

## THE IMMIGRATION POLICY AND PROCESS OF EUROPEAN INTEGRATION: SUPRANATIONALISM VERSUS INTERGOVERNMENTALISM?

*Celal POLAT\**

### **ABSTRACT**

*The establishment of an immigration control system is closely connected with the realisation of free movement of persons. As freedom of movement of persons is designed for the citizens of the EU, there is presently no right of free settlement for the Third Country Nationals legally residing in one of the Member States.*

*Immigration law is a highly politicised area of law and policy in all the Member States, being subject to constant change and amendment. With the current structure, the EU will not be capable to deal with the present and future developments in the field of immigration. It is clear that here is a need for regulation that goes further than regulation on the national level. In principle supranational cooperation in this area is very necessary.*

*Immigration is a long-standing phenomenon, which must be understood with reference to its structural clauses and its global character. Intergovernmental cooperation where the emphasis is laid by the sovereignty of the Member States seems not sufficient to solve the problem of the growth of immigration issues.*

*This paper will focus on the development of the European Community's competence in immigration law. It will analyze whether immigration law is becoming supranational and to what extent and in what way immigration policies are affected by European integration.*

---

\* The Ministry of Social Security, EU Coordination Department, Turkish Social Insurance Institute Inspector, EU Law Expert.

**Key Words:** *Immigration, The European Union, Free Movement of Persons, Supranationalism, Intergovernmentalism.*

## ÖZET

Göçmen kontrolü sisteminin kurulması, kişilerin serbest dolaşım hakkının tanınması ile yakından ilgili bir konudur. Kişilerin serbest dolaşım hakkı, sadece AB vatandaşlarına tanındığı için, üye devletlerden herhangi birinde yasal olarak ikamet eden Üçüncü ülke vatandaşları halihazırda serbest dolaşım hakkından yararlanamamaktadır.

Göç mevzuatı, tüm üye devletlerde hukukun ve politikanın önemli derecede siyasetleştirilmiş, yoğun bir şekilde değişime maruz kalan bir alandır. Mevcut yapısı ile Avrupa Birliği, göçmenlik alanındaki bugüne ve geleceğe ilişkin gelişmeleri çözebilecek yeterlilikten yoksundur. Bu alanda, ulusal düzeydeki düzenlemelerden daha ileri seviyede bir düzenlemeye ihtiyaç olduğu açıktır. Esasen, bu alanda ulus-üstü bir işbirliği gerekmektedir.

Göçmenlik, yapısal şartları ve global özelliği ile anlaşılması gereken uzun süreçli bir olgudur. Üye devletlerin egemenliğine vurgu yapılan hükümetler-arası işbirliği örgütlerinin, artan göçmenlik sorunlarına çözüm bulmakta yetersiz kaldığı gözlenmektedir.

Bu makale, göçmenlik hukukunda Avrupa Topluluğu'nun yeterliliğinin geliştirilmesine odaklanacaktır. Yazı, göçmenlik hukukunun uluslar-üstü bir özelliğe sahip olup olmadığını ve göçmenlik politikalarının Avrupa bütünleşmesi tarafından ne derece ve nasıl etkilendiğini analiz edecektir.

**Anahtar Kelimeler:** *Göç, Avrupa Birliği, Kişilerin Serbest Dolaşımı, Uluslarüstücülük, Hükümetlerarasıcılık.*

## Introduction

Immigration policies have been and will be one of the most important policy areas in the European integration. This importance has been reflected in the successive European Community (EC) Treaty amendments. In the 1990s it became apparent in the European Union (EU) that individual responses, at the level of national, to the immigration issues were insufficient. This created a major shift in the immigration policies in the European level.

With the entry into force of the Treaty of Amsterdam (ToA), immigration policy became EC matter and the competence of immigration has been inserted into the EC Treaty as a new Title IV. However, there are still some problems regarding the harmonisation of EU immigration law.

None of the Member States presently pursues an active immigration policy. On the contrary, all Member States' policies take into account an extremely high level of unemployment throughout the EU, which compels them to restrict further immigration. The EU's migration law still seems to be in a trend where it is building a "fortress Europe".<sup>1</sup>

This paper will focus on the development of the European Community's competence in immigration law. It will analyze whether immigration law is becoming supranational and to what extent and in what way immigration policies are affected by European integration.

### **The European Integration and the Evolution of Immigration Policy**

#### ***The Concepts of Supranationalism and Intergovernmentalism***

There are mainly, two approaches to the organization model in the European integration process, namely intergovernmental and supranational approach. The debate on the supranationalism-intergovernmentalism dichotomy started in the 1980s.<sup>2</sup> According to the intergovernmental model, "without taking consent of its member states, the EU will not be a democratic polity."<sup>3</sup> Therefore, Member States should be dominant power in the integration process. On the other hand, supranationalism envisages that the supranational organizations should make policies and rules which bound the Member States.

Before determining whether immigration law is becoming supranational and to what extent in the European integration process, it is necessary to take a closer look at the main difference between supranationalism and intergovernmentalism. As is known, the role of institutions is of utmost importance in integration process. The real issue of integration has been always the division of competence between Member States and supranational institutions and the way of decision-making.<sup>4</sup> As a general rule, as long as the competence of supranational institutions and areas of qualified majority voting increases, the supranationalism has gained power.

The most important characteristics of supranationalism are:

- There is a transfer of sovereign competences of the member states to the institutions of the EC. Therefore, the institutions of governance and their policy-making activity are above the nation-state.<sup>5</sup>
- The organs of the supranational organization take decisions by quality majority voting.

---

<sup>1</sup> Peers, S. **EU Justice and Home Affairs**, Longman, 2000, p. 104.

<sup>2</sup> Craig and de Burca, **EU Law: Text, Cases, and Materials**, Oxford, 3<sup>rd</sup> edn., 2002, p.6.

<sup>3</sup> Sionaidh Douglas-Scott, **Constitutional Law of the EU**, Longman, 2002, p.20.

<sup>4</sup> Welsh, *Europe United?*, Macmillan, 1996, p.9.

<sup>5</sup> Rosamond, **Theories of European Integration**, Macmillan, 2000, p. 204.

- Compliance of the member states about the laws made by the organs of the supranational organization is subject to judicial review by an independent court of justice.

On the other hand, intergovernmental cooperation is the oldest form of cooperation between different states. The Luxembourg Accords has increased the intergovernmental tendency and affected the supranational characteristics of EC in a negative ways.<sup>6</sup> Intergovernmental cooperation has the following characteristics:

- An intergovernmental organization needs decision-making by unanimity to take binding decisions. So intergovernmental bargaining is the key for European integration.
- The organs of the organization which are taking decisions are composed of persons who are government representatives.
- Domestic considerations are important in formulating preferences.

#### *Pre-Amsterdam*

In the process of European integration, the full of harmonisation of immigration policy have not been achieved. Immigration is sensitive because immigration control has always seen by member states as one of the most important aspects of the exercise of national sovereignty. After the economic crisis of 1970s, the Member States decided to restrict especially the migration of workers. For that purpose states needed to create immigration policies in order to deal with immigrants. However, large numbers of migrants (including illegal immigrants) have continued to come to the EU.

The post- Single European Act (SEA) can be described as an informal intergovernmental cooperation, because immigration issues have been increasingly coordinated by intergovernmental action in this period. This “ad hoc intergovernmentalism” fell beyond of the judicial supervision, parliamentary scrutiny.<sup>7</sup>

The European integration process requires the EU Member states to co-operate closely to solve problems related to immigration. The Maastricht Treaty accepted a formal intergovernmental cooperation regarding immigration in the new "third pillar" of the EU. But this development did not mean supranational integration because this third pillar had not supranational EC law' characteristics. At the same time this intergovernmental development did not “represent the pure intergovernmental cooperation of previous times.”<sup>8</sup>

Under the Treaty on European Union (TEU), the Justice and Home Affairs (JHA) Pillar lacked the legal instruments such as directives or regulations, which are “the

<sup>6</sup> Chalmers, *EU Law -Volume One*, Ashgate, 1998, p.22.

<sup>7</sup> Favell and Geddes, “European Integration, Immigrations and the Nation State”, *Working Papers of the Robert Schuman Centre*, 1999, p.17.

<sup>8</sup> O’Keeffe, “The Emergence of a European Immigration Policy”, 20 *E.L. Rev.* 1995, p.24.

mainstays” of the Community legal order.<sup>9</sup> It used only instruments that were specific to the third pillar. Exclusively, the EC had competence regarding to determine the Third country nationals (TCN) whose nationals must be in possession of a visa when crossing the external borders of the member states and to develop the concept of a uniform format for visas, which would be agreed by the Council, acting on a proposal from the Commission and after consulting the European Parliament (EP).<sup>10</sup>

### *Post-Amsterdam*

Between the time of Maastricht and Amsterdam the immigration issues or related questions such as the “rights of citizens, residents and aliens of the EU emerged as a driving force of European integration”.<sup>11</sup> The ToA has changed the character of the pillar-structure. According to the first sentence of Article 61 EC Treaty, the purpose of measures harmonising law in immigration and asylum must be: “to establish progressively an area of freedom, security and justice”.

The provisions of the new Title do not bind the UK, Ireland and Denmark and the so-called Schengen *acquis*, which covers the same areas as the new Title, is incorporated into the framework of the EU. Thus, decision-making procedures seem “more complex”.<sup>12</sup>

It has been argued that the new Title does not provide for EC powers over every aspect of immigration policy.<sup>13</sup> Article 63 EC Treaty only speaks of “measures on immigration policy within the following areas”. This Article provides that measures adopted by the Council pursuant to immigration policy (conditions of entry and residence; illegal immigration and illegal residence; measures defining the rights and conditions of a union-wide residence right of TCNs shall not prevent any Member States from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements. Thus, Article 63 EC Treaty makes clear that EC competences under Article 62 Treaty are not to be interpreted as an exclusive competence of the EC.”<sup>14</sup>

### *The Role of Community Institutions*

As it determines whether intergovernmentalism or supranationalism, the role of institutions and in particular the voting system in Council is of high importance for the essence and development of the EC.<sup>15</sup> The European Commission was given a very

---

<sup>9</sup> Geddes, *Immigration and European Integration*, Manchester, 2000, p.97.

<sup>10</sup> Peers, “The Visa Regulation: Free Movement Blocked Indefinitely”, 21 *EL Rev.*, (1996), p.151.

<sup>11</sup> Duff (ed.), *The Treaty of Amsterdam- Text and Commentary*, Sweet & Maxwell, 1997, p.8.

<sup>12</sup> Peers, “Justice and Home Affairs: Decision-Making After Amsterdam”, *EL Rev.*, 2000, p.191.

<sup>13</sup> Peers, *EU Justice...*, p.100.

<sup>14</sup> Hailbronner, “European Immigration and Asylum Law under the ToA”, 35 *Common Market Law Review*, (1998) 1051.

<sup>15</sup> Craig / de Burca, p.12.

important position as the initiator of all legislation and guardian of the Treaties. As a most significant supranational institution, the role and structure of the The Court of Justice of the European Communities (ECJ) is also crucial in the development of immigration law. In general, it can be said that a gradual and "partial Communitarization" is achieving within the new Title IV EC Treaty and its "provisions may have direct effect according to EC law."<sup>16</sup> But, the dividing line between the Title IV "ghetto" and other aspects of EC law is not very clear yet.<sup>17</sup>

### Decision-Making Procedures

The ToA applied the 'Community method' to adoption of immigration law, however "with modifications as regards decision-making and judicial control".<sup>18</sup> The most important change is the addition of a new Title on "Free movement of persons, asylum and immigration" is introduced in the EC Treaty. Thus, this subject is moved from the intergovernmental third pillar to the Community Law framework of the "first pillar". However, during a "transitional period" of five years after the entry into force of the ToA, the Commission and the Member States share the right of proposal. This is contrary to the characteristic of EC legal order. After this period, the Council shall act on proposals from the Commission that shall acquire sole right of initiative. However, the Commission must examine any request by a Member State that it submits a proposal to the Council.

Exceptions to the requirement of unanimity are made only for certain measures in respect of visa policies. Under the Article 67(3) EC Treaty legislation may be approved by quality majority voting in the Council, on the exclusive right of initiative of the Commission, on the type of visa to be required for nationals of third states and identifying the states whose nationals require them. This provision had already been under repealed-Article 100 (c) EC Treaty and two regulations have been adopted, the first laying down a uniform format for visas and the second designating the visa states.<sup>19</sup>

The ToA lays down that, during the transitional period, the Council shall in general act unanimously. However, The Council shall "consult" the EP. At first sight, the role of the EP seems to be enhanced and will be improve (especially after the

---

<sup>16</sup> T. Kostakopoulou, "The Protective Union: Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe", 38 *Journal of Common Market Studies*, (2000), 497-518, p.501.

<sup>17</sup> Guild and Peers, "Deference or Defiance? The ECJ's Jurisdiction over Immigration and Asylum", in *Implementing Amsterdam*, E. Guild and C. Harlow (eds.), Oxford, 2001, p.282.

<sup>18</sup> Peers, "The EU Charter of Rights: Will it transform EU Immigration and Asylum Law?", at: <<http://www.theepc.be/challenge/topdetail.asp?SEC=documents&SUBSEC=issue&REFID=1092>>, (20.03.2003).

<sup>19</sup> Council Regulations 1683/95 and 2317/95, *Official Journal*, 1995, L 164/1 and 234/1 respectively.

transitional period) compared to its present role in the framework of the third pillar, but it is less powerful than in the framework of the other Community policies.

After the five-year transitional period, aspects of immigration policy will be subjected to the quality majority voting, provided that the Council decides so by unanimous vote and after consulting the EP. In this event, all or parts of areas concerned would be governed by the procedure referred to in Article 251 EC Treaty, which provides for a stronger say for the EP.

As regards areas brought under the EC, the Treaty provides for recourse to EC instruments, i.e. regulations, directives, decisions, recommendations and opinions. The Council shall adopt, within the first five years, a number of "measures" with direct legal effect in the member states in the fields covered by the new Title. But due to the requirement of unanimity, this is unlikely to lead to any major changes.

### **Judicial Power**

The ToA strengthened the competence of the ECJ. Its competence has been widened to more legal instruments. However, under Article 68 (1) EC Treaty, jurisdiction of the ECJ is limited to preliminary rulings upon request of a national Court, against whose decisions there is no legal remedy under national law. Thus, there is no possibility for other courts to make a preliminary reference concerning the interpretation and validity of Title IV of EC Treaty measures.

It has been argued that "even if the lower national courts have serious doubts as to the validity of a Title IV of EC Treaty measure, they may neither refer questions to the ECJ, or issue an interim order temporarily suspending it" and due to the long wait and delays in judicial procedure, "doubts may be raised as to whether this Article complies with the fundamental right to effective judicial review, as reflected in Articles 6 and 13 the European Convention on Human Rights, and Article 47 the EU Charter of Fundamental Rights."<sup>20</sup>

Moreover, since lower courts will have no possibility to refer a case to the ECJ the judicial protection system may not be sufficient to guarantee an individual's rights in immigration matters. The limitation of preliminary rulings is lead to "undesirable implications, such as expense, delay and ultimately lack of effective protection, for individuals."<sup>21</sup>

Further, under Article 68(2) EC Treaty measures or decisions relating to the maintenance of law and order and the safeguarding of internal security are excluded from the purview of the ECJ. This may mean that there is no possibility of judicial review (especially under Articles 230 and 288(2) EC Treaty) to assess the legality of

---

<sup>20</sup> Ward, "Judicial Architecture at the Cross-Roads: Private Parties and Challenge to EC Measures Post-Jégo Quéré" *Cambridge Yearbook of European Legal Studies*, 2001, p.416.

<sup>21</sup> Kostakopoulou, *Citizenship, Identity and Immigration in the EU*, Manchester, 2001, p.78.

these rules, because the ECJ has been restricted of jurisdiction under Article 68(2) of Treaty, and the ECJ has given the national courts the right to provisionally suspend the validity of EC acts. According to *Foto-Frost* principle, which was confirmed also in the *Atlanta*, “national courts may not declare EC legislation invalid. However, national courts may suspend enforcement of a national administrative measure adopted on the basis of a EC regulation”.<sup>22</sup>

For Ward, the ToA has caused the “fragmentation and dislocation of the EC *acquis* on uniform and effective application of EC rules” and this is “perhaps heralding a new era in “variable geometry” in judicial remedies.”<sup>23</sup> Under Article 67(2) EC Treaty, at the end of the transitional period, the provisions relating to the powers of the ECJ may be adopted by a decision of the Council, acting unanimously after consulting the EP.

### The Schengen Protocol

The Schengen Agreement was reflected “the divisions between Member States over the extent of immigration policy and the possibility of supranationalism”<sup>24</sup> It has resulted in a number of positive developments towards a common migration policy including a harmonised visa issuance policy, the abolition of internal border controls, introduction of a common information and look-out computer system and co-operation in fighting narcotic trade.

At Amsterdam, the Schengen Protocol integrated the Schengen Agreement into the EU framework. Since this area will be subject to parliamentary and judicial control by EC institutions, this step is one of the successes and main feature of the ToA.<sup>25</sup>

According to Schengen Protocol, the UK and Ireland, which have not signed the Schengen Agreements, may wish participate in some or all provisions of the Schengen *acquis*. Moreover, Denmark, although has signed the Schengen Agreements, will have special position. Under these arrangements, the Council, acting unanimously, is to decide which parts of the Schengen *acquis* can be properly based on Title VI Treaty on EU, and which should be passed within new Title IV EC Treaty. The extent of the *acquis* is defined in Council Decision 1999/435/EC.<sup>26</sup>

The Schengen *acquis* and the other measures taken by the institutions, within the scope of the *acquis* are, under Article 8 of the Schengen Protocol, regarded as an *acquis*

<sup>22</sup> Case 314/85, *Foto-Frost* [1987] ECR 4199, para 15; Case C-465/93, *Atlanta* [1995] ECR I-3761, paras 28-30.

<sup>23</sup> Ward, “The Limits of the Uniform Application of Community Law and Effective Judicial Review” in *The Future of Remedies in Europe*, C. Kilpatrick, T. Novitz and P. Skidmore (eds.), Oxford, 2000, p.226, 227.

<sup>24</sup> Favell and Geddes, “European Integration...”, p.17.

<sup>25</sup> Peers, “Caveat Emptor? “Integrating the Schengen *Acquis* into the European Legal Order”, 2 Cambridge Yearbook of European Legal Studies, 1999, p. 91.

<sup>26</sup> OJ L 1976 of 10 July 1999.



which must be accepted in full by all new Member States. This is unique, because neither of the other areas of closer cooperation-monetary and social policy- contained such provisions for new Member States.<sup>27</sup>

### **The Future of Immigration Law: The Issue of Third Country Nationals**

The establishment of an immigration control system is closely connected with the realisation of free movement of persons. As is well known, the free movement of its citizens is a fundamental element of the establishing “people’s Europe”. However, there were no mechanisms at EC level to regulate external entry of TCNs.<sup>28</sup> According to the case law of ECJ,<sup>29</sup> the EC may have competence regarding immigration under Article 137 (ex 118) EC Treaty to the extent that it dealt with the impact of TCNs workers on the EC labour market and working conditions. Thus, “the migration policy is capable of falling within the social field and is not to be subjected to the exclusive competence of Member States.”<sup>30</sup> “Working conditions of TCNs relates in Title IV EC Treaty, but fall within the mainstream EC Treaty and now governed by Article 137(3) EC Treaty.”<sup>31</sup>

As freedom of movement of persons is designed for the citizens of the EU, there is presently no right of free settlement for the TCNs legally residing in one of the Member States. Thus a Turk living in Germany for five years is not entitled to look for a job in the UK or to settle there. However, in recent years the “somewhat artificial division of powers between free movement and immigration has been blurred.”<sup>32</sup> The European Council in Tampere in 1999 agreed that EU immigration policy should include fair treatment for TCNs aiming as far as possible to give them comparable rights and obligations to those of nationals of the Member State in which they live.<sup>33</sup>

The Commission has made proposals for establishing a common legal framework concerning the TCNs. The Commission has put forward a series of proposals for directives in a number of key areas including the conditions of entry and residence of TCNs for paid employment and self-employed activities<sup>34</sup>; the right to family reunification<sup>35</sup>; the status of TCNs who are long-term residents<sup>36</sup>. It is argued that the

<sup>27</sup> Ehlermann, “Differentiation, Flexibility, Closer Cooperation”, **Working Papers of the Robert Schuman Centre**, 1998, p. 22.

<sup>28</sup> Vincenzi, “EU Immigration and Asylum Policy: Problems of Implementation”, in **A Peoples’ Europe**, Konstadinidis (ed), Ashgate, 1999, p.114.

<sup>29</sup> Joint Cases 281, 283-5, 287/85, **Germany and others v Commission** [1987] ECR I-3203; Case C-416/96, *El-Yassini*, [1999] ECR I- 1209.

<sup>30</sup> Mougnot, “Integration of Legally Resident TCN in the EU”, **University of Essex, Dissertation**, LL.M in EC Law, 1997, p. 29.

<sup>31</sup> S. Peers, “Who’s Judging the Watchmen? , 18 *YEL*, (1998), p.395.

<sup>32</sup> Favell and Geddes, “European Integration...”, p.3.

<sup>33</sup> <<http://ue.eu.int/en/Info/eurocouncil/index.htm>> (28.02.2003).

<sup>34</sup> COM (2001) 386.

<sup>35</sup> COM (2002) 225.

<sup>36</sup> COM (2001) 127.

proposed Directive regarding long-term residents “does not go far enough to implement the “equality” principle that EU leaders at the Tampere agreed”.<sup>37</sup>

There is a “paradox” between the wish of establishing a EC which “an area without internal frontiers” with social cohesion and this exclusion of TCNs which damages “the effective workings of the internal market”<sup>38</sup>. Indeed, the Article 62 (1) EC Treaty includes the requirements for the realisation of free circulation of people as part of the internal market aim contained in Article 14 EC Treaty, which it clearly describes as applying both to EC nationals and TCNs.

As the migration flow has increased there is a tendency to restrict the conditions of entry, residence and eventually of citizenship.<sup>39</sup> Whereas, “the building of a fortress Europe restricts their possibilities of gaining access and rights in an increasingly prosperous EU”.<sup>40</sup>

For Juss, “the EC must bring immigration law completely within its jurisdiction because, the present procedure leads to unnecessary duplication, waste, expensive coordination, lack of enforcement, and lack of uniformity of application between Member States.” Moreover, he proposed that the EC rights of free movement should “be extended to the TCNs, because it would appear that in developing an immigration policy for the TCNs, the EC is not going to disregard its human rights norms”.<sup>41</sup>

The same concerns are expressed by the NGOs during the "Convention on the future of Europe" meeting and they demanded that there are not adequate, “effective and transparent judicial, parliamentary and public scrutiny and human rights protection in the field of immigration.” For them, normal EC decision-making procedures should be applied to all immigration matters and they should be subject to human rights obligations in the EU Charter of Fundamental Rights and the European Convention on Human Rights.<sup>42</sup>

The Working Group, with respect to immigration policy, recommends that some measures should be taken to promote the integration of legally resident TCNs and a move to quality majority voting and co-decision for union legislation in these areas.<sup>43</sup> These inclusive measures are necessary for building “an ever closer union among the

<sup>37</sup> ILPA Comments, <http://www.ilpa.org.uk/submissions/residents.html>, (06.03.2003).

<sup>38</sup> Peers, “Building Fortress Europe: The Development of EU Migration Law”, (1998), 35 *CML Rev.*, p. 1272.

<sup>39</sup> Pugliese, “Italy Between Emigration and Immigration and the Problems of Citizenship” in *Citizenship, Nationality and Migration in Europe*, D. Cesarani and M. Fulbrook (eds.), Routledge, 1996, p.106.

<sup>40</sup> Mougenot, p.46.

<sup>41</sup> Juss, *Immigration, Nationality and Citizenship*, Mansell, 1993, p.118.

<sup>42</sup> Press Release of Four leading NGOs on the *Convention on the Future of the EU*, 18 November 2002, available on the internet at: <<http://www.statewatch.org/news/2002/nov/04jtsub.htm>> (13.02.2003).

<sup>43</sup> CONV 426/02, p.3.

peoples of Europe”.<sup>44</sup> Therefore, it is highly time for EU to choose and develop a “human “model of immigration law.”<sup>45</sup>

### Conclusion

Immigration law is a highly politicised area of law and policy in all the Member States, being subject to constant change and amendment. The Single European Act, the Treaty on EU and the Treaty of Amsterdam ave contributed to a “slow and cautious movement towards incorporation of immigration within the EU’s institutional framework”.<sup>46</sup>

Without doubt, the amendments of Treaty of Amsterdam are a significant step towards a more effective and realistic immigration law. It can be said that the supranational character is strengthened according to the characteristics of supranationality. However, the Treaty of Amsterdam could not provide a decisive shift in the balance of powers in immigration policy, moving away from the intergovernmental to supranational level.<sup>47</sup>

There is still a “democratic deficit” and “human rights deficit” in the formulation and application of immigration policy of EU”.<sup>48</sup> Furthermore, the Member States has taken a “cautious”<sup>49</sup> position on whether immigration law should be moved to the core of the supranational order:

Firstly, according to Article 68 EC Treaty and Article 35 Treaty on EU, “only the highest courts are allowed to make a reference”.<sup>50</sup> Moreover, under the Article 68(2) EC Treaty, the ECJ jurisdiction has also been limited with respect to the maintenance of law and order and the safeguarding of internal security.

Secondly, according to Article 67(1) EC Treaty, during a transitional period of five years, adoption of legislation will require unanimous approval of the Council, the Commission has to share its right of initiative with Member States, and the EP is only to be consulted.

---

<sup>44</sup> Peers, “Towards Equality: Actual and Potential Rights of Third-Country Nationals in the EU” 33 *Common Market Law Review* (1996), p.50.

<sup>45</sup> Peers, Aliens, Workers, Citizens or Humans? Models for Community Immigration Law, in *Implementing Amsterdam*, E. Guild and C. Harlow (eds.), Oxford, 2001, p.291.

<sup>46</sup> Favell and Geddes, “European Integration...”, p.15.

<sup>47</sup> Vink, “*Domestic Politics and the Emerging European Immigration Regime*”, Leiden University, 2001, p.15.

<sup>48</sup> Juss, p.116.

<sup>49</sup> Halibronner, *Immigration and Asylum Law and Policy of the EU*, Kluwer, 2000, p.36.

<sup>50</sup> Thym, “The Schengen Law: A Challenge for Legal Accountability in the EU”, 8 *ELJ*, (2002), p. 231, 233.

Thirdly, according to Article 67(2) EC Treaty, even the Commission regains its exclusive right of initiative in May 2004, the possibility of co-decision and ECJ jurisdiction would have to be decided unanimity by the Council.

Finally, it is argued that the failure of all Member States to agree to the incorporation of the Schengen regime and the protocols and declarations regarding Title IV of EC Treaty matters will cause significant “rupturing to the uniform application of EC law.”<sup>51</sup> Likewise, for Peers, the flexibility clause of Treaty of Amsterdam is the “worst drafted provisions of the Treaties”.<sup>52</sup>

With the current structure, the EU will not be capable to deal with the present and future developments in the field of immigration. It is clear that here is a need for regulation that goes further then regulation on the national level. In principle supranational cooperation in this area is very necessary. The author thinks that an approach that goes further than intergovernmental cooperation would be very effective.

Immigration is a long-standing phenomenon, which must be understood with reference to its structural clauses and its global character. Intergovernmental cooperation where the emphasis is laid by the sovereignty of the Member States seems not sufficient to solve the problem of the growth of immigration issues.

Consequently, although, “a clear trend has been set for the future in taking the first steps to move to quality majority voting and co-decision in this area,”<sup>53</sup> in the light of the continuing limitation of judicial supervision and parliamentary scrutiny, the intergovernmental approach will still predominate in this area. Immigration policy and law is still largely intergovernmental rather that supranational in nature.

---

<sup>51</sup> Ward, “The Limits...”, p.220.

<sup>52</sup> Peers, “Who’s Judging...”, p.390.

<sup>53</sup> Galloway, *The Treaty of Nice and Beyond*, Sheffield, 2001, p.106.