that were developed without involvement of the European Commission (EC) or the European Parliament (EP). In the new Chapter on migration and asylum the involvement of the EP is constrained to a consultative role. The European Court of Justice’s role is larger than it was in the days of the Third Pillar, but still under constraint. (GUILD 1999; KOSTAKOPOULOU 2002) But notwithstanding these reservations, many saw in the establishment of the Amsterdam Treaty new possibilities for public, parliamentary and judicial scrutiny of (European) migration policy.

The European legal community and migration

That last remark does remember us of our one-sided focus on the Europeanisation of decision making so far. We did not look into the influence of European law on national policy implementation. The Amsterdam Treaty was an important marker of the supranationalisation in this policy field. Since decades, however, it was possible for individuals to bring their case before an European Court. The first rulings on migration issues of The European Human Rights Court (ECHR) and the European Court of Justice (ECJ) appeared in the 1970s and 1980s. And of course, European law had its bearings on the decisions on the rulings of national courts; the latter might be therefor even be understood as European institutions.

As to the role of EC-law, one can follow Guild (GUILD 1999) in her conclusion that in the field of migration in Europe a bipartite relation has made way for a three-sided relation. Within the Community of free movement there originally has been chosen for a direct relationship between individuals and community-law. Individual liberties were connected to economic activity; relevant individuals being citizens of member states. Non-discrimination and the removal of constrains on free movement were the guiding principles. From the start third country nationals were addressed in the same manner: individual liberties were created, categories of economical activity were employed and the aim always was constraining the discretion of states to limit entry. The chosen form often was that of an agreement with (neighbouring) states. (Rights equal to those of the
citizens of member states, however, the citizens of a third state did only get when their country became an full EC-member.)

In community-law, as it developed in recent years in the Schengen-partnership, this logic of increasing individual liberties, has been abandoned. The attention shifted towards rules of co-ordination between states, for instance as to the responsibility of dealing with specific asylum applications. Now the focus is far less on the relation of the individual and states via Europe.

The European Charter on Human Rights up to the 1980s only had direct implications for citizens of states that signed the treaty. Since then, however, also cases of resident aliens have been brought to court. In the last decades the importance of art. 3 (on inhuman treatment) and art. 8 (on family life) of the Charter and art. 1 of its 7th Protocol (protection against arbitrary expulsion) has increased. (GROENENDIJK 1999a; KOSTAKOPOULOU 2002) Especially since the mid-80s it is not the EC, but the Council of Europe (or for that matter: the European Human Rights Court) that has taken on the role of ‘third party’ in the triangle of (migrating) individuals, states and Europe. That is particularly the case in issues of asylum and family unification. According to Groenendijk the Council of Europe is (in the future) a guarantee for minimum standards, a beacon of fundamental values and it might repair the holes in Community-law. (GROENENDIJK 1999a)

2. European integration: rules and regulations

After this overview of the development of institutions we now turn to the developments in rules and regulations

Rights and liberties of long term resident third country nationals

As free internal movement of capital, goods, services and labour is the axis of European co-operation, our attention naturally is drawn first towards regulation of labour migration. The migration of workers from third countries is (still) to an important degree the prerogative of member states. It is at their discretion which individuals from which countries are permitted to enter and find a legal employment. In comparison to the 1950s and 1960s the national policies have become more restrictive and more selective. Increasingly admission is restricted to people with specific qualifications from specific countries. (APAP 2002) In many cases labour migration from third countries has been formalised through agreements between the country of origin and the country of employment. The EC also did partake in association-agreements establishing rights and liberties of third country nationals. The EC-involvement in this field is especially of importance for the position of labour migrants that are already (for a longer period) residing in an European country. The last decades show a strengthening in the position of these third country nationals. Their position converges in important respects with the position of citizens of member states. (KOSTAKOPOULOU 2002) Differences did not completely disappear, though. They can still be found in rights of prolonged residence and of political participation. (GROENENDIJK 1999a) According to some the introduction of a EU-citizenship in 2000 even widened the rights-gap between citizens of member states and third country residents as the latter are excluded from it. (KOSTAKOPOULOU 2002)

‘collective restrictivism’

In general, however, long term third country residents and citizens of ‘associated countries’ gradually experienced an increase in liberties and basic guarantees. Towards other groups of (potential) migrants migration policy became more restrictive. Some refer to this development as the creation of a ‘Fortress Europe’ or call it ‘collective restrictivism’ (UCARER 2001) and ‘the securitisation of migration’. (BIGO 2001; BROUWER 2003; CHOLEWINSKI 2000; HUYSMANS 2000; LAVENEX 2001a) As mentioned earlier, the European Human Rights Charter did strengthen the position of migrants to some degree. But in recent years policies have been developed that hinder arrival and residence. This ‘collective restrictivism’ most often is pointed out in the field of refugee protection. Within the Schengen-group new instruments were developed to determine which country was responsible for dealing with specific asylum applications. Among these new instruments are: the introduction of the category of applications that are evidently untrustworthy or falling outside the refugee definition; the rule that asylum requests should be made and dealt with in the country the request could have been made first (within Europe or any other ‘safe country’); sanctions for companies that carry individuals without proper entry-documents; special preliminary procedures to sort out the ‘manifest unfounded’ or wrongly addressed asylum requests. Critics have pointed out the consequences these instruments can have for refugee protection. They might easily hinder refugees to flee to Europe. And the judgement on their situation might be left to officials hardly equipped (or motivated) to do so appropriately. (UCARER 2001)
‘Securisation’
The co-operation between European countries aiming at the realisation of free movement within Europe for a large part took place on an informal intergovernmental level. Some depict this co-operation in terms of ‘transnational relations between subnational actors’. Often it were (officials of) executive bodies of the different states that deliberated and formulated agreements, that operated in the field of Justice and Home Affairs. These subnational actors shared a perception on migration-issues: such issues were dealt with from a preoccupation with security, with fighting against smuggle, terrorism and crime. This background might explain that the co-operation did result in regulations concentrating on control and exclusion and on specification of discretion and responsibilities of the national executive bodies. (GUIRAUDON 2000b; GUIRAUDON 2003)
The development in policy and regulation in this field is often referred to as ‘securitisation’. That label is used to indicate the manner migration issues are increasingly presented (or ‘framed’) in political debate and policy analysis: the way problems are defined and the kind of instruments chosen. It are not rights and liberties of aliens that are brought forward, but instruments that we are familiar with in the spheres of police work, prosecution and penalisation: data-systems of fingerprints (Eurodac), (preventive) detention, body-search, deportation, (preventive) exclusion for reasons of security, etc. In short: the sphere of crime-fighting has begun interfering with the sphere of migration. (BIGO 2001; CHOLEWINSKI 2000; HUYSMANS 2000; KOSLOWSKI 2001) And this process started years ahead of 9/11 2001. (BROUWER 2003)
A substantive part of the research on migration policy concerns itself with the question how to explain these developments, a question that we will keep clear of in this paper. (BOSWELL 2003; GIBNEY 2001; GUIRAUDON 2000a; GUIRAUDON 2000b; VINK 2003) Some present the restrictivism in Europe as an aspect of a more general development. They point out that at refugee protection increasingly is left to others in other regions. (CHIMNI 2000)

3. European expansion
Above we concentrated on the European institutionalisation and the development of European migration policy. In passing we already mentioned the role and position of third countries and other actors involved in this field. In this section we will focus on this ‘external’ dimension of the Europeanisation of migration policy. First our attention will go to the way in which Europe in fact managed to mobilise third countries (and private parties) for its purposes. At issue is, using Guilds words, the moving of the borders of Europe. (GUILD 2001) Then we will turn to a second relevant aspect: the relation between European enlargement and the European migration policy.

Moving the borders of Europe
People that want to go to Europe often experience that the effective border of the European Union does not coincide with the geographical line around its territory. It are not the border patrols at the outer borders that one (at first) encounters. Often one has to apply for a visa at a foreign representation of a member state of the EU. For such visa European guidelines have been developed, including a list of countries of origin. For citizens from some countries getting access is much easier than it is for others. The common denominator of (most) favoured countries seems to be that they are not poor and not Islamic. (GUILD 2001)
The control of documents often takes place in countries of departure. Many countries now have agreements with the EU to enact such controls, to offer protection for refugees and take back persons that are not admitted to the EU. And often documents of travellers to the EU are checked at the airport at departure by carrier-employees or European liaison-officers. The countries of departure themselves increasingly imitate Europe’s restrictive regime in order to prevent to get a heavy burden in dealing with asylum applications and refugee protection. (GEDDES 2003; GROENENDUK 2003; GUILD 2001) Europe’s collective restrictivism in entry (non-admission policies) thus has often also the effect of a non-arrival policy. The regulations make it more difficult to get to Europe.
We can distinguish these instruments that try to block the arrival of people in Europe, from measures that are of a more preventive nature. Such preventive measures aim at remedying the causes of migration: by enhancing economic development, ending human rights violations, or supporting refugee protection in other regions. In Europe the willingness to make contributions in this manner is often declared. But the effectuation has proven not to be very straightforward, yet. One of the reasons possibly being that measures supporting economical development in the short run tend to lead to an increase in migration. (BOSWELL 2003) As to initiatives to support refugee protection in other regions there is yet only little consensus between European governments.
The admission of new member states

The Europeanisation of migration policy thus has had the effect (intended or not) that third parties came to be involved in its implementation. As mentioned earlier, the association of states in Europe working together in migration affairs has not been fixed over the years. The co-operation started with the Benelux-partners, and later France and Germany joined them in co-operation. Southern-European countries soon followed. Since the Schengen-agreements was brought under the umbrella of the EU, new members of the union automatically become partners in this co-operation. There is, however, an important difference between the entrance of the Southern-European countries in the co-operation and that of the Central and Eastern-European countries. The Northern countries had an interest in the co-operation in the field of migration both with the eastern and the southern countries, as migrants tended to come to western Europe via both these regions. The Southern countries, however, were in better position to negotiate. They already were EU-members and therefore they did not have to accept the Schengen Acquis as it already existed. The Central and Eastern European countries were in fact forced to accept the Acquis in order to be accepted as a EU-member. Actually these new member states already implemented the European migration regulations in the years of their candidacy. Such was partly agreed on in association treaties. And the candidate member states were keen to show themselves competent also in these respects.

The new member states in the east functioned as the gatekeepers of Europe’s eastern borders. Third countries that probably become EU-members in the next round of enlargement probably function likewise as agents-in-remote-control of European regulations and policies. (BYRNE 2003; BYRNE 2002; GEDDES 2003; JILEVA 2002; LAVENEX 1998; LAVENEX 2001b; LAVENEX 2002; MITSILEGAS 2002; WALLACE 2002; ZIELONKA 2001)

Enlargement and migration being the issue, a last aspect has to be brought up. Admission of a new member state to the EU de facto means that its citizens are granted citizenship of the EU and the accompanying liberties of internal movement. In a sense European enlargement might be understood as a form of migration policy. Granting a state Union membership means that a large group of people get the possibility of (labour) migration into the European sphere. This form of liberalisation of labour migration, however, has as its complementary effect, as we pointed out above, restrictions on the liberty to migrate to Europe for other people in the world.

4. Summary: tendencies

In the pages above an overview of the history of the Europeanisation of migration policy was presented. Now a summy of basic trends can be given.

(a) Europeanisation of institutions: unity and plurality

In the field of migration we can witness intergovernmental co-operation, even a certain level of supranationalisation in Europe: States handed over discretion to European institutions; Rules and regulations are (being) developed that are binding for member states; Individuals can turn to (European) courts to enforce European migration law.

This European unity implies (steering) power. The co-operation between European states made it possible to realise restrictive policies in this field. It also led to the involvement of third countries (and parties) in the effective implementation of these policies. Decision making and implementation, however, did not completely shift to a pan-European level of governance.

Many issues are still at states’ discretion. And the actual implementation is in this field, as it is in any other in Europe, left to states and their bureaucracies. There is no European office dealing with asylum applications, no European service offering refugees first assistance, etc. National units still do the job and national differences, for instance in administrative and legal competence and traditions, lead to different outcomes. (GEDDES 2003; LAVENEX 2001a; VINK 2003)

Plurality is also apparent in the relation between the European Union and the Council of Europe. Exaggerating the picture somewhat: on the one hand the European Charter of Human Rights guarantees liberties and rights, also of (potential) migrants, on the other the European Union regulations tend towards restriction of migration.

If we try here for a comparison with states, then we might say that Europe on the one hand can be understood as a ‘super state’ (having new opportunities and powers to manage migration) while it on the other hand it looks like a very weak state (lower level units having much discretion). Of course, as to this last remark: we must not oversimplify the situation within states. Also within states several offices are involved in migration issues, and here also the judiciary and lower levels are involved in this field. (GUIRAUDON 2003)
Within the EU rights of free movement have developed – for citizens of member states, but also for third country nationals employed in Europe. The European Human Rights Charter also guarantees rights relevant for migrants, especially concerning asylum and family unification.

European countries agreed on measures co-ordinating responsibilities in dealing with asylum applications. To effectuate these agreements new instruments, such as data-systems, were established. These data-systems make it possible to exclude individuals that are, for instance, according to one of the participating states, a threat to (national) security. States also introduced new instruments of aliens control. (Mobile patrols, deportation, connecting databases, etc.) Because of these new instruments some speak of ‘the securitisation of migration policy’.

The Europeanisation of migration is closely linked to European enlargement. Candidate EU member states often implement and even copy EU migration policy. Also other third countries feel themselves forced to imitate aspects of the (restrictive) European migration policy. Private parties (carriers) are, furthermore, given a role as well. Some critics point out that this development has the consequence that Europe’s restrictive non-admission policies have in fact become non-arrival policies.

If we try again for a comparison with the ‘classical’ migration policy of states it is remarkable that the territorial borders and the actual borders that migrants encounter often do not coincide anymore. These borders have been moved out (towards third countries), but also moved in (as in the case of checks on legal residence). The importance of the territorial borderline decreases in the implementation of migration policy.

III. Dimensions in normative migration research

Few fail to notice that ‘multiculturalism’, ‘legal pluralism’, ‘cohesion’ and ‘citizenship’ nowadays have the attention of disciplines like ethics, philosophy of law or political theory. Often these issues are in some way related to the presence of (new) migrants in western societies. The issue of migration itself also is addressed within these normative disciplines. But like most normative studies on integration, those on migration take states as their units of research.

Four our survey of normative studies on migration we will categorise them into three dimensions. A first dimensions concerns the justification of migration control as such. A second dimension concerns specific responsibilities of states for migrants, or put otherwise, the relevance of special claims of specific groups of aliens. In a third and last dimension the effects of policy instruments are at issue. This set of dimensions shows a decreasing line of abstraction: from the general issue of justification of migration control, via suitable criteria of selection, down to the level of specific policy instruments. This line of reversed abstraction. However, does not mean that answers for a lower level simply can be deduced from those given at a higher level. Justifications for migration restrictions (often) leave the question open which people might be given priority in entrance. And even the relevant criteria are clear, many instruments can be thought of to implement them. The choice between instruments often implies new normative issues. The three dimensions, however, are not completely independent. The choice for policy instruments, for instance, is of course is narrowed down by the relevant criteria of selection.

1. Justification of exclusion

One’s duty towards strangers is a classical theme within ethics. In treatises on war, friendship or charity this issue is central. Admission being the issue, for a long time reflections on hospitality and asylum dominated the field. Different as these treatises on the virtue of offering asylum or being hospitable may be motivated, the position of the party already present was unquestioned.

In modern times the position of an already present party (being virtues or not) is no longer taken to be evident one. The question what gives (the prince or the citizens of) a political community the right to decide on the exclusion or admission of people from abroad becomes unavoidable. How could any such right be justified and within which constrains might it be employed? In treatises dealing with these issues a tension between a right of a collective of people (somehow understood) and the rights of (the sum of) individuals (equal in some sense) is apparent. A well known example is that of Immanuel Kant in zum ewigen Frieden (1795). He formulated a
visitors right. This right can be understood to bridge the tension between, on the one hand, the demand of peoples to shape their lives autonomously and, on the other, the needs and desires of individuals leaving their homes to settle elsewhere. Kant's visitors right comes down to the liberty of strangers to enter the territory of a political community, not their own, provided that they have peaceful intentions. It is prohibited to the political community to expel these people if it would bring them into peril.

More recently the issue of justification of migration control was raised against the background of the liberals-communitarian-debate in the 1980’s. Again the issue centred around particularity and communities on the one hand and universal equality of individuals on the other. Starting from a liberal point of view Carens for instance argued that there are no good reasons for migration control. Libertarian, liberal-egalitarian as well as utilitarian theories all lead to the conclusion that borders must to be open. (CARENS 1987) He reached that conclusion by extending the arguments Raws, Nozick and others developed for domestic issues to the international field of migration. Arguments like that of Carens have been criticised for its one-sided individualism. It is pointed out that such an approach does not take the (meaning of the) particularity of political communities into account, while at the same time presupposing the existence and continuance of present states. Critics, in other words, judge it inevitable to include communitarian viewpoints into the debate. Communitarian theories, however, proof themselves in turn however not to be able to take the position and fundamental liberties of individuals (as yet outside particular communities) into account. Some conclude that a conclusive answer to questions of justice in migration cannot be reached within the liberals-communitarian-debate. (COLE 2000; THOLEN 1997) Others amended Carens’ argument. Carens already admitted that minimal restrictions in migration may be legitimate for reasons of public order and security. Some liberties might be restricted for the sake of securing others. It might be necessary to restrict migration when not doing so would jeopardise the whole project of a state guaranteeing liberal rights. But, one might continue, are there not also other necessary conditions for the functioning and further existence of such states? Does a flourishing political community not need the commitment of its subjects to this particular community, one that people understand as ‘theirs’? (MACINTYRE 1984) Does the ‘reproduction’ of a liberal state not ask measures guaranteeing economical and ecological conditions? (HABERMAS 1992) Do not institutions ‘reproducing’ citizenship (like schools and neighbourhoods) have their limitations - limitations that justify migration restrictions? (TRAPPENBURG 1998) Eventually these considerations on limits to open borders seem to lead to positions that are not that different from standing practise in most Western states. (BARRY 1992)

Notwithstanding these nuances in this recent debate, the bottom line did remain the same: restriction of migration is something that has to be justified.

The recent debate also brought different ideas forward about the nature of the unity (or commonality, etc) of states or national societies that might be justified (to some degree) in controlling migration: political communities as systems of mutual economic cooperation, as having a shared public sphere with an ongoing conversation, as involving a vivid sense of commitment or a some shared identity, or being a ‘thick community of shared understandings’, etc. The debates on the justification of migration control are often about the way states as political communities can be or have to be understood. That it are states that are the relevant units in this debate is rarely questioned. In most of the contributions to this debate states simply are taken to be the obvious subject of migration regulation. One that makes this claim more explicit is Walzer. The nationalisation of welfare, politics and culture in the last century, so he argues, have made the nation the proper level of exclusion, more so than the local. “The politics and culture of modern democracy probably require the kind of largeness, and the kind of boundedness, that states provide.” (WALZER 1983)

2. Selection criteria

Most arguments on the justification of migration restriction say little about considerations for selection among possible migrants. For many authors this is reason to skip the earlier discussion and simple start with the issue of selection. If any restriction is legitimate, the question becomes central what values, considerations or points of view are relevant for selection. Here we will systemise the existing positions by following a categorisation into tree kinds of considerations: of need, mutual advantage and special ties. (BRUGGER 1994; GIBNEY 1999; WALZER 1983)

Need

Above we already mentioned treatises on asylum and a visitors right as Kant formulated it. That right did find its effectuation in the principle of non-refoulement. States are obliged to take on people who were in danger elsewhere, or more precise: it is forbidden to expel such people after their arrival. However, state responsibility
for strangers in danger or otherwise in needy conditions has also been brought forward in an alternative manner. 
Argued is that the (primal) concern of states for their own citizens is only legitimate if those states also show a 
responsibility in second resort for others. That responsibility in second resort has to concern those people that 
have no government of their own that sees to the realisation of their rights and guarantees their liberties. 
(CARENS 1991; CARENS 1992) This understanding of state responsibility is more utilitarian in character than the 
deontological visitors right and the rule of non-refoulement. The states’ role here is not formulated in terms of a 
rule concerning the treatment of migrants already present. States are demanded to take responsibility when other 
states fail - where-ever the people involved are. This could mean, given the circumstance, that people should 
take in as refugees. (This approach, sometimes presented as humanitarianist (GIBNEY 1999), is also an 
effort to combine universalistic and particularistic considerations. It can be questioned whether this succeeds 
where others fail. (THOLEN 1997).)
The argument of a responsibility of states for people in need who did not (yet) present themselves at their 
orders, has also been developed in another way. It, then, is not motivated by an utilitarian concern for 
maximising basic care and guaranteeing rights for all individuals in the world. It is an approach using an 
retributive argument: fault makes responsible. States do have a special responsibility in remedying the needs of 
those people who’s hardships they caused. (WALZER 1983)

Mutual advantage
Among the considerations we encountered in the debate on the legitimacy of exclusion are those of the 
economical preconditions for a viable political community. It are such considerations that are often implied in 
debates on the proper regulation of migration. Often the benefits and costs of a migration policy is some kind 
for the national economy at large or for a specific portion of the nations labour market are spelled out. 
Sometimes it are demographic considerations that dominate the discussion: without a certain kind and level of 
migration pensions, or education or healthcare in the near future will be at risk, etc. Sometimes it is the national 
position in international economic competition that is said to be at stake. To strengthen that position migration 
should be open (or closed) for specific groups of migrants. In this kind contributions to the debate consequences 
for the national economy is the focal point – disagreements exist on the way ‘national advantage’ should be 
understood and on the empirical effects of certain measures. This shared focus, however, in normative research 
is questioned in several ways.

- Why should considerations of advantage limit themselves to (the economies) of states receiving migrants? As 
  far as notions of justice and fairness are involved, there seem to be no good reasons to limit their application to 
domestic spheres. (POGGE 2002) Should not also taken be taken into account effects for sending countries when 
judging migration policies by their economic consequences? (brain drain effects, money transfer and migrant 
investments, etc.)

- Should the national indeed by considered as a unity? ‘National’ advantages of migration are not necessarily 
  advantageous for everyone. Should not immigration (for mutual advantage) be especially of advantage for those 
citizens who are worst-off now (or should not at least be guaranteed that their position will not get worse 
because of immigration)? (SOMEK 1998)

- And last but not least, should not the position of the migrants themselves be taken into further consideration? 
  What should ‘mutual advantage’ exactly mean for the labour migrant? Is it enough that these migrants are 
  willing to sign a labour contract or should they be granted rights citizens already have? Is it acceptable that 
labour migrants live under another legal regime than citizens do; do they not end up as denizens, as ‘inliving 
servants’ even? Such a position might not be a justifiable one in modern societies. (WALZER 1983)

Special ties
Above several times a distinction was made between the collection of members of a particular political 
community on the one hand and the (more abstract) collection of all individuals in the world on the other. In the 
discussion on the legitimacy of migration restriction we encountered it, but also in the argument for a state’s 
responsibility in first and second resort. This dichotomy, however, might be to simple in issues of migration. A 
more complex model is that of ‘circles of proximity’. This is a model that Cicero already used to describe levels 
of duties and responsibilities. He distinguished responsibilities towards family, city, state, etc. According to 
some, also in present day such a model offers an useful indication of special ties and responsibilities relevant for 
considerations in migration policy. Some people are yet living outside this political community, but are in a 
sense less ‘far’ from us as others. One might think of (former) citizens (or their descendants) that now live
abroad or of people living in another country but sharing the religion dominant in this country. (BRUGGER 1994; GANS 1998; WALZER 1983)

Arguments for a migration policy following the idea of special ties and special claims haven’t been without comment. Critics, for a start, focus on the idea of state implied in such arguments. It seems to involve the idea that states are in some respect (cultural, ethnic, religious) homogeneous, some portion of the cultural or religious body finding itself at the moment outside the state’s borders. That presentation of fact, however, is easily falsified. It neglects the diversity in composition of modern day states. Realising a migration policy based on the idea of special ties in fact means that a dominant group is able to present itself as the pars-pro-toto of the political community at the expense of (other) minorities. Such an approach conflicts with the principles of equality that are basic guidelines in modern societies. Critics, secondly, comment the special ties argument because it legitimises racist policies. It might be used to justify the migration of one category of people (non-blacks from western countries, for instance) and the exclusion of others. The ‘white Australia-policy’ often is presented as a fine example of this practise. (CARENS 1988)

The focus on ties of a cultural, ethnic or religious nature, however, could make us forget that also other kinds of ties could be relevant in judging migration policies: the ties between individuals living in (and belonging to, in some sense) this political community and individuals elsewhere. Immigration of one person in order to start or continue family life with someone else already present in this political community can be understood in terms of special ties giving reason for admission. This use of a special ties argument does not seem to be at odds to modern principles of equality. These special ties, by the way, do not fit easily into a model of circles of proximity as sketched above. Special ties of individuals with others, living at a distance, falsifies the suggested correlation between responsibility and geographical proximity.

The relation between these three considerations of selection
So far we looked into the three kinds of considerations separately. A last item, we need to address here, is the relationship between them. In most studies only one of these considerations is at issue. Authors that do address the relationship argue that one kind should not dominate another. Inclusion of, for instance, people with whom special ties are felt, must not be to the detriment of people who are in need. (BAIER 1995) And considerations of mutual advantage should not block the admission of people citizens have special ties with. A quota-system for labour migration should be developed separately from policies giving refuge to people in need. In general it seems to be the dominance of the considerations of utility over the other two that concerns critics.

3. Policy instruments
The third and last category of normative research is that which deals with policy instruments. It are the consequences of policy instruments chosen that are investigated and taken into consideration for judgement. Effects of policy choices are often illustrated by referring to instruments distributing scarce goods. The choice for a specific ways of distributing goods might have considerable effects - effects on the distribution of a good over individuals, but also effects in terms of liberties. A system that distributes according to a system of, for instance, ‘first comes, first served’ has other consequences than one that uses some criteria of priority. The first privileges individuals having some qualities, the latter rewards others and makes it also necessary to gather personal data and check on them. And data gathering might have consequences for individuals privacy. (ELSTER 1992) In the field of migration the policy instruments chosen also bring additional issues into play. And it is within this third dimension that we can find most normative studies. Especially in the study of Jurisprudence (and the sociology of law more specific) many (planned) policy instruments are judged on their effects and side-effects. Often side-effects for (potential) migrants are pointed out, but also effects for long term residents and citizens, or consequences for the public support of migration policy in general. As to the direct consequences for migrants infringements on rights and liberties (privacy, family life, etc.), discrimination of certain groups (women, for instance, or people from specific regions) and consequences for peoples self-respect re often brought forward. Characteristically such issues are addressed in terms of proportionality: can the effects aimed at balance the negative side-effects for migrants and others?

Here we cannot make reference to the abundance of instrument studies. We will limit ourselves to a few examples, ordered into three categories of instruments.
- Instruments of restriction: Are the aims of detention of illegal aliens in proportion to its negative effects? Are the negative effects of excluding illegal aliens from public services justifiable?
- Instruments of selection: Is testing marriages between citizens and aliens on ‘genuineness’ a tolerable infringement on privacy? Does the current design of asylum interviews leave the asylum seeker enough room to
present his story? Is a certain quota-policy in labour migration not improperly discriminating a specific group of people?
- Instruments of entry: What effect on privacy and self-respect does the housing of asylum seekers and refugees in camps, in stead of ordinary homes, have and how is this instruments therefore to be judged? Is granting labour migrants certain rights and liberties only after some time of residence to be judged as fair?

IV. Normative issues in the light of Europeanisation

In the preceding sections an overview was given of empirical and normative research. Now we must bring these two together. What new elements does the Europeanisation of migration policy add – elements that ask for an extension or revision of the normative approaches that concentrated on national migration policies? In this exploration we will again use the arrangement into three dimensions.

1. Justification of exclusion

In section II a process of co-operation and even supranationalisation in the decision making on migration policy was sketched. The European Union has taken on a role, and possibly will take on an even larger one in the near future, that until recently resided in states. That development brings us to the question whether the EU is equally legitimated (or as little legitimated) in making migration restrictions as states are? To answer this question we need to compare the EU and states, especially on the aspects that are seen as relevant in the discussion on state’s prerogatives in this field.

We might start by distinguishing two extreme and mutually contradictory positions. According to one position ‘Europe’ has developed into a state. The institutionalisation of Europe in the field of migration can be understood as an aspect of a much broader process. Tasks and discretion in so many fields have been transferred to the EU that it has now itself become, in the relevant sense, a state. The implication then is that the ethical issues concerning exclusion are identical to that discussed in the last section. According to an alternative opinion, however, such is not the case. The co-operation on a European level has brought about a new (international) configuration that asks for a different perspective: we are (or have been) witnessing the end of the nation state, the end of classical hierarchy in governance and the end of territorial unity and sovereignty. Nowadays new concepts are in place, concepts like transnationalism, multi-polarity, post-Westfalian-system, post-nationality, etc. (BAUBÖCK 1994; BAUBÖCK 2003; GUILD 2001; MORRIS 1997; SASSEN 1999; SOYSAL 1993; ZIELONKA 2001) Which of these two positions should we give credit?

The EU in many respects resembles states (as the are commonly understood and defined). It has, for instance, some level of internal and external sovereignty; a territory within which its citizens are free to move; decision making powers in broad array of policy fields; separation of powers and checks and balances, etc. But compared to states, differences are also apparent: free movement but no free settlement for everybody; Europe’s territory is extending (that of states normally being fixed); the EU is not a functional organisation, but its range of affairs is not as broad as that of states; there is a Constitutional Court that itself is not part of the EU; and the competency of the EP is much smaller than that of national parliaments. (LEHNING 1998) Do these differences make the EU less legitimate in making restrictions on migration? To answer that question we need to take into account other characteristics – characteristics that played a role in the discussion we looked into earlier. Do the people of Europe have ‘shared understandings’, do they identify with an European political community and European citizenship, does there exist an European public debate and an European “Öffentlichkeit”, is there a European demos? Does a pan-European system of organised solidarity exist, for instance in the form of shared arrangements for social security of pensions? Many think the answer to these questions has to be negative. If Europe in any sense is a community, they say, it is a legal community, a thin community, not a thick community as states are often understood. (LACROIX 2002; LEHNING 1998; VINK 2003) Our conclusion, then, should be that Europe is not, less even than states, justified in making migration policy. (JORDAN 2003) That would imply that the supranationalisation realised so far should be made undone. Or at least strong efforts are in place as to intensify the process of Europe becoming a ‘real’ state in the relevant respects. As a result of some economical or political logic Europe did get a role that it should not (yet) have. In many respects Europe should first develop, for instance, into a United States of Europe (moulded after the USA).
Such development however might, for other reasons, not be that desirable. Many understand and value European unification as a post-national process: Europe as a political community that can and should be more universalistic than European states: more strictly following an ideal of universal individual rights and less institutionalizing (nationalistic) ties and a specific national culture. A European state copying national states would diminish the special quality of Europe. (BIGO 2002; HABERMAS 1992; KOSTAKOPOULOU 1998)

A peculiar contradiction is the result. On the one hand there are good reasons for national states to co-operate, good reasons even to hand over discretion to a supranational Europe: reasons of efficiency and effectiveness (for instance to combat ‘asylum-shopping’) or reasons of adequate refugee protection (preventing a race to the bottom in national protection norms). On the other hand that Europe might not have the legitimacy for conducting itself any migration policy. And, moreover, the development of Europe into some kind of entity that is legitimated to do so is for other reasons undesirable.

This stalemate could be evaded when approaching Europe in a different manner. Above Europe was understood as a (deficient) replacement of states. It might, however, be understood as institutional complementary to states. (BADER 1999) Using such a perspective the European Union and its member states are often presented as a system of cheques and balances. One can take Guilds idea of a three-sided relation, mentioned earlier, as an example. (GUILD 1999) Some European deficit in legitimacy in migration affairs, then, is not of relevance. But can such an approach really be the solution that it promises to be? The issue we encountered is what the proper level for decision making in migration affairs is. Adherents to the idea of complementarity like to use a multi-level model of sovereignty, a model such as Pogge proposed, for instance. An important principle in that model is that of subsidiarity: decision-making has to be placed in the lowest level (or on the smallest scale) possible, taking into account issues of commonality in language, ethnicity and history, but with a voice for all that are “significantly and legitimately” concerned. (POGGE 1992; POGGE 2002) That, however, seems to open again the debate on the appropriate level of decision making (on specific aspects of) migration policy. Lawyers often raise the question whether the developing European migration regulation leads to a fair balance between migrant rights and effective migration control. (VERMEULEN 2002) The issue then remains: who’s control for what? This issue of the proper level of discretion in migration affairs even becomes more urgent when we take recent local initiatives into account: initiatives as to try to control ‘migration’ at the municipal level.

2. Criteria for selection

The second dimension we distinguished above is that of criteria of selection among potential migrants. Passing the issue of the legitimacy of the EU deciding on migration, we now concentrate on the question what the Europeanisation of migration policy implies for considerations of need, utility and special ties. Are these considerations analogously relevant for the developing European entity?

Need

The Europeanisation of migration policy also concerns refugee protection. In the European Charter on Human Rights in particular, the rights for people in need of protection are formulated. EU-member state, moreover, agreed in recent years on regulations concerning effective access to protection. Still it are the states’ institutions, however, that actually deal with asylum applications.

In co-operation European states have proved to be able to transfer part of the ‘burden’ of refugee-protection to other states. Without violating the refoulement-prohibition (in a strict sense) European states managed to leave the protection of refugees to other actors – often actors that are probably less equipped for the job than they are themselves.

A question that arises is whether this approach concurs with the idea of responsibility in second resort. It is not the ‘legalistic’ question whether the principle of non-refoulement is violated that is at issue. The responsibility in second resort for people in need might be realised by offering or supporting care and protection to refugees elsewhere. Does the EU, being relatively well organised and affluent, have a special responsibility - a responsibility larger than that of (the sum of) European states? Can there be given convincing argument for EU’s responsibility extending over refugees that have not (yet) reached European territory: A special responsibility perhaps to support countries in the region and International Organisations (like the UNHCR) and to further the realisation of a global protection regime? Might the responsibility of the united Europe exceed that of the individual member states? (GHOSH 2000; JORDAN 2003)

The powerful position of the EU might given support to arguments of special responsibilities. Above the consideration was cited that responsibilities arise when an actor in some sense caused another one’s misery.
Does the position of a united Europe in global politics and economics give reason for any such special responsibility to people in need elsewhere? One might argue, after all, that Europe is, more than its member states, a powerful global player in these spheres. It seems to have more possibilities to contribute to a more just or fair global order. Are there special reasons for Europe to make an effort for preventive non-arrival policies (be it in the form of aid in economic development or the promotion of good governance) and free trade? (Niessen 1999)

Above we concluded that the EU might be justified even less than states in conducting migration policies. Here reasons are given for a special responsibility of the EU in issues of migration. Together these two suggestions lead to a peculiar conclusion: greater responsibilities but a smaller legitimacy in acting in this field.

So far, in this section, we concentrated on the Europe’s unity. Above we also pointed out the remaining plurality within Europe. That internal plurality also is of relevance for issues of selection. We already stumbled upon the issue whether decision making on the protection of refugees eventually should not be a national prerogative (or duty). (Vermeulen 2002) And even if there are good reasons for deciding on asylum-rules (and even for dealing with applications) on an European level, the question remains in which member state refugees must be offered care and protection. Which state should get what ‘burden’ and what distributive instrument is appropriate? (We will return to this latter question below.)

**Mutual advantage**

Although member states have a considerable discretion in admitting labour migrants from third countries, also in the field of labour migration Europe has its say. Of importance here is the process of enlargement of the EU and agreements of co-operation (or association) with third countries. Opportunities are created for workers from other countries to enter the European labour market. The rules and conditions for labour migration are (at least from a strictly legal point of view) not simply imposed upon individual migrants. The governments of the sending countries (formally guarding their citizens’ rights and liberties) did, after all, signed the agreements. An asymmetry in the contractual positions of labour migrants en receiving society seems to be remedied in this way.

In the Europe of Free Movement the legal position of labour migrants, especially of long term residents was strengthened in the last decades, as we saw above. The position of third country nationals in many respects has come to resemble that of citizens of the member states. But, though they did not end up as ‘inliving servants’, their position is still not identical to that of citizens. As to the right to vote, and the right of residence their position is less robust. Some argue that the threat of second-class citizenship for third country nationals remains present. Differences in legal position might motivate employers and others to discriminate. (Groenendijk 1999a; Morris 1997) The ‘mission’ of the EU, creating an free economic sphere for equal participants, might offer ‘supra-national’ reasons for furthering the position of third country nationals. Is it appropriate in that context to extend Union-citizenship to people that work and live (for a considerable time) in Europe but are not citizens of one of the member states? Or would granting resident third country nationals European Union citizenship not make any difference?

Finally, we must, in this section, ask whether Europe should have a much bigger role in decision making on migration for economic purposes. Should not issues of entry to that one market be made on central level? Or do labour markets and welfare-arrangements first have to be Europeanised? Here again we come across the issue of the appropriate level of decision making on migration.

**Special ties**

Within the European migration policy, as it recently developed, considerations of special ties also seem to play their part. The liberated (labour) migration from states in the European region that already have become Union members (or possibly will get that status in the near future) may count as an example. That also goes for the states on the most-favoured-countries-list, specifying the countries the citizens of which are granted entry more easily. And probably the special treatment of refugees from the European region – such as former Yugoslavia a few years back - might also be counted as an example.

Arguing from the idea of ‘circles of proximity’ and special duties towards those who are near, these considerations prima facie seem as (little) relevant to Europe as they are to states. If proximity is accepted as relevant for national migration policy, then it seems reasonable to accept it for Europe also – the only difference being that for Europe a wider circle might be appropriate. Or isn’t it? Is the idea of circles of proximity really that relevant? As we did see above, European unification often is connected to the ideal of a post-national entity, concerned more with universalistic then particularistic goals. (Habermas 1992; Kostakopoulou 1998) For
such an entity the idea of special care for those ‘near(by)’ is not appropriate. The idea of concentric circles of proximity for Europe also for another reasons can be said to be less suitable than it is for particular states. The composition of Europe’s population is even less homogeneous (mono-cultural, mono-national, etc.) than national societies are. Within Europe many people are involved in transnational networks, feeling themselves tied to other in different parts of the world. ((BAUBÖCK 2003; SASSEN 1999)

But how about that more individualistic kind of special ties? As noted earlier, considerations of special ties might also imply special rights to family unification. Does the more universalistic character of the European project demand for a special responsibility in this field?

Further, we might ask whether the special concern for those ‘near(by)’ does not go at the expense of those (yet) ‘far’. As we saw in section II policies liberalising labour migration from associated countries seems to go together with the implementation of restriction towards other potential migrants (asylum seekers more in particular) from other parts of the world. Is one consideration here illegitimately dominating another?

As a final item in this section, we turn to the possible relevance of European plurality. Possibly considerations of geographical or cultural proximity are not appropriate for Europe as one entity. But should they then (continue to) play a role at national levels? Should states (continue to) have discretion in this field of migration policy. Here the existence of Europe even has further consequences. On the one hand EU-migration regulations demand restriction in the policies of new member states in Central and Eastern Europe. On the other hand restrictiveness is contested by national/ethnic groups finding themselves now living at both sides of the EU border. These groups, ironically, often have only become able to raise their political voice as a result of minority rights established by the Council of Europe.

3. Instrument effects

The third dimension in normative research is that of the consequences of instruments chosen for implementing migration policy. In section III we distinguished in state-focussed studies three categories of instruments: those aimed at exclusion, those aimed at selection and those realising entry. What implications does the Europeanisation of migration policy have the choice in instruments en what new issues have therefor to be addressed? The sketch of the Europeanisation we presented above leads us to two issues. First, within the three categories of instruments just mentioned new species have developed – new species that could be developed because of the European co-operation. And second, a new category of instruments came to existence – instruments aimed to divide tasks and distribute ‘burdens’ among EU member states.

**Instruments of restriction, selection, and entry**

European integration in the field of migration did lead to new policy instruments: new instruments of remote control and instruments with a history in the field of security.

Instruments of remote control draw in third parties in the implementation of migration policy. (Potential) new EU member states, neighbouring countries of the EU and other states did get involved in the realisation of Europe’s migration policy. Private actors also did get a role in implementing admission and exclusion regulations. And further parties might get involved when in the future judgements on asylum applications and actual protection – that is what some European governments suggest - will be realised outside Europe’s territory. (LOESCHER 2003) For the development of these instruments of remote control the Europeanisation of migration policy need not be have been in all instances a necessary precondition. European co-operation, however, at least created a setting which was very favourable for their development. For third countries being confronted with European states co-operating there is often no alternative to accepting (the consequences of) European migration regulations. And private parties, like air-carriers, cannot threaten to stop flying on certain destinations as all countries establish the same sanctions. (BYRNE 2003)

Within the triad of ‘EU-member states – third countries – migrants’ the first group probably profits most from remote control in this field. Leaving control and refugee protection to countries at Europe’s border, it are the countries but little equipped to do the job – that is less equipped than the countries that developed the policy. The judicial and bureaucratic tradition in the countries now implementing Europe’s migration policy often is weaker, their financial and technical means are minimal, and the legal safeguards they can offer for migrants (therefore) are often smaller. It are such countries that had to take on new tasks regulated by complex directives. Many fear that this shift in the implementation of migration policy makes for deficiencies in refugee protection. Possibly Europe’s restrictive policy could only be effectuated because of the involvement of those third countries. And the burden of being an ‘agent’ for the European ‘principal’ might be considerable: in terms of the costs of the bureaucracy and judiciary involved, but also as to consequences for internal stability and civic
support. (BYRNE 2003; BYRNE 2002; GEDDES 2003; JILEVA 2002; LAVENEX 1998; LAVENEX 2001b; LAVENEX 2002; MITSILEGAS 2002; WALLACE 2002; ZIELONKA 2001) The question then is whether a fair distribution of the ‘burden’ is realised. What can be said from a viewpoint of responsibility that European Union has been able to hand over tasks to its neighbours in the east and to others?

Governance by remote control is an issue broadly debated within Political Science and Public Administration. Often questions are addressed concerning the consequences for legitimacy (be it in terms of responsibility and accountability or of effectiveness). Where implementation is transferred to other actors the issue becomes acute whether the steering actor (‘principal’) can adequately control the results and whether deficits in accountability arise. (GUIRAUDON 2001; KERSBERGEN 2001) These questions are also of relevance for the field of migration policy as we are studying it here. Do the shifts that we sketched lead up to deficiencies in legitimacy in any sense, might complementary measures be taken to remedy these deficits, do the measures that have been taken have indeed such an effect? How might the involvement of third countries and private actors be adequately checked, what support, if any, ought to be offered to them? Do the compensatory measures that individual states (like Germany’s financial contribution to Poland) and the EU took balance the negative consequences of the transfer?

It seems, furthermore, that we have to deal with an extra complicating factor. The shift towards third parties in the implementation of European migration policy might not be completely comparable to most cases of governance by remote control. In most cases discussed in literature the transfer of tasks (and discretion) was enacted explicitly and formalised in regulations or covenants. In the field of migration, however, the transfer surely is an effect of European co-operative policy making – but can it be (always) understood as a intended effect? If that is not the case (in some instances) what does it then mean for judgements of accountability and responsibility?

Many see reasons for the conclusion that migration policy did get entangled with security policy. Examples of this observation above have been given in policy development, in co-operation of executive offices, and in regulations. Those who speak of ‘the securitisation of migration’ unmistakably use this phrase as a negative one. Their description of developments is always accompanied by strong reservation. Do these measures offer a solution to real problems and do they not have undesirable effects? Is the threat of massive migration and crime, endangering law and order, that serious? Does the wide array of measures make for effective control in this field? Does the approach chosen not in fact have the opposite effect: creating illegality and trafficking for instance? What consequences does it have for the support of European citizens for migrants rights and refugee protection? And, last but not least, do the intended effects of securitisation balance infringements on individual rights and liberties? Generally put, the benefits of deploying instruments of a securitised migration policy seem to be, just as they are in the case of remote control, on the side of the European co-operative ensemble. (BIGO 2000; BIGO 2001; BIGO 2002; CHOLEWINSKI 2000; GUIRAUDON 2003; HUYSMANS 2000; JORDAN 2003; KOSLOWSKI 2001; LOESCHER 2003; TWOMEY 2000)

How might we understand the relation between ideas on admission and our understanding of security? In the debate on the legitimacy of (state) exclusion we looked into before, all parties accepted migration restriction for the sake of public order and security. (BARRY 1992; CARENS 1987; HABERMAS 1992; TRAPPENBURG 1998) But do these arguments also support the security measures that are been taken in Europe in the field of migration? The argument of restrictions for reasons of security can be understood either as a general or as a very specific consideration. On the one hand it might be argued that migration restriction is appropriate when such a large number of people will migrate, that guaranteeing public order and the rights and liberties of all present will be impossible. On the other hand it might be argued that the admission of specific people must be blocked because there is reliable evidence that they have the intention to commit (and have been preparing) a crime or an act of terrorism in this country. If the latter argument is valid - one could object that this is more an issue of persecution and penal law than of migration – it still probably fails to underpin the broad securitisation that has become part of migration policy instruments in general. The first argument does focus on large numbers and categorical measures. Here it is the sheer number of people that is depicted as a threat, not their (supposed) criminal or terrorist intentions.

Behind these questions, of course, there is the more general one: what is meant by security(threat)? When exactly does what (suspected) infringement on whose rights amount to a reason to exclude a specific individual? Or, more relevant even, who is to decide in this issue? Must this be determined on a European level, or should it be left to the state’s discretion? Should definitions on security be harmonised, or do national ‘shared understandings’ on this issue be given authority?
Instruments of burdensharing

New instruments in migration policy not only follow from Europe’s developing unity, but also its (remaining) internal plurality. That plurality is accompanied by issues of division of labour and circumscribing responsibilities. It seems to be migration because of need that is at stake here, less so of utility and special ties. Instruments dealing with handling asylum applications and protection mostly are addressed under the heading of ‘burdensharing’.

Presently applications and admittance of refugees are dealt with following the regime of the Dublin Treaty. The country in which an asylum seeker could have made his application first is responsible for judging on his application and offering refuge. This system has the effect that some countries, because of their geographical location, have a larger burden. It also implies that refugees have some, be it a limited, freedom in choosing their destination. But other systems might also be feasible. States may be held responsible for the asylum seekers that effectively ask for asylum there – irrespective of their route of travel. The system, however, might still follow another distributive logic: not ‘distributing’ people but money. Burdens might be shared by states receiving money from or contributing to a fund according to the relative amount of refugees each state actually offers protection. In again another system dealing with applications and offering refuge could be disconnected. Asylum requests might be judged on in one place while those admitted might be allotted to the member states. (NOLL 2000; NOLL 2003) Each of these systems, being further specified of course, has different consequences for member states and migrants.

Box 1. Empirical trends and normative dimensions combined

<table>
<thead>
<tr>
<th>NORMATIVE DIMENSIONS</th>
<th>TRENDS</th>
<th>European expansion</th>
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<td>Europeanisation of institutions</td>
<td>Europeisation of regulations</td>
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<td>Unification and plurality</td>
<td>Securitisation</td>
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<td>Legitimacy of restriction</td>
<td>Legitimacy supranational migration policy?</td>
<td>Restriction in entry for reasons of security?</td>
</tr>
<tr>
<td>Criteria of selection</td>
<td>Collective European responsibilities?</td>
<td>National discretion desirable?</td>
</tr>
<tr>
<td>Instrument effects</td>
<td>Most balanced system of burden sharing?</td>
<td>Security without negative side effects?</td>
</tr>
</tbody>
</table>

V. Conclusion

Our aim in this paper was to investigate whether – and in what sense - the Europeanisation of migration policy gives reason to extend the research agenda of normative disciplines. To answer this question we first extracted tendencies from the abundance of empirical research. Next we confronted these findings with the approaches as yet found within political theory and philosophy of law.

In our exploration we encountered issues that within state-focussed normative studies are not (or only marginally) addressed. These are issues follow from: the EU being one and at the same time remaining plural in certain respects; The EU as an actor with special opportunities towards third parties; and an European policy of migration that can be called securitised. Concluding this paper our findings might be summarised and ordered into a research-agenda, containing three sections.
1) Responsibilities in the one but divided Europe

In many studies on legitimacy in migration control, the central actor is taken to be the state. Migration issues are often addressed picturing the relevant context as a world of individual states. Decision making and implementation of policies are, often implicitly, understood as a matter of national discretion. The Europeanisation of migration policy involves the development of a new (or several) new actor(s) on a supranational level. It brought states into a new institutional configuration. European states developed special relations, relevant for dealing with issues of migration, they do not have with others. These European states all are relatively wealthy, relatively well-organised and adhering to human rights principles. They are all (therefore) attractive for immigrants.

New questions:
- Is the EU (Europe as a unity) legitimised in conducting migration policies to the extent that states are argued to be?
- Are there good reasons to leave (some) discretion in migration policy to national levels (or sub-national levels even)? If so, what system for the distribution of sovereignty would be appropriate in this field?
- What system of ‘burden sharing’ between member states (concerning asylum seekers) is the most balanced – taking the interest of all involved into account?

2) Collective responsibilities of the united Europe

European co-operation has resulted, up to a certain level, in a common migration policy. The EU also in this field has become a powerful player in the international arena. In some respects the EU developed into a state, a ‘super state’ even. It is capable, for instance, to govern by remote control, that is by transferring the implementation of its migration policy partly to third parties. It is, furthermore, often called a post-national entity: more oriented on universalist than on nationalist values.

New questions:
- Does the Union of European states have a greater responsibility as a collective than the sum of individual states had in remedying the sufferings of people in need? Is the (use of) economic and political power of Europe and the consequences thereof for the living conditions of people here of relevance?
- Do considerations of special ties have any relevance for an European migration policy?
- Should the EU compensate for the effects of its remote control, even if these effects are the result of actions of other actors, not (directly) instigated by the EU? How might the responsibility of other parties be articulated and taken into account?

3) Securitisation of migration control

Migration policy and security considerations did get intertwined in the process of the Europeanisation. Conceptually (as in ‘policy frames’) as well as in the use of instruments the spheres of migration and security did get intimately connected.

New Question:
- How and in what sense exactly might exclusion for reasons of security be justified?
- What kind of security-measures might properly balance the interests of all those involved?

Literature
