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Forging Flexibility – The British ‘No’ to Schengen

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1. Introduction¹

Schengen² is about border politics, i.e. politics and policymaking about border crossing in the widest meaning of the sense of the term ‘border’. As such it touches on the core areas of governance. Any decision to join the Schengen process involves therefore considerations about the meaning of border politics and the norms that guide them in the context of the respective member state, or, member state to be. So far, thirteen of the fifteen current member states of the European Union (EU) have signed the Schengen Implementation Agreement (SIA) and hence agreed to implement the Schengen *acquis*.³ While the majority of EU member states as well as Iceland and Norway as associated members have been relatively keen on signing the SIA, the UK, Ireland and to a limited extent Denmark have, so far, maintained a disinterest in signing and, subsequently, compliance with the Schengen *acquis*.⁴ They either oppose becoming a full member and prefer, to opt-into specific

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¹ This article highlights aspects of an ongoing research project on *Governance under Changing Conditions of Democracy* that is currently conducted by the author (Wiener, in preparation). For comments on the research project I would like to thank the participants of research seminars in 1999 at ARENA, University of Oslo, ECPR workshops at Mannheim, the Free University of Berlin, University of Hannover, University of Nijmegen, as well as the panel participants at ECSA-US, Pittsburgh. For comments on earlier versions of this specific article I would like to thank Gordon Anthony and Elspeth Guild. The responsibility for this version is the author’s.

² The term ‘Schengen’ is used in this article with reference to the process that was conducive to the signing of the Schengen Implementation Agreement (SIA).

³ At this stage, nine states have fully implemented the Schengen *acquis*.

⁴ It needs to be noted that Ireland has decided to withhold from signing Schengen because of its common travel area with the United Kingdom. Denmark has signed Schengen, however objects to the communitarisation of Schengen, that is, it will opt-out of the transfer of parts of the Schengen *acquis* into the First Pillar. It is further important to note that all candidate countries for EU enlargement (current top candidates are: Poland, Hungary, Slovenia, Estonia, the Czech Republic and Cyprus) must comply with the Schengen *acquis* before joining the EU.

areas of the SIA only like the UK. Or, they object to the communitarisation of the Schengen *acquis* as in the case of Denmark.

So far, the literature on Schengen has largely dealt with two aspects. It has either been predominantly engaged in trying to make sense of Schengen, or rather, the sheer amount of technical data relating to it, ranging from the vast piles of the Schengen *acquis* to the cornucopia of involved working groups and committees. Much of the *acquis*, including the material, the institutional and the substantive aspects of Schengen have indeed remained barely known to even participating policy-makers, let alone the public.⁵ Or, it has concentrated on the Schengen implications for changing migration policy in Europe.⁶ In turn, there has been little theoretical work on Schengen from the perspective of shifting politics of governance, and specifically, decision-making 'between' international politics, European integration and domestic politics.⁷ However, recent work on European integration in the social sciences, as well as legal debates over the concept of flexibility and/or the nature of the 'European' polity⁸, offer promising avenues towards a more theoretically informed approach to Schengen.⁹ This article elaborates on them. A note of caution is in order, however. The intention of the article is to shift the angle on Schengen and raise a number of questions about the crucial role of norms in decision-making processes. It does not aim at presenting an empirically sustained contribution to theorizing governance. Instead, it seeks to bring the role of Schengen in shifting perspectives on governance to the fore.

As an empirical angle the article draws on the hearings on Schengen that were held in the British House of Lords European Communities Committee.¹⁰ It is argued that, the discourse presented in the minutes of these hearings bring an interesting perspective on British border politics to the fore which facilitates a view on the Schengen agreement and its implications for governance between Europe and the nation-state. The hearings suggest that the British

⁵ See, in particular, work by Den Boer, Taschner, Hoogenboom, Boltan, Weber-Panariello, as well as political contributions by Lode van Outrive while a socialist MEP in Brussels.

⁶ See, in particular, work by Favell, Geddes, Huysmans, Joppke, Lavenex, for an overview, see JEMS Special Issue 1999.

⁷ For an exception see Thomas Gehring work on co-ordinated action outside the EC/EU that is couched in international relations theorizing on cooperation under anarchy (Gehring 1998).

⁸ The term 'European' is put in inverted commas when referring to only part of Europe such as the European Union (EU).

⁹ See, for example, Shaw 1998; Leslie 2000; Stubb 2000; Wallace 2000; von Bogdandy 1999; Curtin and Dekker 1999; De Burca and Scott, forthcoming; Walker, forthcoming, respectively.

¹⁰ See: "European Communities 31st Report," London: House of Lords, European Communities Committee.

'no' to Schengen may not be sufficiently explained with reference to British Euroscepticism. A closer investigation of possible other factors that are of significance for decisions about supranational rules in core policy sectors is therefore required. For example, the dual character of norms (stable and unstable) as well as the level of norm construction (national and supranational) are crucial factors in the Schengen equation not only for the UK but for all participating member states.

As this article proceeds to show, an interdisciplinary perspective that draws on the constructivist assumption of intersubjectivity on the one hand, and on metaconstitutional theorising about the Europolity as a non-state polity, on the other, brings a curious twist to the fore. In fact, once working with a constructivist approach that identifies a *dual character of norms* as stable structuring as well as unstable constructed factors in the policy process, it follows that the British 'no' has been substantial to *forging flexibility* as a constitutional principle in the 'European' polity (Curtin 1995; Shaw 1999; Shaw and Wiener, forthcoming; Wallace 2000). As will be demonstrated, the Schengen process, including its inception and its current communitarization has contributed to further European integration. That is, flexibility appears to have assumed a place within the 'embedded *acquis communautaire*' of institutional deepening (Wiener 1998b). Indeed, the flexibility principle has already been singled out as crucial to other core policy areas in the EU, such as, for example enlargement.¹¹

The article is organised in three further sections. *Section 2* briefly introduces basic information about the Schengen Convention and defines the current conditions under which decisions on the Schengen *acquis* are made. It suggests that constitutional variables have a significant impact on decisions about changes in core areas of governance such as, for example, border politics. *Section 3* sheds light on the puzzle of the British, 'no' to Schengen. *Section 4* develops the theoretical argument, elaborating on the influence of norms in decision-making situations. The article concludes by generating a path for further empirical work.

2. The Schengen Case

In 1985, the governments of five European Economic Communities (EEC) member states signed an agreement toward the "gradual abolition of checks at their common borders" in Schengen, a small town in Luxembourg. The agreement sought to abolish controls on the internal borders between Belgium,

¹¹ Thus, a group of three "Wise Men" has suggested to "flesh out the principle of flexibility" with a view to preparation for enlargement. See: Frankfurter Rundschau online, 19 Oct. 99, <http://www.fr/aktuell.de/fr/aktuell/t000016.htm>, p. 1.

the Netherlands, Luxembourg, France and Germany. The shared interest in moving ahead towards creating a common market without internal frontiers within the EEC made the governments of these member states act on an intergovernmental basis. The goal was "facilitating the transport and movement of goods" (Meijers 1991, p. 155, Appendix 2). Since the harmonisation of border politics appeared unlikely to be achievable within the common market framework, at the time, the Schengen signatories decided to pursue their shared goal unhampered by EEC legislation, and opted for an out-of-community approach instead. On the basis of co-ordinated action outside the Communities border politics were hence "fragmented" in 1985 (Gehring 1998; Wiener 1998a). It is however important to note that the fragmented border politics was explicitly linked with the common market legislation. All provisions of the convention were only to "apply insofar as they are compatible with Community law."¹² The border politics were eventually to contribute to creating an internal market without internal frontiers (Hailbronner and Thiery 1997, pp. 957 ff.).

In other words, former Commission President Jacques Delors' popular slogan of "Europe '92" was now pursued in two arenas, inside, as well as outside Community structures, if with actors who often participated in committees of both organisations. Commission and other Euro-enthusiasts backed the plan. They were hoping that Schengen would turn into a "laboratory", or even better, an "engine" which would push the complex issue of border politics, i.e. the realisation of the four freedoms of movement of goods, services, capital and persons according to the Treaty of Rome (Wiener 1998a). Realisation of the four freedoms became a particularly important goal for the realisation of a "People's Europe."¹³ It was the basic condition for creating a feeling of belonging, based on a stronger bond between the Community and its citizens. In practice, the idea was that crossing borders without being stopped for controls was a major issue on the agenda of creating a European identity.¹⁴ Once the Schengen states had successfully implemented the Schengen *acquis*, however, no later than 31 December 1992, border politics was to return into Community policy.

¹² Schengen Convention, Title VIII, cited in: Wiener 1998a, p. 229.

¹³ Bulletin, European Communities, Supplement 7, 1985 "A People's Europe." Reports from the *ad hoc* Committee.

¹⁴ Faced with EC member states who were not interested in joining Schengen, Martin Bangemann, Commissioner in DG III, at the time, suggested to "wave" a closed passport at external Schengen frontiers. Thus, European citizens could be identified by UK migration officers without being decriminated on the basis of time. The action was dubbed the "Bangemann wave". For a more detailed description, see: Wiener 1998a, p. 243; for the current application of the policy, see: House of Lords 1999, Question 121, p. 3/11, answer by Kees Goenendijk.

While in 1990, the Schengen states signed the "Convention Applying the Schengen Agreement," the 1992 deadline for creating the internal market passed without much progress in implementing the Schengen *acquis*. Some Commission officials now considered the Schengen *acquis* a possible "graveyard instead of a laboratory for the EC,"¹⁵ whilst members of the European Parliament expected Schengen to produce a "boomerang effect" that would produce "aversion" against the EC among European citizens.¹⁶ They feared that, when in March 1995 a number of governments decided to go ahead and put the Schengen Agreement into force, instead of creating a stronger bond of belonging based on open borders, European citizens found themselves checked at internal Community borders among Schengen and non-Schengen states. Finally, at the 1996–1997 Amsterdam intergovernmental conference (IGC) which prepared the Amsterdam Treaty, the EU member states decided to incorporate the Schengen *acquis* into the Community legal order by means of a protocol annexed to the Treaty.¹⁷ Once identified, the Schengen *acquis* will be transferred into the first (European Community) and Third (Justice and Home Affairs) pillars with movement matters relating to the first pillar and police matters to the third pillar, respectively (Petite 1998).

Three major aspects of the Schengen *acquis* have implications for the area of national border politics for all signing member states. The first aspect is the abolition of controls at "internal borders". It entails the removal of border checkpoints at internal borders among Schengen Member States. The second aspect refers to the implementation of "flanking measures". Such measures include setting up new control mechanisms that substitute the abolition of border controls, for example, by introducing "spot-checks" in the wider border areas, and by enforcing external borders of the Schengen territory.¹⁸ The third aspect which has been established by the Amsterdam Treaty will trigger a "ventilation exercise". That is, by the process of transferring part of the Schengen *acquis* into the First Pillar, and thereby subjecting them to Community law, on the one hand, and by leaving part of the *acquis* in the Third

¹⁵ Comment by Commissioner Martin Bangemann, DG III cited in: Wiener 1998a, p. 241).

¹⁶ See: Agence Europe, No. 5859, 18 November 1992, p. 3 (cf. Wiener 1998a, p. 241).

¹⁷ See: Treaty of Amsterdam, Protocols, B. Protocols annexed to the Treaty on European Union and the Treaty establishing the European Community "Protocol integrating the Schengen *acquis* into the framework of the European Union".

¹⁸ For details on the Schengen Agreement, the Schengen Convention, and the conditions for implementing and communitarising the *acquis* in the 1990s, see the excellent report by the British House of Lords, European Communities Committee, at <http://www.parliamentary.the-stationary-of...199798/Idselect/Idcom/139/8072801.htm>.

Pillar of Justice and Home Affairs that is managed on an intergovernmental basis.¹⁹

The result is an extremely complex approach to compliance with Schengen rules, in particular for those Member States that have chosen to opt-out of the Schengen process and that may choose to opt into specific areas of Schengen later.²⁰ Why do some states decide to adopt and implement the Schengen *acquis* whereas others opposed the project in 1985 when the Schengen Agreement was first signed, and subsequently preferred to opt into certain areas of Schengen based on the principle of flexibility that was established at Amsterdam? In other words, why this denial or reluctance to join a club that appears to be gaining popularity lately, particularly, and perhaps specifically in the German member state of the EU. What are the implications of handling the difference in dealing with Schengen among EU member states for the emergent 'European' polity?

European integration literature offers two answers to the first set of questions. The first answer refers to the UK's geographical location as a condition which, specifically in the 1980s when the creation of a single market without internal frontiers was first discussed, led to override the shared norm of European integration. The long prevailing British argument is that, as an island, the UK has a comparative advantage in the field of border politics. In other words, the government maintains that based on its geographic location the UK's immigration control is reduced to certain main ports of entry such as airport, seaports, and, now, the Channel tunnel. Joining Schengen would mean significant changes in UK border politics. For example, in a White Paper titled "Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum" the United Kingdom government's policy on frontier controls is characterised in the following way:

- "frontier controls are 'an effective means of controlling immigration and of combatting terrorism and other crime'
- these controls 'match both the geography and traditions of the country and have ensured a high degree of personal freedom within the UK'
- this approach is different from that in mainland Europe, 'where because of the difficulty of policing long land frontiers, there is much greater dependence on internal controls such as identity checks'."

¹⁹ The concept of ventilation is explained by Mr Adrian Fortescue of the Secretariat-General, European Commission, Question 218, p. 2/3 <http://www.parliament.the-stationary-of...a/ld199899/Idselect/Idcom/37/3701.htm>.

²⁰ This process is further complicated by the addition of a new Title IV on migration and asylum into the Amsterdam Treaty.

²¹ Committee on European Communities of the British House of Lords, Seventh Report, 1999, Part 2, p. 2/4.

It could, however, easily be stated that for example, Italy could feel equally threatened by Schengen. It could further be argued that, in the age of the aeroplane, and with the Eurotunnel in service, geographic location is no longer as strong a factor to distinguish UK security interests from other countries as it once was. The reasons for opting out of the European norm therefore appear to lose persuasive strength. The following citation from a witness hearing on the costs and benefits of joining Schengen in the British House of Lords demonstrates the limited weight of the argument of geographic location for taking a decision on Schengen. Being asked by the Chairman of the Committee:

“...Do you accept that Britains geographical position is different and therefore I do have a justification to opt out, or do you take the more sceptical view and believe that border control, as such, is not the key question?” (Question 130, p. 7/11, asked by Lord Wallace of Saltaire)

Professor Groenendijk answers a few questions down the line in the same hearing:

“...I will not deny that Britain has a special geographic position. However, I think the way the border control tradition in Britain has been established, is not specifically related to its geographic position. There are other European countries like, for instance, Germany and the Netherlands who have long relied on strict control at the external borders and few controls inside while, for instance, Belgium and France have a long tradition of not so strict controls at the external borders but more controls inside the country. As to that aspect, **Britain is not so typical in its reliance on strong external border controls, that is not a typical British tradition only.**” (Question 132, p. 9/11) (emphasis added, AW)

In other words, on a cost-benefit scale, and comparing the British situation with experience in other Schengen member states, a British decision to join Schengen would not necessarily imply a set-back compared to the current system of border controls.

The second position has been developed within the framework of constructivist theorising in European integration. It proceeds from the observation that “socialisation matters” to the extent that “ideas and identity constructions become consensual when actors thoroughly internalise them, perceive them as their own, and take them for granted” (Marcussen et al. 1999, p. 617, see also: Finnemore and Sikkink 1998; Risse and Wiener 1999). This research finds that the UK’s national interest has created a context for identity-options, which does not allow the government to easily opt in favour of European norms. In other words, this research has demonstrated

that "Europe" is still perceived "as Britain's other" (Marcussen et al. 1999, p. 625). The chosen policy suggests an identity that does not resonate with the majority of the policy addressees. Due to the slowly changing national interest that prevails as a main factor in the formation of public opinion, the new Blair government cannot simply move in and go ahead and change its policies regarding the EU. This situation significantly restricts the identity-options available to the UK as a potential Schengen member state as well.

Identity-options are crucial for the negotiation and implementation of supranationally established rules in the respective domestic environments of the signing member states. This article draws on this insight. It argues, however, that identity-options are specifically important for major decisions that have a broad popular impact, such as, for example the introduction of the Euro. Other decisions that are less exposed to popular scrutiny require more specific insights into why decision-makers make certain choices. Therefore, this article seeks to push further. It suggests examining the impact of the 'situatedness' of decision-makers. That is, it pursues the question of which social norms make decision-makers decide as they do. To that end it elaborates on the impact of the dual character of norms on decision-makers. This perspective draws on two aspects that are important for analysing decision-makers' behaviour in the Schengen process.

First, Schengen impacts on the core components which define the sovereign status of nation-states in global politics, i.e. borders, security and citizenship (de Witte 1998; Kratochwil 1994; Zürn 1998). Its constitutional implications therefore touch the values established by and entrenched in the constitutional context of the Schengen member states. The question is hence, whether or not Schengen policy resonates with these contextual variables.²² Secondly, Schengen does not present a decision-making situation within a clearly set time frame. Instead, it needs to be viewed as a process that develops over time. In other words, the potential for (a) incremental institution building, and (b) the construction of shared values among the participating decision makers need to be taken into account.²³

Both have the potential to contribute to building institutions and constructing norms that subsequently become part of the *acquis communautaire*. As such these processes have substantial impact on European integration. They may crucially impact on decision-makers' contexts, identities, and, subsequently behaviour. The identity of the decision-makers thus reflects, among other things, alternating practices in national and supranational contexts. It is therefore of critical importance to the explanation of supranational decision-

²² I thank Jeff Checkel for pointing out the importance of the 'resonance' factor.

²³ See: March and Olson 1996; and Koslowski and Kratochwil 1994.

making.²⁴ The British discourse in the process of taking a decision about Schengen exemplifies the situation. During the hearing with witnesses in the House of Lords, the issue of fairness and the threat of racial discrimination as a consequence to the abolition of border controls and the establishment of the flanking measure of spot-checking were addressed. The investigating committee raised concerns about racial discrimination, asking:

“How do you interpret the strictness of a control with the promotion of good race relations in the country? Do you think that genuine visitors are being put through the same machinery as illegal immigrants before their entry over here and that it has an adverse effect on good relations in this country?” (Question 93, p. 5/8 asked by the Chairman, Lord Lester of Herne Hill)

The following response shows that while inflicting harm on race relations may not be intended, the checking of identity cards is deemed necessary nonetheless. This appears to create concern about the justness of the procedure among those who are responsible for the implementation of the Schengen measures.

“We certainly have no reason to believe that the control is acting in a way that is inimical or harmful to good race relations. . . . Clearly, it is a more thorough control in respect of third country nationals arriving in this country but many of those who arrive here of course arrive from elsewhere in the world. Therefore, were they arriving in Schengen, they would be undergoing a similar kind of control. Against that, I would put the point, which the government I know attaches great importance to, **that the alternative to that kind of border control will be the kind of internal control that involves a much higher degree of discretion and intervention, seeking production of identity documents, which the government views as likely to be more harmful.** In that context, I think they would be mindful, among other things, of the current debate associated with the Stephen Lawrence inquiry on police relations with ethnic minority communities.”²⁵

In a country with a civil liberties tradition that does not follow the rule of compulsory identity card carrying, the perspective of establishing flanking measures according to the Schengen *acquis*, do not appear to resonate well.

²⁴ See, for example, Ulrich Sedelmeier's work on eastern enlargement of the EU (Sedelmeier 1998).

²⁵ Question 93, p. 5/8, Mr Boys Smith, Home Office, British House of Lords Hearings (emphasis added, AW).

3. The Puzzle: Opting out Despite Shared Interests

This section discusses a number of supranational conditions and their potential resonance with British security interests which would suggest a positive attitude towards Schengen. It first situates the British puzzle in the larger context of supranational norms that have contributed to policy changes in the area of border politics. The subsequent *section 4* places the Schengen decision-making process within the larger context of polity-formation.

Two types of supranational conditions suggest that the British 'no' to Schengen stands in opposition to British interests in security and democratic performance. The first condition is best characterised as a norm which is defined by the shared objectives that are part of the *acquis communautaire*, that is, the shared body of legislation, the rules, procedures, directives and regulations of the EU.²⁶ It can be argued that British and continental European governments actually share an interest in the area of border politics. For example, the free movement of workers has been a shared objective of the EEC, and now EC for decades (Hailbronner and Thiery 1997, p. 957). The amendment of Article F of the TEU towards the inclusion of a section on Freedom, Security and Justice further sustains the concern about security. The second supranational condition with an impact on decision-making in the area of border politics includes the "securitisation" of border politics (Buzan et al. 1998; Huysmans 1997), on the one hand, and an increasing decline in the legitimating role of majoritarian rule in liberal democracies (Held 1992) on the other. The first implies a shared strong interest in securing borders, and keeping so-called third-country nationals out. The second suggests that output-oriented policy making is gaining weight in comparison with input-oriented democratic legitimisation. Schengen does potentially offer an answer to both. Still, the UK does not wish to join the Schengen club, despite a shared interest in a given issue area, and strong supranational conditions which would favour such a step.²⁷ In the following I elaborate on these observations.

From Co-operation to Integration: An Emergent European Norm

In itself, the refusal to join an international co-operation agreement is not puzzling. After all, states do have different interests and therefore pursue different political agendas. For realists, the puzzle would not occur at all. Under conditions of anarchy, states would only cooperate in case of threat. Liberal and neorealist approaches in international relations theory accept

²⁶ On the *acquis communautaire*, its role and the way it is "embedded" in social processes, see Wiener 1998b.

²⁷ The larger project involves a comparison with the German case. This article is however, limited to identifying the British puzzle.

co-operation as a means to achieve gains for all actors involved. In turn, constructivists would argue that states are part of a structured relationship that stems from the interrelation between states and increasingly other actors in global politics as well. Co-operation within this structure is not unlikely but to be expected. It is even more likely when institutional arrangements have been purposefully constructed with a view to increase co-operation among states such as, for example, NATO, WTO, NAFTA, the UN, the EU, and Schengen as well.

However, it needs to be noted that among these institutional arrangements, the EU is an exceptional case. It is less than a state and more than a regime. Crucially, it is an arrangement that facilitates co-operation to an extent that differs from other international organisations because it always involves the assumption that the interest in participating in the co-operative process is expected to override national interests. This expectation manifests itself in the EU's first pillar of community legislation, which stipulates that most decisions are to be taken by qualified majority voting.

When analysing the EU, it is important to note that what was once a regime has developed institutional features beyond original design and certainly beyond the purpose of managing economic interdependence. As it now stands, the polity is not exclusively based on the original set of political and legal organs, but has come to include shared norms, commonly accepted rules and decision-making procedures. Subsequently, decision-making in the 'European' polity is not only guided by the shared legal and institutional property of the EC/EU. It is also both result and part of an ongoing process of construction that is driven by the process of governance beyond the nation state.

The potential of overriding national interest is hence shared by the participating actors in EU politics. It has become a rule that is legally grounded in the practice of qualified majority voting in the Council of Ministers. In accepting this rule co-operation has acquired the meaning of 'co-operating towards European integration.' It is possible then to conclude that in the case of the EU, co-operation is larger than the sum of the co-operating actors and the rules that guide them. The ongoing process of European integration has thus produced an institutional arrangement that is more than a regime. It is a polity, albeit a non-state polity.

If the structural force of shared norms such as 'co-operating to further integrate' did actually impact on actors' identity, interest and behaviour, then one would not expect significant variation among European member states' attitude towards Schengen. After all, the Schengen Agreement was perceived as a process of co-ordinated extra-community action that would enforce the abolition of internal EU borders (Gehring 1998). By increasing the realisation

of the four freedoms of movement of capital, goods, services and persons, Schengen would therefore ultimately contribute to the process of European integration. If European integration is perceived as 'a good thing', and Schengen is considered an "engine" or a "laboratory" for the process of European integration, then it follows that the SIA would resonate perfectly well with the EU member states. In other words, signing the SIA and complying with the Schengen *acquis* could be expected to raise substantial support from all EU member states. That is however, not the case. Not now and it was not true either about 15 years ago, when the Schengen Agreement was first signed.

Unless it were convincingly shown that there is no shared norm of European integration, that intergovernmentalism were back and, with it, a strong national interest of keeping control over national borders, the strong structural push factors suggest that the British opting-out remains a puzzle. While it has, indeed, been argued that the IGCs concluding at Maastricht (1990–91) and at Amsterdam are the markers of a return to the perils of intergovernmentalism in the EU, this article proceeds to show, that curiously, the British 'no' to Schengen actually furthers European integration by forging flexibility. The resistance to sign on as a member state has caused an opening in constitutional politics.

Security Risks and the Democracy Deficit

Beyond shared European norms, two further conditions suggest a shared interest in participating rather than opting out of Schengen for the UK. One condition is the now familiar phenomenon of the 'democracy deficit' in the EU and elsewhere. The other is the phenomenon of securitisation, that is, a growing perception of threat among the population. While the democracy deficit has long been discussed as a particular problem stemming from the EU's institutional arrangements that lack electoral legitimation, the notion of democratic deficit has also been underscored by a thinning out of national identities, and in efficient national policy performance. Without providing much more detail at this point, in a nutshell it can be stated that the democratic deficit is a globally occurring condition that structures governance in one way or another (Zürn 1998). Supporting 'human rights', creating 'democratic conditions' throughout the globe, supporting 'sustainable development', participating in 'peace-making', and much less spectacular – since less successful – creating jobs and/or job security have been reactions to the condition of democracy deficit.

This assessment of the democracy deficit as a condition with structural impact on actors is based on the observation that, legitimate governance depends on three necessary conditions. The first is input-oriented legitimacy i.e. representation based on voting procedures which are specific to

the respective democratic order. The second condition is output-oriented legitimacy, i.e. efficient policy performance of the government. The third condition is the normative requirement of a shared collective identity which makes input-based decision-making acceptable to the minority, on the one hand, and that evaluates efficiency, on the other. As Fritz Scharpf stresses, without this shared collective identity, a society is unable to provide the solidarity that is the necessary condition for minorities to accept and tolerate majority decisions (Scharpf 1995, pp. 2–3). As long as these three conditions remain at equilibrium, the expectation is that legitimate governance is relatively stable. The balance between these three conditions has, however, lost stability. If the stability of this legitimacy balance has been the core of post-war western democracies, then a shift in this balance is likely to change the conditions.

The second supranational condition is the phenomenon of the “securitisation” of migration policy and hence of ‘border politics is of particular importance.’²⁸ According to the migration literature, migration has been increasingly presented as a security threat. In the process, terrorism, drug dealing, and trade with human beings – especially women –, Mafia and other criminal elements have been linked to border politics. Policy reactions to the securitisation of border politics include anything from increasing internal security measures, enforcing border patrols, to installing new security systems on a general level. More specifically, in Europe, these innovations include enforcing external border controls and spot-checking, as well as setting up new security institutions such as, for example Europol, the European police agency.

The so-called flanking measures that are part of the Schengen *acquis* entail a number of measures designed to increase security. Indeed, as some have observed, Schengen appears to be more of a security convention than a convention towards the abolition of borders. As such, becoming a Schengen member includes the opportunity to demonstrate the achievement of badly needed efficiency with a view to increasing legitimacy at home simply on the basis of supporting the creation of Europol.

In other words, if it were true, that on the one hand,

- EU member state action is linked to the existence of the shared norm of European integration, as ‘a good thing’,

²⁸ This condition has been identified on the basis of speech-acts that contribute to the politicisation of particular contexts. See, for example Buzan, Waever and de Wilde who note that “(T)he process of securitisation is what in language theory is called a speech act. It is not interesting as a sign referring to something more real; it is the utterance itself that is the act. By saying the words, something is done (like betting, giving a promise, naming a ship)” (Buzan et al. 1998, p. 26).

- that state action on a global scale is structured by conditions of an increasing crisis of majoritarian rule and that, furthermore, the securitisation of border politics favours an increase in security measures by national governments, and if it were also true that, on the other hand,
- Schengen provides a number of policies that are so-called flanking measures which are intended to set up new security controls within Schengenland,

then, the UK's opting out of Schengen is puzzling. What remains to be explained is, why does a government (a) prefer to evoke the image of opposing the shared norm which, surely, will create a disadvantage in the ongoing history of co-operation/integration, and (b) let the chance to increase government legitimacy pass.

It is suggested that the answer to this puzzle lies hidden in the complexity of context variables. Thus, two sets of stable 'norms' that are supranationally shared can be identified. They include first an increasing acceptance of European integration as a 'good thing'. The second stable condition for decision-making in the context of the 'European' mixed polity is a growing need for output-oriented legitimacy which could be achieved, for example, by successful policing on the basis of the new Schengen Information System (SIS). These supranational conditions are in conflict with the nationally entrenched context variables. In part, these are set by the citizenship discourse that contributes to establish the "borders of order" in a particular polity (Kratochwil 1994). In the following, I turn to these domestically set norms. I argue that the stability of national norms is the decisive factor in the Schengen equation, because, on the one hand, they influence opting out, and now, opting into Schengen, whereas on the other hand, their stickiness has had a substantial impact on forging flexibility. The negotiations over Schengen have made flexibility socially acceptable in the 'European' polity.

Supranational Conditions versus Domestic Norms

The observation that the discourse of citizenship defines the borders of political order in specific settings begins with the assumption that citizenship is always more than the sum of its parts. At the centre of this argument lies the assumption that intersubjective practices such as social and communicative action contribute to the meaning of the border of order at specific times and places. If this intersubjective perspective is accepted as one crucial dimension in defining borders, then perceptions of borders and how to deal with them differ according to discursively constructed communities.

Clearly, the limits of such communities are always subject to change. They are therefore potentially shifting. They may, however, crystallise over long periods of time, as occurred, for example during the post-war period. In such

periods, the limits of the discursively defined community, and subsequently, the limits of shared norms remain stable. A change in the perception of borders, however, has an impact on how to deal with borders. It destabilises decision-makers' view on whether or not to accept rules that aim at changing border politics. If this observation were correct, then it would follow that compliance with Schengen rules is, in no small part, dependent on changing perceptions of borders. A view of the concept of borders underscores the crucial question about the stability of national norms for decisions about Schengen rules.

Border politics have been crucial to and are influenced by state-formation in the modern world. They are core to the concept of sovereignty, both in setting its legal boundaries and in constructing the social boundaries (De Witte 1998; Biersteker and Weber 1996). Specifically, the process of citizenship practice that sets the terms of citizenship in a given context has been invariably linked with and constitutive for the formation of modern-nation states.²⁹ Towards the end of the 20th century that relation has begun to change. Citizenship is now increasingly fragmented and moving away from the single rooted identity that was core to the power of sovereign nation-states in the Westphalian system of states (Meehan 1997; Benhabib 1998). Borders are subject to frequent crossing, globalisation and migration flows impact on a changing perception of borders of order. Politics are found to be more medieval than modern in shape. That is, they are at times overlapping, come in different sizes, entail multiple ways of political organisation (Ferguson and Mansbach 1996).³⁰ The EU is a prime example of this process.

This change in the shape of polity has implications for the substance of politics as well. That is, one or more of the four basic dimensions of a polity – authority, identity, the ability to mobilise citizens and the capacity to grant continuity in the institutional structure (Ferguson and Mansbach 1996) – will eventually change as well. The question is, whether and if so, how, these processes implicate changes on perceptions of the border of order in the EU member states. In other words, and with a view to the Schengen case in particular, it needs to be established what decision-makers consider as just and fair and on what grounds. In the following, I elaborate on the dual character of norms and its role in the decision-making process over Schengen.

²⁹ See: Bendix 1964; Marshall 1950; for the concept of "routinising relations" see: Tilly 1975; for the concept of "citizenship practice" see: Wiener 1998a, Ch. 2.

³⁰ Some have indeed described polities such as the Euro-polity as "postmodern" (Caporaso 1996; Ruggie 1993).

4. The Dual Character of Norms

On the one hand, the *sui generis* status of the mixed 'European' polity remains a matter of dispute among students of European integration to this day. On the other hand, the state-based tools of much of European integration research, in political science and law in particular, are increasingly problematic for analyses of a polity which, as Amsterdam made very clear, keeps forging flexibility as a core governing principle. This section elaborates on the implications of the dual character of norms for the mixed 'European' polity. It is argued that this impact is, indeed, twofold. It refers to decision-making in a mixed polity setting, on the one hand, and to the impact on the forging of new constitutional principles, such as flexibility, on the other. In conclusion, this section finds that the identification of the 'situatedness' of decision-makers allows for *explaining* decisions. Beyond that, it opens perspectives for *understanding* the role of the peculiar locus 'in between' polity levels, legal frameworks, and, indeed, polities (Curtin 1996) in the process of constructing the 'European' polity as a non-state, and despite states (Shaw and Wiener 1999).

The argument is interdisciplinary, in so far, as it combines legal and political science theoretical debates on European integration. It builds on constructivist approaches to European integration that stress that socialisation and intersubjectivity matter for decision-making (Christiansen et al. 1999). It further draws on recent metaconstitutional theorising by legal scholars. The article proposes a focus on the 'situatedness' of decision-makers that is, it stresses the crucial impact of differently established understandings of constitutional norms and demonstrates the impact of nationally embedded norms on decision-makers' behaviour in supranational contexts. While supranational norms do condition the behaviour of domestic actors, the role of constitutive norms within domestic frameworks must not be underestimated. Different perceptions of constitutionally entrenched values can be of significance for both, making decisions in a multi-level polity such as the EU, and, in turn, forging flexibility as one core principle of governance in this polity.

As one of the policy sectors where flexibility has been institutionalised Schengen challenges long-standing assumptions about the politics of international relations (IR) in a system of states. Crucially, IR theorists have argued that this system is structured by the principle of anarchy and based on the mutual acceptance of national sovereignty, i.e. a level of governance out of reach of constitutional law and with little impact on national constitutional change. Similarly, lawyers traditionally make a sharp distinction between international and constitutional law. However, the global system increasingly resembles, in its features, much more a medieval pattern where polities of dif-

ferent shape and institutional order partially overlap (Ferguson and Mansbach 1996).

In that context, Schengen also poses a threat to the cosy niches of domestically established and nationally guarded constitutional contexts. As the safeguard of national borders is threatened by the new border politics that comes with Schengen, those domestic constitutional contexts are equally at stake. Ironically, the British 'no' to Schengen has contributed to forging flexibility as a core governing principle in European integration after Amsterdam. Yet, the increasing acceptance of this principle as a European norm, further constitutionalises European integration. If Euroscepticism were the main motivation for British decision-makers to withhold from Schengen membership, the consequences of the British 'no' were diametrically opposed to that intention.

Two leading observations guide the argument. They are part of the constructivist approach of this article. First, if it is true, that "(T)he universality of law, its 'justness,' does not consist in its abstractness; rather, it is constituted by its respect for the rights and duties that we, as fully situated persons, have" (Kratochwil 1994, pp. 495–496) then, being situated in a specific constitutional context implies that the understanding of norms is equally specific. To know what is just or fair, then, depends on a number of contextual variables. Secondly, if intersubjectivity matters to norm construction, then it follows that norms do not only structure decision-makers' behaviour, but they are also constructed by them. As the article proceeds to discuss, norms cannot be taken as stable over long periods of time. This complicates investigations that consider norms as causal factors.

To explain decisions on constitutionally entrenched issues such as border politics in the Schengen case, it is not sufficient to observe the strategic steps of decision-making. *Where* a decision is being made is crucial. This position is defined by a time axis, as well as by the location within the multi-level governance structure of the EU. Both define the contextual variables that are influential for situating decision-makers. In the EU, in particular, such processes, almost as a rule, lie in an area which has been defined as "in between" (Curtin 1996). In other words, it can neither be reached by domestic constitutional law, nor by international law, statist approaches to politics and law often contribute to confuse, rather than clarify the issue (Shaw and Wiener 1999).

Different from the "modern constructivist" (Katzenstein, Keohane et al. 1998) rationale that focuses on the impact of supranational cultural norms on domestic behaviour, the perspective on the dual character of norms stresses a more careful elaboration on the fluid aspects of norms. In other words, in situations where the stability of norms cannot be taken as given, and fluidity

is a likely option, further conceptual definition is required. It follows that the context for decision-making is not only set by stable supranational and national norms, it also contributes to the process of establishing and/or creating new norms, i.e. to the process of forging flexibility. The dual character of norms points to the following causal relations: The less stable national norms get, the more likely is a decision to opt into the Schengen *acquis*. Curiously, with a view to the process of forging flexibility in the 'European' mixed polity, this same relation implies, that the less likely a British decision to accept Schengen rules, the less likely is a decrease in the importance of flexibility as a governing principle in the Schengen context.

This section raises the issue that further to being stable factors with structuring capacity – as demonstrated by students of international relations (Katzenstein et al. 1998) – norms also entail unstable qualities. That is, norms do not only possess structuring capacity, they are also subject to reconstruction. While as a general rule, norms are sticky and change slowly, they do possess potential for change. The key task is therefore to establish *when* and *where*, in the context of multi-level governance, norms are stable, and, in turn, when and where they are subject to change. As this section suggests, for an understanding of decisions that appear contradictory in a larger normative context, it is helpful to begin with identifying the dual character of norms. The following, first briefly recalls the main features of multi-level governance in a mixed-polity, and then stresses the helpful conceptual window that is opened by taking the avenue of metaconstitutionalism.

The Mixed Polity

European integration has created a 'mixed polity' in a world of states. The mixed polity status has gained a new quality with the Amsterdam IGC which contributed to giving the concept of flexibility almost constitutional status. With a view to the role of constitutionalism in this mixed polity, it has been argued that Amsterdam offers new insights into the role of law indeed. As Neil Walker has pointed out, "Amsterdam is both *instrumental* and *reflexive*. It both adds to the unplanned architectural sprawl of flexibility, particularly in documenting the latest compromises over Schengen and the Third Pillar, and begins to reflect upon, learn from and impose certain design and a certain set of ordering principles upon the flexible arrangements already in place ... " (Walker, forthcoming, p. 4).

The Amsterdam decision to bring the Schengen *acquis* of the 1985 Schengen Agreement on the abolition of border controls into the EU's pillar structure is a core factor of this shift. In political terms, the decision to institutionalise the practice of opting into certain policies that are regulated on the supranational level while opting out from others, represents a critical

turning point towards forging flexibility as a core principle of governance. Three components need to be distinguished when dealing with a mixed polity. They include the type of integration, i.e. positive, negative, differentiated (Scharpf 1995), norm acceptance from, i.e. politically, legally, socially (Zürn and Wolf 1999) and, the 'constitutional character' of policy, i.e. international law, domestic constitutional law, or neither of both (Walker, forthcoming).

Where and when a decision is being taken is crucial for explaining the outcome. As such, recognising the context of decision-making situations is widely shared among political scientists ranging from the rationalist to the reflectivist (for the range, see: Christiansen et al. 1999, p. 543). Context always matters. The controversial question is, however, how does context matter, and, more specifically, which are significant causal factors that make actors decide in one way and not in another? In situations of co-operation and bargaining beyond the institutional structures of nation-states, the main point of dispute among rationalists and reflectivists has been the assumption of stability and change that frames decision-making. Rationalists seek to establish stable factors and cannot account for change during the decision-making process itself. They calculate with stable identities and interests and seek to isolate significantly influential factors that cause actors to behave in one way and not in another. In turn, reflectivists work with the assumption of fluidity and change throughout. That is, the negotiating process is likely to cause changes in identity and hence interests. To work with the law-like theoretical foundations of the natural sciences, means to cast social relations in stone and hence undermine their flexible quality.

5. Conclusion

This article sought to demonstrate that 'Euroscepticism' was not the decisive motivation for the British 'no' to Schengen. Instead, the article identified the influence of contextual variables such as supranational and domestic conditions. Based on the constructivist assumption that socialisation and intersubjectivity matter, it suggested to situate decision-makers. In particular, it pointed to the dual character of norms as structuring factors that inform decision-makers, albeit often invisible *and* as constructed components in the process of European polity-formation. As such, the article showed that the controversial debates over the implementation of the Schengen *acquis* has contributed to forging flexibility as a governing principle in 'European' politics. The interdisciplinary political scientist and legal approach of the article brought to bear findings of the creeping constitutionalism, that has assumed pace specifically after the Amsterdam IGC. Beyond offering an explanation of the British 'no', the article thus opened a theoretically informed perspective

on the Schengen case as entailing key features of the process that is forging flexibility.

The working hypothesis underlying this article was that changes in border perceptions differ in European countries. This assumption was based on the finding that Europeanisation involves the two dimensions of available identity-options to state actors on the one hand, and entrenched constitutional rules, values and norms, on the other. At a time when supranational conditions are the same – albeit with a different impact – for all participating actors, domestically entrenched norms still potentially differ in decisive ways. The British puzzle suggests that this difference matter. A preliminary conclusion of the cursory insight into the discourse on Schengen that is related to the decision-making about opting into certain aspects of Schengen, is therefore that a specific practice of civil rights, or, a particular citizenship practice for that matter, contributes to a particular understanding of justness. For example, in the British case a change of border politics poses the threat of changing the British understanding of justice because opening the borders threatens to lead to a change in this particular situatedness of British citizens.

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