The 'Soft' Europeanisation of Migration Policy:

European Integration and Domestic Policy Change

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Abstract

In the early 1990s, the relative stability that had characterised Europe's post-war asylum regime gave way to radical and widespread policy change. In order to explain how such substantive change was possible, in a policy area in which policy makers have traditionally faced strong constraints from both domestic and international sources, the paper uses insights from new institutionalism which remind us of the ways in which institutions can constrain *and* enable policy makers. This paper seeks to develop a conceptual framework which will help to explain *how* European integration (i.e. the development of institutions at the EU level) can selectively legitimate actors, ideas and discourses, and in doing so facilitate domestic policy change. The paper analyses three mechanisms—two level games, policy transfer, and social learning—through which these processes of legitimisation take place. In the case of asylum policy, empirical evidence suggests that instead of adding to the international and domestic constraints that national policy-makers have traditionally been faced with in this area of policy making, European integration has, in fact, helped policy-makers to partially overcome such constraints. In doing so, European initiatives have threatened to undermine refugee protection in Europe.

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1. Introduction[1]

For much of the post-war period, Western Europe's asylum regime enjoyed a remarkable degree of stability, despite the fact that refugee flows varied greatly both in the number, and the characteristics, of displaced persons seeking protection. In the early 1990s, this stability gave way to radical and widespread changes. Within a few years, countries across Europe moved to introduce very similar and far-reaching restrictions into their domestic asylum legislation (Danish Refugee Council 1997; Lavenex 1999b). Perhaps most importantly, almost all European countries introduced provisions which meant that refugees could be turned away at the border of a state and sent to what this state considered to be a 'safe third country', calling into question fundamental aspects of the 1951 Geneva Refugee Convention (Hathaway 1993; Amnesty International 1995; ECRE et al. 1999).[2]

If one seeks to explain stability and change in Europe's asylum regime, it is useful to look at the literature on new institutionalism. This reminds us that institutions can constrain actors not only in a formal rule-led sense in which actors weigh the cost and benefits of non-compliance but also in a more subtle, norm-based way by defining the range of options that actors perceive are available to them in a particular institutional context. Whereas the relative stability of Europe's post-war asylum regime can therefore be accounted for by the fact that policy-makers in this area are faced with strong international (e.g. human rights norms) and domestic (Courts, Constitutions, etc.) institutional constraints, explaining the far-reaching changes introduced in the early 1990s continues to constitute a challenge. This is particularly so, as the changes that were initiated across Europe were very similar in character and were introduced even in countries with very low numbers of asylum seekers (e.g. Portugal or Finland). Although

1 Previous versions of this paper were presented conference of the European Community Studies Association, Madison, USA, 30 May - 2 June and the American Political Science Association's Conference in San Francisco, August. I gratefully acknowledge comments and suggestions received on both occasions.
2 UN Convention on the Status of Refugees 1951, as amended by the 1967 New York Protocol.

it is clearly the case that migratory pressures in the early 1990s differed from those of earlier periods both with regard to their scale and the origin of refugees, such pressures alone are unable to account for the legislative changes that were introduced across Europe in the early 1990s.

Already by the mid 1980s, i.e. long before the fall of the Berlin Wall that led to an increase in migratory pressures across Europe, European countries had initiated first significant steps to compensate for the dismantling of internal border in Europe by moving towards a coordinated European immigration and asylum policy. These attempts showed their first results with the signing of the Schengen and Dublin Agreements in the late 1980s. These developments initially did not impose legal obligations on the signatory states and this is why, for a long time, they were largely ignored by the migration literature.[3] However, this paper argues that despite the fact that these conventions became legally binding only in the late 1990s, European integration must be regarded as a crucial catalyst for the changes in domestic asylum legislation that were introduced throughout the 1990s.

Much of the existing political and legal EU literature emphasises how European integration (i.e. the development of new institutions at the EU level) has led to domestic adaptation pressure and created new constraints for domestic policy makers (see e.g. Knill and Lenschow 1998; Cowles et al. 2001; Thielemann 2002). Comparatively little attention has so far been paid to the ways in which Europeanization can increase the room for manoeuvre of domestic policy makers (for exceptions see Radaelli 1997; Lavanex 1999a; Guiraudon 2000). This paper seeks to develop a conceptual framework which will help to explain how European integration (i.e. the development of common institutions at the EU level) can selectively legitimise actors, ideas and discourses, and in doing so facilitate domestic policy change. The paper analyses three mechanisms—two level games, policy transfer, and social learning—through which these processes of empowerment and legitimisation take place. In the case of asylum policy, empirical evidence suggests that instead of adding to the international and domestic constraints that

3 For notable exceptions see Hailbronner (1992); Hathaway (1993), Ucerer (1997) and Favell (1998).

national policy-makers have traditionally been faced with in this area of policy making, European integration has, in fact, helped policy-makers with a restrictive asylum policy agenda to partially overcome such constraints. In doing so, European initiatives have threatened to undermine refugee protection in Europe.

2. Institutional logics and Europeanisation: A framework for analysis

Institutions can be defined as rules, norms, conventions and discursive frameworks that shape human interaction.[4] Insights from the new institutional literature (March and Olsen 1984; Hall and Taylor 1996; Peters 1999; Caporaso and Jupille 2000; Olsen 2001) have re-emphasised the importance of institutions in the policy making process—both with regard to their constraining and their constitutive effects. Traditionally rational choice institutionalism has been regarded as being in a privileged position to tell us something about the way institutions can have a constraining effect on actors. However, there is clearly something to be learnt here from the other institutional approaches, in particular from sociological institutionalism which uses the notion of 'logic of appropriateness' (March and Olsen 1984) to highlight more subtle institutional constraints. According to this latter logic, by 'defining' the range of options that actors perceive are available to them, institutions can have less obvious but nonetheless powerful constraining effects.[5] The two principal new institutional approaches, rational choice- and sociological institutionalism, represent two basic logics of social action through which human

4 The definition used here is close to Krasner's definition of regimes which he defines as 'implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations (1983: 2).

5 Few would question that actors do act according to different logics. Sometimes, they act in a consequentialist, sometimes according to a logic of appropriateness. A number of authors have analysed the question of the compatibility of the two approaches/logics (Ostrom 1991; Dowding 1994; Aspinwall and Schneider 1998). Even more interesting questions in this context regard the identification of scope conditions. Under what condition will actors follow one logic or the other? We will return to this question, which so far has received little attention in the institutional literature, at the end of this paper.

behaviour can be interpreted (March and Olsen 1998: 7-10).[6]

On the one hand, action can be seen as being driven by a logic of rational and strategic behaviour that anticipates consequences and is based on given preferences. Actors chose among alternatives by evaluating expected consequences of their actions for the achievement of certain objectives, expecting other actors to do the same. In this rational choice informed model, actors assess their goals, interests and desires independently of institutions: in other words, it is assumed that actors' preference formation is external to the institutional context in which actors find themselves. Institutions affect 'only the strategic opportunities for achieving these objectives' (Immergut 1997: 231). For rationalists, institutions constitute a strategic operating environment and they tend to regard institutions primarily as constraints for rationally behaving actors. The logic of expected consequences is the most commonly accepted of frameworks for the interpretation of political life. It has informed most of the writings on international politics and European integration (Scharpf 1988; Garrett and Tsebelis 1992; Tsebelis 1994, Milward 1992; Moravcsik 1998; Marks, Hooghe and Blank 1996).

On the other hand, action can be regarded as being based on a logic of appropriateness, according to which, behaviour is guided by notions of identity and roles shaped by the institutional context in which actors operate (March and Olsen 1984; DiMaggio and Powell 1991; Checkel 2001). According to this logic, action is based on rules, practices and norms that are socially constructed, publicly known and anticipated. Behaviour often can be associated with what is considered 'appropriate' in a particular socio-cultural context. Sociological orientated approaches emphasise that the motivations, choices and strategic calculations of political actors are framed by institutional contexts, which shape opportunities for action. Such a perspective raises the question, to what extent an actor's broader institutional environment can lead to norm-guided behaviour that may supplant

6 With regard to the above distinction of two basic logics of social action, the third new institutional school, historical institutionalism, combines both logics and thus falls in between the other two institutional approaches (Pierson 1996; Checkel 1998: 7). This is why the historical institutional approach is not discussed separately here.

strategic calculation.[7] According to sociological institutionalism, interest formation and decision-making is shaped by the general institutional context in which actors are embedded. It claims that agency rationality, preference formation and strategic bargaining are conditioned by an actor's institutional context. It is in this sense that institutional context reflects norms of decision-making and provides actors with a certain 'logic of appropriateness'. 'Seemingly neutral procedures and structures embody particular values, norms, interests, identities and beliefs' (Lowndes 1996: 191). Sociologically orientated approaches regard institutions as a political environment or cultural context which shape an individual's interests, i.e. actors are conditioned (as to their identity, priorities and interpretations of reality) by institutions over time. Decisions are often taken according to what is considered 'appropriate' behaviour, with institutional norms being the main shapers of such notions of 'appropriateness' (Knill and Lenschow 1998). A calculus of identity and appropriateness is sometimes more important to actors than a calculus of political costs and benefits (March and Olsen 1989). To reiterate the general point. The key difference between rationalist and sociological institutionalist logics is not the dichotomy between material and non-material motivations. Even if goals are non-materialist, like adhering to certain norms for reasons of international standing, the underlying logic of action is often still consequentialist—means-ends—in nature (Checkel 1999).

This paper contributes to the growing literature (Katzenstein; Keohane and Krasner 1998; Risse, Ropp and Sikkink 1999; Risse 2000; Checkel 2001; Schimmelpfennig 2001) which argues that the two logics of political action outlined above are not mutually exclusive. Political action cannot generally be explained either as based exclusively on a logic of consequences or as based exclusively on a logic of appropriateness but probably involves elements of each. The approach taken here views the relationship between actors and structures as closely interrelated. Strategically acting agents shape their environment even as they are being formed by it. Political actors are constituted both by their interests, by which they evaluate their anticipations of consequences, and by the

7 Kohler-Koch uses the term reflexive institutionalism. While interests define politics, the definition of one's own interests derives from conceptions of politically appropriate behaviour, which are passed on by institutions (1997: 229-30).

norms embedded in their identities and political institutions. They calculate consequences and follow norms, and the relation between the two is often subtle (March and Olsen 1998: 10). However, the complexity of the relationship between these two logics of action has so far remained relatively unexplored in the literature and will be addressed in this paper.[8]

Table 1: Logics of Social Action and Institutional Constraints

	Logic of Action	**Type of constraint**
Rational Institutionalism	'expected consequences'	rule-based (external)
Sociological Institutionalism	'appropriateness'	norm-based (internalised)

The principal difference between the two institutional approaches outlined above, has often been said to be the effect that the two schools attribute to institutions. Rational institutionalism is often held to emphasise the constraining effect of institutions, while sociological institutionalists emphasise their constitutive effect. It can be argued, however, that no matter which of the two perspectives one analyses institutions, both schools tell us something about the way institutions can have constraining effects on actors. On the one hand, there are the obvious rule-based constraints that rational choice institutionalists emphasise. It is quite clear how a formal law, for example, can act as a constraint on actors. On the other hand, from a sociological institutionalist perspective, in defining the range of options that actors perceive are available to them, institutions can have a more subtle but nonetheless powerful constraining effect that result from their

8 Institutionalists (Stinchcombe 1986: 158; Searing 1991; Garrett and Weingast 1993: 186; March 1994: 101-102; Offe 1996: 682, March and Olsen 1998) have so far only touched on this question and have

'constitutive' capacities. This 'bounded' perception of available options is shaped by both formal rules as well as by more informal norms, conventions and discursive frameworks that characterise a particular institutional context in which policy is made.

2.2. Europeanisation as a Catalyst for Change

Conventionally, Europe integration—although at least partly motivated by the desire to overcome collective action problems (Moravsik 1991)—has often been regarded as adding further to the constraints decision-makers in the Member states are faced with (Thielemann 2000). It can also be argued, however, that European integration and processes of Europeanisation can help Member State national executives to overcome institutional constraints that they are faced with at the domestic level.

Europeanisation is a two-way process. 'European integration shapes domestic policies, politics and polities, but Member States also 'project themselves' by seeking to shape the trajectory of European integration' (Bomberg and Peterson 2000: 1).[9] This emphasis on the interaction between European and domestic dynamics leads to a richer account of Europeanisation. Europeanisation is defined here as a process whereby domestic discourses, public policies, political structures and identities adapt to, and seek to shape, European integration. Reviewing the literature on Europeanisation, Radaelli (2000b) identifies three broad mechanisms of Europeanisation: presence of a European model, 'negative' integration, and 'framing' (2000b: 12-16).

The first one refers to the existence of a European model which often implies coercive pressures for adaptation in the Member States in areas of new regulatory policies such as consumer protection or environmental policy. 'Negative integration' refers to European initiatives to create integrated markets by removing barriers to trade, investment and free movement. In this process there is no prescribed European model. Such processes work

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produced only very tentative attempts of hypothesising this relationship.

through 'mutual recognition' and often trigger regulatory competition (Majone 1996). The final mechanism relates to what Radaelli refers to as a 'soft framing' logic, a mechanism that is of increasing importance but which has so far received little attention. 'Soft framing' refers to the fact that even in the absence of comprehensive EU directives, European decision making fora can significantly influence domestic politics and policy as their activities provides 'frames of reference' to domestic policy-makers. Whereas the first two Europeanisation mechanism identified by Radaelli emphasise potential additional constraints on policy-makers as a result of Europeanisation, the 'framing logic' can help us to explain how Europeanisation allows domestic policy-makers to overcome institutional constraints. This latter logic therefore deserves closer attention. 'Europeanisation through framing' can be analysed with reference to three concepts that have been highly influential in the recent literature on European integration and policy-making: two-level games, policy transfer and learning.

Two level games

Putnam's logic of two-level games is perhaps the best known model for analysing the entanglements of domestic and international politics (Putnam 1888; Evan, Jacobson and Putnam 1993). According to Putnam it is useful to 'contrast between issues on which domestic interests are homogenous, simply pitting hawks against doves, and issues on which domestic interests are more heterogeneous, so that domestic cleavage may actually foster international cooperation' (1988: 460). He suggests that domestic policy-makers can 'let themselves be pushed' (Putnam 1988: 429) into a policy that they privately favour, but which they would have found costly or even impossible to enact without the indirect support from the international/European level. We should expect therefore the enactment of domestic policies that differ from those that would have been adopted in the absence of international (European) activities in this area. By playing two level games, domestic actors (with government officials being in a particular strong position to play such games) therefore hope to import legitimacy for their respective claim that will help them to win domestic political battles. Two-level games can be used not only to sideline the domestic opposition but also to win the intra-governmental competition for agenda

9 See also Bulmer and Burch (2000).

control among the competing government ministries and departments.

Policy transfer

Europeanisation of the 'soft framing' kind can further be analysed with reference to the concept of policy transfer (Bennet and Howlett 1992; Rose 1993, Dolowitz 2000, Radaelli 2000a). Policy transfer can be defined as a

> 'process in which knowledge about policies, administrative arrangements, institutions and ideas in one political setting (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political setting' (Dolowitz and Marsh 2000: 5)

In the EU context, one can distinguish between vertical and horizontal transfers. As to the possibility of vertical transfers, Radaelli points out that minimalist European directives or non-compulsory regulations, although they do not coerce states to adapt, can nonetheless prepare the ground for major policy change. They do so 'by providing additional legitimacy to domestic reformers in search for justifications, by 'inseminating' possible solutions in the national debate, and by altering the expectations about the future' (Radaelli 2000b: 15).[10] The EU may also provide a platform for horizontal policy transfer from one country to others. Brussels provides opportunities for administrators from different countries to meet frequently and to exchange ideas about administrative innovations and examples of best practice. The result of policy transfer through such interaction in often purpose-built policy networks may be policy convergence 'driven by the increasing "fusion" and dense interaction among bureaucrats and experts on all levels of decision-making' (Wessels and Rometsch and 1996: 351-2). Policy transfer (both vertical and horizontal) can thus provide policy-makers with new options, potentially widening their margin of manoeuvre.

Learning

10 Additional legitimacy is in particular important for domestic decision-makers who aim to achieve more radical reforms. New solutions coming from the European level or other countries can trigger learning dynamics and mimicry. Such new solutions can lend support to certain domestic groups while

The concept of policy learning suggests that processes of learning can play a role in Europeanisation. The literature on learning distinguishes between 'simple' and 'social' learning (Levy 1994; Checkel 1999). Simple learning refers to processes in which agents acquire new information, alter strategies, but then pursue given, fixed interests. Policy transfer, facilitated through the establishment of exclusive policy networks, constitutes a good example of simple learning. This suggests that even in the absence of binding EU directives or regulations, European integration can facilitate learning and thus lead to policy transfer. In contrast to the idea of simple learning, social learning can be defined as a process in which actors, through interaction with broader institutional contexts (norms or discursive structures), acquire new interests and preferences (Checkel 1999: 6). Interactions in exclusive circles of national governmental officials at the EU level can not only lead to the adoption of new policy tools or strategies to achieve certain objectives. Insulated from moderating or dissenting voices, national government officials in these networks, which often share similar backgrounds, can count on mutual support and a positive reception of suggestions made. Such fora thus provide a mechanism of socialisation, which constitutes a potential channel of cognitive convergence, and a vehicle for the transmission of a specific policy discourse. Kohler-Koch argues that such contacts can also have a deeper impact than suggested by the policy transfer literature as participation in EU networks may change the belief systems of domestic civil servants (Kohler-Koch 1996). The particular discursive structures facilitated by these meetings, can therefore also lead to a redefinition of actors' interests and preferences and hence changing perceptions of appropriateness.

What does this mean in terms of the earlier discussion on institutional constraints that are based on different logics of social action? Two-level games and the idea policy-transfer quite clearly correspond to the logic of expected consequences. With regard to two-level games, domestic policy-makers strategically use the international/European level to increase their margin of manoeuvre at home. Similarly, the concept of policy transfer 'assumes that policy diffusion is a rational process wherein imitation, copying and

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undermining those opposed to reforms which can be portrayed as fighting for a 'lost cause' as Europe can be seen to be moving in the direction of the reformers (Knill and Lehmkuhl 1999: 12-13).

adaptation are the consequences of rational decision by policy-makers' (Radaelli 2000a: 38). Studies on policy transfer therefore tend to downplay the logic of appropriateness and instead put emphasis on the logic of expected consequences. New policy design is often a copy and is often presented as such even if it is something new. 'The designer, if seen as such, will unavoidably come under the suspicion of trying to impose his particular interest or normative point of view upon the broader community, and that suspicion alone, unjustified though it may be in some cases, may invalidate the recognition and respect of the new institution (Offe, quoted in Radaelli 2000a: 28). With regard to the concept of learning, a conclusion is less straightforward. Whereas 'simple learning 'can be captured by methodological-individualist/rationalist accounts' (Checkel 1999: 6), social learning corresponds more with the sociological institutional logic of appropriateness. Social learning through processes such as socialisation can lead to the internalisation of norms. As a consequence of such processes the actions of actors cannot be interpreted as solely consequentialist. New internalised norms can lead to changed behaviour that is driven by a new (re-defined) logic of appropriateness.

The conceptual considerations above will be applied in the subsequent empirical part of the paper. After introducing the background of the European asylum regime, it will be shown how national asylum policy-makers have been constrained by international institutional (e.g. UN Human Rights norms) and national institutions (Courts, Constitutions, etc.). The section will then trace the principal steps that have been taken towards the EU asylum system, seeking to show how European co-operation in this area can help domestic policy-makers to overcome institutional constraints.

3. Stability and change in European asylum policy

The basic principles of the European asylum regime go back to the immediate period after World War II and international agreements as the 1951 Geneva Convention, which over time were incorporated into the constitutions and laws of all European Member

States. Despite strong migration pressures, Europe's asylum regime remained remarkably stable until the early 1990s when most European states started to significantly tighten their asylum laws.

3.1 The European asylum regime and its underlying institutional constraints

In principle, sovereign states are free to determine who they allow to enter their territory. However, it is clear that when making policy in the area of asylum, national authorities have always been constrained by both international and national institutions.

International constraints

There has been a long running debate regarding the question as to what extent international legal instruments constrain the actions of national policy-makers. That such instruments can constrain action, however, is rarely disputed. Liberal theorists (Rawls 1971; Ruggie 1982) argue that rights expressed in international norms and principles, such as international human rights agreements, act to constrain the power and autonomy of states. Some have even argued that the source of legitimacy of rights now lies beyond the nation state (Soysal 1994; Sassen 1996; Jacobson 1996). International legal instruments such as the Geneva Convention and jurisprudence from international Courts, such as the European Court of Human Rights, constitute a set of widely recognised international institutions that affect national policies on asylum.

The principal international instrument that outlines the rights of asylum-seeker is the 1951 United Nation's Geneva Convention. The Convention protects the rights of people fleeing persecution on the grounds of race, religion, nationality or memberships of a particular social group or political opinion (Goodwin Gill 1995; 1996). The Geneva Convention's principle of non-refoulement, that is the obligation on states not to send a refugee back to a persecuting country, can be regarded as the centrepiece of refugee

protection.[11] In Europe, the provisions of the Geneva Convention have been complemented by the European Convention on Human Rights. Against the background of such international legal frameworks, the UNHCR or NGOs such as Amnesty International, which observe the adherence of national government practices to these regimes they can assert pressure on states. As most countries are concerned about their international reputation as well as domestic public opinion (Risse-Kappen 1995; Risse, Ropp and Sikkink 1999), they often are susceptible to such pressures.

In Europe, the European Court of Human Rights (ECHR), can exert pressure on states by 'naming and shaming' violators through the publication of Court decisions and reports. Although the ECHR has no power to grant asylum or residence, the ECHR used Article 3 of the European Convention on Human Rights to effectively prevent signatory states from extraditing individuals who are threatened with torture or inhumane or degrading treatment in the country of return (Hailbronner 1999: 8). The Court has used Article 3 in cases where the expulsion or deportation of an ill person could amount to inhumane treatment.[12] It has also used this Article where the person threatened with expulsion might incur inhumane treatment, which the Court in recent years has extended to apply to treatment flowing from non-state groups if the state and its organs are unable to grant sufficient protection to the individual.[13]

Domestic constraints

A further reason why governments cannot ignore international norms is the fact that such norms are protected by domestic institutions. European States have usually enshrined the right to asylum as a fundamental principle in their constitutions. Joppke argues that 'constitutional politics better explain the generosity and expansiveness of Western states towards immigrants than the vague reference to a global economy and an international human rights regime' (1997). States have clearly self-limited their discretion of allowing or rejecting the entry of third country nationals (such as in the case of family reunions)

11 UN Convention on the Status of Refugees (Geneva Convention, Article 33).

12 In the case of D. v. UK, the Court ruled that a person who suffered from HIV in the last stage must not be expelled to a country lacking sufficient medical care as the interruption of treatment (combination treatment) would dramatically shorten the life expectancy of the person concerned.

as well as their capacity to dispose of foreigners at will, once they have been admitted. Equally important is the fact that national Courts increasingly refer to international human rights norms in their decisions (Lahav and Guiraudon 1997; Joppke 1997) while at the same time interpreting and safeguarding the adherence to domestic law. In this way, national Courts have played a significant role in the consolidation and protection of the rights of non-nationals.

Examining the jurisdiction of the German Constitutional Court on asylum matters, for example, Hailbronner attributes to the Court a 'right-expanding' role (1999: 5-6). 'When the Asylum Procedure Act of 1992 had severely restricted the possibility of judicial relief of deportation orders, the Constitutional Court decided that even in preliminary injunction procedures a comprehensive examination and ascertainment of all the facts had to take place before a claim could rightly be considered as manifestly unfounded' (Hailbronner 1999: 5). He continues: 'As a consequence of the jurisdiction of the Constitutional Court, rapid execution of deportation orders was rarely possible' […] 'In the Court's interpretation, the individual interest was not to be limited by the public interest in limiting immigration' (Hailbronner 1999: 5-6).

Similarly, the right of family reunion as well as provisions regulating the termination of residence and expulsion constitute good examples of the driving role of the German courts. The Aliens Act of 1965 imposed no limitations on the scope of discretion on the German authorities when dealing with applications for family reunion. However, the German courts held that the authorities had to take Article 6 of the German Constitution, which places marriage and family under the special protection of the state, into consideration even when taking administrative decisions pertaining to foreigners. This imposed an obligation on the authorities to limit the adverse effects of their decisions on family life (Hailbronner 1999: 2-3).

International and national human rights norms and their interpretation by the Courts are of course not just legal obligations. They also influence interests, preferences and

13 Note that this line of argument has not been accepted by German Courts (see below).

identities, shaping conceptions of what actors consider appropriate behaviour. In doing so, they limit the options that policy-makers consider to be open to them when taking decisions on asylum matters. The following section shows how European-level policy initiatives in this area have helped to widen the room for manoeuvre of domestic policy-makers.

3.2 Europeanisation as a catalyst for domestic change: The example of 'safe third country' provisions

Not least as a consequence of international and domestic constraints identified above, Europe's post-war asylum regime, until the early 1990s was characterised by a remarkable degree of stability, despite migratory pressures. Attempts to counter these measures focused primarily on adjusting existing regulatory frameworks to speed up the asylum process, tightening visa requirements and introducing cuts in the social provisions for asylum seekers. At the same time, the principle of offering displaced persons arriving at a state's borders the possibility to apply for asylum remained largely untouched.

In the mid 1980s this started to change and a decade later most, if not all, European states had introduced fundamental changes to their legal/constitutional provisions on asylum, making Europe's asylum regime significantly more restrictive. Perhaps the most fundamental change introduced during these years concerned the widespread adoption of so-called "safe third country" provisions (Hailbronner 1993; Kjaergaard 1994) according to which an asylum seeker is denied access to the refugee status determination procedure on the grounds that he or she already enjoyed, could or should have requested and, if qualified, would actually have been granted asylum in another country. In practice this means that asylum seekers who have travelled through other countries before reaching their destination will not have their asylum application examined in the country of their choice but will be expelled to another country. These provisions, which have been

severely criticised by the UNHCR, human rights NGOs and the Courts,[14] have proven to be highly effective in deflecting asylum seekers.[15] The concept has spread rapidly and by the mid-1990s almost all European States (including those outside the EU)16 had introduced 'safe third country' principles into their domestic laws.[17]

When trying to account for these policy changes in the early 1990s it is important to go beyond the analysis of factors that concern changes in the external environment of European states (Selm-Thorburn 1998), but also look at the evolving European cooperation on asylum and immigration as a further important causal factor for changes in Member States' asylum policies, a factor which has so far received insufficient attention in the literature.[18] With reference to the conceptual discussion above, the following sections provide evidence for the operation of a number of key mechanisms through which Europeanisation has been taking place. In particular, it is shown how European cooperation in the area of asylum has facilitated changes of Member States' domestic asylum regimes.

In contrast to the high degree of Communitarisation of issues concerning economic

14 The "safe third countries" doctrine constituted a significant departure from established norms such as those expressed by the Conclusions of the 1979 UNHCR Executive Committee meeting which made it clear that 'asylum should not be refused by a contracting State solely on the ground that it could be sought from another state'. The European Council on Refugees and Exiles (ECRE) believes that the discrepancies in the asylum practices among European states (even between the EU Member States) are so serious that it has proposed that the States should discontinue the application of the safe third country concept until a detailed set of safeguards has been adopted (ECRE et al. 1999: 9). See also Amnesty International (1995) and Marx and Lumpp 1996).

15 After the introduction of "safe third country" provisions in Germany, the numbers of those seeking asylum in Germany dropped from 438,190 in 1992 to 127,210 in 1994 (Source: Refugees and Others of Concern to UNHCR: 1999 Statistical Overview, UNHCR, Geneva, July 2000 (http://www.unhcr.ch/statist/main.htm). Clearly, the newly introduced 'safe third country' provisions played a major part in this decline. For a broader overview on the effects of the new provisions see Noll (2000).

16 A recent report by the Danish Refugee Council compares the practices vis-à-vis the 'safe third country' principle in over 30 European states (Danish Refugee Council 1997). See also (European Parliament 2000).

17 The application of these provisions, however, differ widely between states. In Germany an applicant can be rejected by the border authorities without the application being sent to the Federal asylum determination body and appeal rights against this decision are very limited as an appeal has no suspensive effect. In contrast, in the UK all applications must be sent to the Home Office, and an appeal can have suspensive effects under certain circumstances. In Denmark, no appeal right against a safe third country decision by the authorities exist.

18 For an exception see Lavenex (1999a).

migration of citizens within the Member States (free movement of persons), issues relating to the admission of third country nationals did not come onto the European agenda until the mid 1980s. Until then, European initiatives in this area were few and far between and the enumerated principles were so general that they were no basis for any substantive harmonisation of domestic asylum procedures (Hailbronner 1989: 28). From the mid 1980s onwards, cooperation in asylum matters increasingly moved away from the humanitarian platform of the Council of Europe to new intergovernmental fora composed of EC Member States (Geddes 2000).[19] The development of the Schengen Agreement in the late 1980s and the Dublin Convention in 1990 were the first significant agreements resulting from this process. Central to both Conventions is the concept of 'safe third countries' with which EC Member States sought to prevent multiple asylum applications.[20] The remainder of this section presents some illustrative evidence to show how asylum initiatives at the European level (despite their very limited legal effect)[21] have facilitated the rapid spread of safe third country provisions across Europe, overcoming international and domestic constraints which had at least been partially responsible in preventing such asylum reforms until then.

Overcoming constraints through two-level games

In a 1991 report to the European Council, the Member States' ministers responsible for immigration, stated that 'harmonisation has not been regarded as an end in itself but as a means of reorienting policies where such action makes for efficiency and speed of intervention.'[22] This reorientation is facilitated through the specific characteristics of intergovernmental cooperation which means that exclusive groups of interior ministry

19 This intergovernmental cooperation took place in two parallel processes, the Schengen agreement and the Trevi Group, the latter of which was later taken over by the Ad Hoc Immigration Group. While the former has always been the initiative of a limited (albeit increasing) number of EU member states, the latter constituted a process of regular consultation among the interior ministers of all member states. Bigo explains the development of European intergovernmental cooperation as resulting not only from the prospect of the abolishment of internal borders but also as a counter-reaction by Europe's interior ministries to the prospect of an increasing Community competence in their, until then, exclusively national domain of the 'interior' (1994).

20 The Second Schengen Convention of 19 June 1990 which builds on the first agreement of 14 June 1985 is printed in Bunyan (1997: 110). For the 'Dublin Convention on the State Responsible for the Examination of a Asylum Claim', see EC Bulletin (1990/6).

21 The Dublin Convention did not come into effect until 1997 and like Schengen its direct legal effects were of course limited to its signatories.

officials can step outside the domestic arena where they usually would be constrained by having to compete with other established interests such as political parties, NGOs or lawyers (Favell 1998: 16).

This intergovernmental logic of European cooperation on asylum has characterised all European initiatives in the area of asylum and has only very partially been altered with the Treaty of Amsterdam. European co-operation in the area of asylum policy started out as a series of ad-hoc intergovernmental meetings of interior ministry officials (Trevi, the Ad Hoc Immigration Group, Interpol, the Schengen Group, etc.). These networks were dominated by national government civil servants and were generally closed to other interested groups such as officials from other ministries, subnational officials, officials from the EU organisations and international and non-governmental organisations. One can show that European co-operation in the area of asylum policy has opened up new opportunities of political action as the newly created European institutions have selectively empowered a small elite of interior ministry officials.[23]

For such privileged groups of interior ministry officials, the advantages of intergovernmental cooperation are clear:

> '[S]tate officials such as the military and police interested in cross-national co-operation have found the European meetings have enabled them to find common interests away from national governmental and civil service control. Police across borders find they have more in common with each other than with their domestic political masters, and have capitalised on this to create more space for action in service of their own independent interests' (Favell 1998: 10).

At home the same ministers and officials can then seek to legitimate domestic reforms by the "need" to come into line with European initiatives. In doing so European cooperation 'favours the implementation of particular policy frames by changing the distribution of power among various domestic advocacy collations and strengthening the domestic

22 SN 4038/91, 03/12/1991, p.3.
23 See e.g. Bigo (1994) and Favell (1998).

position of those actors, who act as a hinge between the European and domestic policy arenas' (Lavenex 1999a: 195). This process has long been criticised and is particularly problematic in the human rights area as one of the leading authorities on asylum law explains:

> 'Because critical decisions have been taken within an international body and codified in international agreements, governments have not had to contend with the vagaries of a domestic policy debate. Yet by avoiding the supranational fora of the Council of Europe and European Community, it has proved possible to achieve the coordination of immigration policy without any *formal* renunciation of domestic jurisdiction or submission to substantive scrutiny and procedural accountability' (Hathaway 1993: 733, emphasis in original).

An excellent example of using Europe to achieve domestic policy change provided for by debates surrounding the 1993 reform of Article 16 of the German Constitution which introduced the principle of 'safe third countries' and made it one of its core principles.[24] The emerging EU migration regime was useful to those in the Kohl government who had long sought domestic reform and who now started to justify their restrictive policy proposal by arguing that Germany's participation in the European regime required constitutional amendment. This argument was repeatedly made by respective Ministers of the Interior from Friedrich Zimmermann (CSU) to Wolfgang Schäuble and Rudolf Seiters in the late 1980s and early 1990s.[25] After the new Article 16 GG had finally been

24 In Germany the existence of international and domestic institutional constraints was stronger than in other European states. Most Germans attached strong normative value to the liberal character of the old Article 16 of the German Constitution which many saw as a symbol of Germany's post-war moral consciousness and its dissociation from the horrors of National Socialism. (Lavenex 1999a: 179). However, as already mentioned above, similar reforms were undertaken across the whole of Europe (Danish Refugee Council 1997).

25 See the 'Report of the Standing Group of Interior Ministers of the Länder' or 27/11/1984; Schäuble 1989 or Seiters inaugural speech before the Bundestag on 28/11/1991 (BT PlPr 12/61: 5167). The link was made even more explicit in statements by Schäuble in 1992 in which he threatened to block the ratification of the Schengen Agreement unless parliament agreed to an amendment of Article 16 GG (FAZ, 18/4/1992). Although this argument had little support among academic lawyers (see e.g. Hailbronner 1992) it had a strong impact in the debate. With time it was taken up by the SPD which had long been opposed to a change of Article 16 GG (See Frankfurter Allgemeine Zeitung 7/3/1992 and 24/8/1992; Frankfurter Rundschau, 17/3/1992 and Berliner Tageszeitung, 18/3/1992.

adopted,[26] Chancellor Kohl sought to legitimise the introduction of safe third country provisions: 'The new regulation of the right to asylum of 1 July [introducing safe third country provisions] was an important precondition for the fact that Germany can fully participate in a common European asylum policy' (International Intelligence Report 1994, quoted in Ucarer 1997).

Overcoming constraints through policy transfer

Once European safe third country provisions were in place they acted as a model that facilitated horizontal and vertical policy transfer. In part, this is supported by the similar wording of the safe third country provisions adopted.[27] Moreover, in the debates in the German Bundestag surrounding the reform of Article 16 GG, proponents of reform repeatedly made reference to what they regarded as the stricter asylum legislation in other countries, particularly France.[28] In the 1992 London 'Resolution on a harmonized approach to questions concerning host third countries', which extended safe third country provisions beyond the territory of the Member States, the participating ministers 'agreed to seek to ensure that their national laws are adapted, if need be, and to incorporate the principles of this resolution as soon as possible, at the latest by the time of entry into force of the Dublin Convention'.[29] At a later meeting the same Ministers recommended the conclusion of readmission agreements with non-EC third countries and for this purpose provided a specimen draft of a bilateral readmission agreement between individual Member States and third countries.[30] Thus one could observe powerful feedback loops as key principles of European asylum initiatives were transferred vertically and horizontally across Europe. European initiatives most certainly played a role in the fact that 'most advanced European countries have been converging towards more restrictive policies and most have rapidly accelerated the pace of new legislative and administrative reforms to control immigration' (Lahav and Guiraudon 1997: 21-22). Advocates of stricter domestic asylum control could point to the tougher underlying principles of the emerging EU regime and those already adopted in other countries, to argue for a 'coming in line' of domestic provisions with lower standards elsewhere. It

26 The new Article 16 GG was adopted on 26 May 1993 (BT PlPr 12/160 of 26/5/1993). All nine countries having a land border with Germany were deemed safe third countries.

could therefore be said that the use of 'policy-transfer' as a public policy tool, was not so much about 'learning' but about the legitimisation of contested policy initiatives.

Overcoming constraints through 'learning'

Transnational networks of interior security professionals have been critical to setting the agenda for member state co-operation by linking the problems of international crime and illegal immigration. This link was continued under Maastricht's third pillar and has been only partially broken with the Communitarisation of asylum and immigration under the Treaty of Amsterdam. This logic has meant that 'migration is addressed not in terms of human rights but in terms of internal security' (Koslowski 1998: 173). Exclusive groups of interior security officials, shielded from the input of other interests, develop their own particular dynamic. According to Den Boer and Walker, 'the consistent association of the different themes in the language and practice of politicians and professionals has created a mutually reinforced "internal security ideology"' (1993: 9).31

The former General Secretary of the European Council on Refugees and Exiles (ECRE) has little doubt about the process involved

> 'whereby a mistaken policy, say for example the notion of 'Safe Third Country' is dreamed up at a closed, confidential meeting, then refined, then becomes a familiar debating item of international fora and eventually assumes the dignity of a quasi legal concept' (Rudge 1998: 13 ,15).

European initiatives since the mid 1980s have clear helped to shift domestic discourse by portraying the asylum issue in strongly 'realist' terms which privilege the norm of state sovereignty over the liberal universal norms regarding refugee rights (Lavenex 2001).

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27 See the recent report by the Danish Refugee Council which compares the 'safe third country' legislation in more than 30 European countries (Danish Refugee Council 1997).

28 See e.g. Seiters on 30/04/1992 (BT PlPr 12/89: 7298) or Schäuble,30/04/1992 (ibid 7313).

29 'Resolution on a harmonised approach to questions concerning host third countries' by the Ministers of the Member States of the European Communities responsible for Immigration on 30 November and 1 December 1992 '(printed in Bunyan 1997: 63).

30 'Draft Council Recommendation concerning a specimen bilateral readmission agreement' (JHA Council of 30/11 and 1/12/1994).

An example such changing discourse have contributed to changed notions of appropriateness among British policy-makers are changes in the UK law with regard to safe third country provisions.[32] Following similar steps elsewhere, the rules attached to the 1996 'Asylum and Immigration Act' introduced the possibility of sending asylum seekers back to countries they travelled through on their way to the UK, if such countries were considered safe by immigration officers. These provisions, however, were hardly ever applied. When they were, they could be challenged in the Courts. In other words, refugees could go to Court to argue that the particular country they were meant to be sent to was not safe for them for certain reasons. German and French authorities (and Courts), for example, do not consider non-state persecution a legitimate reason for an asylum claim, whereas British Courts may.[33] After the institutionalisation of the Dublin Convention, the 1999 Immigration and Asylum Act introduced a list of countries which are by legal definition deemed 'safe countries' (including France and Germany).[34] This has meant that safe third country decisions involving countries included on the list could no longer be challenged in the Courts. The denial of all rights for a judicial review in such cases would have been unimaginable only a few years earlier. Although there were clearly other reasons involved (such as the continued increase of asylum seekers in Britain when the pressure on the rest of Europe generally declined), this step by the Labour government also points to an increasing 'internalisation' of 'realist' asylum discourse which over the period of a decade or so had begun to change notions of 'appropriateness' among policy-makers and the general public alike. This argument can be further supported with reference to recent British calls for a reform of the Geneva Convention. When the Austrian EU Presidency, in a leaked internal document,[35] suggested amendments to the Convention, their proposal was widely condemned by the

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31 Such claims are supported by recent studies on the socialisation effects in similar small groups settings. See e.g. Lewis (1998) or Trondal (2001).

[32] Interviews in June and November 2000.

33 See e.g. The Economist, 6 May 2000, p. 31. German Courts have rejected to regard cases of persecution (e.g. in Algeria) which are not caused or at least condoned by state authorities as legitimate grounds for an asylum claim. Similarly, the Federal Administrative Court decided that danger for life or health caused by insufficient medical facilities is not a legitimate ground either, which clashes with British Court judgements on this issue (Hailbronner 1999: 9).

34 See 'The Asylum (designated countries of destination and designated safe third countries) Order 1996' (Statutory Instruments SI 96/2671).

35 'Strategy paper on migration and asylum policy', July 1998. For the text of this document see: http://www.proasyl.de/texte/europe/eu-a-o.htm.

other Member State governments, the UNHCR and most NGOs. However, only a few years later, the British Home Secretary Jack Straw openly called for the revision of the Convention which in his words was 'no longer working as its framers intended'.[36] This time, despite falling numbers of asylum seekers in most European countries, the critical response remained much more mooted.

4. Conclusion

This paper set out to explain how European integration can increase the room for manoeuvre for domestic policy-makers. It was argued that the integration process opens up new discursive avenues for the legitimisation of domestic policies. European institutions selectively legitimise actors, ideas and discourses, which in turn help to legitimise some policy proposals over others. It was further argued that such processes of 'soft Europeanisation', albeit not being based on legal obligations, can have far-reaching domestic effects. It was emphasised that these processes have two principal effects. On the one hand they influence the strategies of policy-makers, by providing them with opportunities to play two-level games or to invoke the logic of policy transfer, opportunities that can help them to circumvent certain domestic constraints. On the other hand, by opening up new discursive avenues, European integration also creates new opportunities for processes for social learning, i.e. process as a result of which actors come to a new or changed understanding of what they regard as 'appropriate action' in a particular institutional context. Processes which also enable policy-makers to go new ways. The dynamics 'soft Europeanisation' are still insufficiently understood but the evidence of this paper suggests that given their territorial reach and their long-term effects on actors' interests and preferences, they deserve to form a crucial part of any study that seeks to explain the impact of European integration on domestic policy-making.

36 Home Office News Release 'International Asylum System needs reform', 06/02/2001.

When trying to explain the far-reaching and widespread change in domestic asylum policies that one could observe across Europe in the early 1990s, rising migratory pressures as after the fall of the Wall must be regarded as only part of the explanation. Despite the fact that European initiatives in this area, which preceded the momentous changes in Eastern Europe, initially imposed no legal obligations on national governments, they nonetheless provided additional rationale and legitimisation for highly restrictive asylum policies that were proposed inside *and* outside the EU in the late 1980s and early 1990s. The European decision making process in this area enabled interior ministry officials to use the EU-level strategically to strengthen their own domestic position and to initiate processes of vertical and horizontal policy transfer that helped the introduction of more restrictive asylum rules. In parallel, these fora were successful in promoting a new European internal security discourse which over time legitimised restrictive asylum proposals which had long been widely regard as being unacceptable from a human rights perspective. In the area of asylum European integration has thus clearly helped domestic policy makers to partly overcome long established institutional constraints and facilitated domestic policy change across Europe. Unless the EU can agree to open up of its decision-making process beyond the highly tentative steps outlined in the Amsterdam Treaty, processes of 'soft Europeanisation' will continue to pose a fundamental challenge to some of the key principles of refugee protection in Europe.

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