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21. Legal pluralism in the European regulation of border control: disassembling, diffusing, and legalizing the power to exclude

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I. INTRODUCTION

In this chapter I will look at EU immigration law through the lens of legal pluralism. My analysis will be based upon a broad understanding of legal pluralism, at least initially, that insists on 'the multiplicity of different legal systems coupled with the claim that these systems can interact in interesting and important ways'.[1] Focusing on the transnational legal regulation of border control by the EU and its Member States aims to answer the following question: are configurations of political authority changing as a result of the (partial) transfer of lawmaking competence in immigration policy from the national to the EU level, and if so, in which ways? The scope of this article is limited: it will not encompass EU migration law as a whole, but instead will focus on the transnational regulation of exclusion, which will be narrowly defined as laws regulating physical access to Schengen territory by non-EU citizens and laws addressing their physical exclusion from it in the case of irregular migration.

Aside from reasons of space, this limitation is justified because these instances of regulation of human mobility are among the most tangible and concrete forms of migration control, and as such are most acutely bound up with modern understandings of sovereignty – both in its external and internal manifestations. Traditionally, internal sovereignty is seen as a state's claim to ultimate legal authority within a certain demarcated territory. External sovereignty denotes the independence and autonomy of the state within a global system of mutually independent, territorially defined states. In modern legal discourse, the predominant vision on the relation between sovereignty and immigration is that states are free to exclude immigrants (noncitizens) from their territory (some important legal exceptions based upon international human rights and refugee law excluded). Although it is generally not made explicit, such a view on the right to exclude can be traced back to the way in which international law has recognised the state's right to defend its territorial integrity as inherent to its external sovereignty.[2] At the same time, by exercising power over individuals and providing for the legal regulation of the exercise of such power in the form of immigration laws, administered by state institutions and subject to (at least a certain extent of) judicial

[1] N.W. Barber (2006), 'Legal Pluralism and the European Union', *European Law Journal* 12(3): 306–29, at 329.

[2] See G. Cornelisse (2010), *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*, Leiden and Boston: Brill.

control by domestic courts, internal sovereignty is implicated in excluding immigrants as well. In providing the basis for the exclusion of immigrants in law, internal and external sovereignty are thus conflated. Crucially, this construction is wholly contingent on territoriality – the coupling of political power with clearly demarcated territory. Against this background, the transfer of lawmaking competences in immigration policy from the national to the European level raises interesting questions regarding this particular understanding of political power: is it undergoing significant changes, for example because Member States lose exclusive control over their own territory as the legal orders of other Member States encroach upon it as a result of supranational laws?[3] However, before turning to analysis, it is important to define the legal orders that will be the subject of this chapter. Apart from the most commonly described instance of overlapping legal orders in the literature dealing with legal pluralism in the EU, namely the two-dimensional relationship between EU law and the national law of the Member States, another dimension of legal orders existing alongside each other can also be detected in this particular policy area.

Indeed, the observant reader will have noticed that, when defining border control above, I used the terms access and exclusion from *Schengen territory*, not the territory of the EU. The topic under consideration can accordingly be perceived as a specific instance of European integration, also known as differentiated integration, according to which not all Member States participate to the same extent in the legal instruments dealing with border control in the EU. Thus, not all Member States of the EU participate in Schengen, and complicated opt-in and opt-out arrangements are provided for those states that have chosen not to partake. As such, it has been argued for some time that we need a multidimensional perspective to help us make sense of transnational patterns of political authority within the EU, as a two-dimensional analysis, tied to traditional paradigms of constitutional thought, would no longer suffice for this purpose.[4] I concur with the importance of recognizing the complexities of asymmetrical integration when trying to understand the current configuration of political authority in the EU.[5] Nevertheless, this chapter will take as a starting point a two-dimensional perspective, investigating what the (partial) transfer of lawmaking competence in immigration policy from the national to the EU level can tell us about the nature of political authority in Europe. It seems appropriate to employ such a two-dimensional perspective, at least to start with, precisely because focusing on the transnational regulation of migration shows that traditional or dominant paradigms of constitutional thought, as espoused by a number of theories on legal pluralism, may not even do justice to the relation and interaction between the legal order of the EU on the one hand, and the national legal orders of the Member States on the other.

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[3] See more generally with regard to transnational administrative law: A.S. Gerontas (2013), 'Deterritorialization in Administrative Law: Exploring Transnational Administrative Decisions', *Columbia Journal of European Law* 19(3): 423–68.

[4] N. Walker (1998), 'Sovereignty and Differentiated Integration in the European Union', *European Law Journal* 4(4): 355–88.

[5] See G. Cornelisse (2014), 'What's Wrong with Schengen: Border Disputes and the Nature of Integration in the Area without Internal Borders', *Common Market Law Review* 51(3): 741–70.

To recapitulate: this chapter will look at the way in which EU law regulates physical access to and expulsion from Schengen territory in order to make sense of the nature of political authority in contemporary Europe. It will do so by focusing on the transfer of lawmaking competences from the national level to the European level, and the resulting case law of the Court of Justice of the EU (ECJ). In section II, I will start with a discussion of theories of legal pluralism. The predominance of constitutional pluralism in theorizing the interaction between the legal orders of the EU and its Member States will be critically evaluated. After that I will turn to the policy domain of migration in order to show that, due to their focus on abstract constitutional questions, these theories fail to capture the full complexity of the relations between the EU legal order and the legal orders of the Member States. First I will provide an overview of the origins of European lawmaking and policymaking in the area of immigration and border control (section III). Then I will turn to the main legal instruments regulating access to and exclusion from Schengen territory, and ECJ case law on these instruments. I will pay specific attention to how the ECJ perceives the relation between the EU legal order and those of the Member States (section IV). It will become apparent that the transnational regulation of border control shows a rather diffuse picture of political authority: European integration has led to the supranationalization and 'superterritorialization' of national executive discretion, coupled with the constitutionalization or legalization of the exercise of migration control at the national level (section V). In the conclusion to the chapter (section VI), I will relate my findings on legal pluralism in EU migration law to the dominant form of theorizing legal pluralism in the EU.

II. THEORIZING PLURALISM IN THE EU: CONSTITUTIONAL PLURALISM

Many of the theories that address the relationship between the legal orders of the EU and its Member States in terms of legal pluralism tend to do so in the context of constitutional pluralism. Thus, they have been formulated against the background of the puzzles posed by abstract constitutional questions, such as how the doctrine of precedence of EU law can be made to fit with traditional monist-oriented approaches to the relationship between EU law and national law. Most profoundly, these theories seek an answer to the question of where, as a result of European integration, ultimate authority is currently located: does it remain within the legal orders of the Member States; does it reside in the EU legal order; or is there a more diffuse picture where the two legal orders posit equally plausible claims of ultimate legal authority? The former two answers would necessitate a rejection of the pluralist position, while the latter endorses such position, albeit in many different forms.

Generally, there seems to be agreement among the participants to the debate on constitutional pluralism that it is a theory that both describes and prescribes, that is, an attempt to account for contemporary legal reality as well as a normative vision on how the relationship between the legal order of the Member States and the EU would be

best be shaped.[6] The same goes for theories that reject the pluralist position. Nevertheless, and in spite of the generally explicit admission of the blurring between 'is' and 'ought' in the scholarly writings on constitutional pluralism, I still find myself puzzled by many of them in terms of their understanding of the 'descriptive' element of their theory on the interaction between the two legal orders. Thus, the majority of them, when they purport to be describing the law empirically, are actually taking an internal perspective on the law.[7] Law, according to the internal perception, and especially when it comes to the way in which the legal order understands and defines itself, is a systematic and unitary whole. Adopting the internal perspective does not allow one to conceive of a single legal order as containing competing claims to ultimate authority, or as capable of embodying unresolved inconsistencies; instead it is based upon complete consolidation and clear legal hierarchy. The internal perception thus uncritically replicates the legal discourse of the nation state itself (or of the EU for that matter, or of both), most often in the very same terms as those used by its principal mouthpieces: constitutional courts. However, instead of an empirical description of the relationship between law and social reality, such a perspective is based upon an ideology: 'a mixture of assertions about how the world ought to be and a priori assumptions about how it actually and even necessarily is.'[8]

Interestingly, it is the ideology of the nation state as the fundamental unit of political organization that has provided the necessary basis for an ideal of law as a systemic whole, and that presents the claim to ultimate authority within that system as plausible. And while sociolegal scholars started to challenge these views of law and legal systems as early as in the beginning of the twentieth century,[9] legal philosophers and constitutional scholars have for the most part uncritically replicated them in their analyses of law and legal systems.[10] As such, theories that seem postnational in the sense that they 'challenge the traditional unitary nature of sovereignty as an exclusive

[6] See for example Barber (2006); M. Maduro, 'Three Claims of Constitutional Pluralism' (2012), in J. Komarek and M. Avbelj (eds), *Constitutional Pluralism in the European Union and Beyond*, Oxford: Hart Publishing, pp. 67–84; and R. Barents (2009), 'The Precedence of EU Law from the Perspective of Constitutional Pluralism,' *European Journal of Constitutional Law* 5(3): 421–46, at 439.

[7] See J. Bengoetxea (1994), 'Law as a Regulative Ideal', in H-J Koch and U. Neumann (eds), *Legal System and Practical Reason*, Stuttgart: Hans Steiner Verlag, pp. 65–80.

[8] John Griffiths (1986), 'What Is Legal Pluralism?' *The Journal of Legal Pluralism and Unofficial Law* 24: 1–55, at 3.

[9] Interestingly, Roger Cotterrell observes that 'the subversive beginnings of modern socio-legal critique occurred at perhaps the exact historical moment of greatest acceptance of the Westphalian nation state system and its correlative view of state-centred legal systems': R. Cotterrell (2009), 'Spectres of Transnationalism: Changing Terrains of Sociology of Law', *Journal of Law and Society* 36(4): 481–500, at 483.

[10] I use the word 'analysis', but perhaps it would be better to see the work of these scholars as contributing to the construction of law as a legal system. See also Bengoetxea (1994).

property of the state'[11] are also still significantly tied to our ideological understanding of the nation state.

In other words, the descriptive element of theories rejecting or adopting constitutional pluralism is actually deeply normative, because it takes as a starting point the plausibility of the claims made by either the domestic or the European constitutional order,[12] or by both. It does not seem to question (or search for empirical validation of) the accompanying notions of the unity and consistency of law within a single legal order. Similarly, it fails to assess critically what ultimate authority actually means outside the narrow confines of the practice of constitutional courts that are asked to formulate an answer on precisely such a question.[13] What most of these theories generally fail to do is make explicit the normative, theoretical or ideological assumptions underlying this allegedly descriptive view on law and a legal order in a more general sense.

It is rather surprising that a theory the name of which is so clearly indebted to the tradition of legal pluralist theory, which in turn can be traced back to modern sociolegal critique, takes for granted the idea that within one legal order legal diversity is implausible,[14] and that it has taken the (constitutional) claims of one legal order in

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[11] See M. Avbelj (2011), 'Questioning European Union Constitutionalisms', in R. A. Miller and P. C. Zumbansen (eds), *Comparative Law as Transnational Law: A Decade of the German Law Journal*, Oxford: Oxford University Press, at 398, referring to, inter alia, the work of Neil Walker.

[12] Walker describes the plausibility of the claim to ultimate legal authority identifying and grounding a particular legal order as a combination of objective and subjective factors: 'Subjectively there has to be common assertion or acceptance by the key officials of the legal system in question – in particular its judges – that such legal system exists and that it does so in accordance with certain fundamental and irreducible propositions or assumptions. Objectively this set of beliefs and claims must be plausible, in that there is evidence of a high level of general obedience to the framework of laws which are valid according to the system's ultimate criteria of validity.' Walker (1998), at 358.

[13] Interestingly, some scholars who do seem to adopt a more external perspective when investigating the particular claims made by one legal order vis-à-vis the other legal order do so selectively, because when they fail to find empirical validation of the claims of one legal order in social reality, they assume without much further ado that the claim to ultimate authority will be found within the other legal order. See for example Gareth Davies, who rejects the constitutional claim by the EU: 'To speak … of constitutional pluralism, as if the Treaties and the Constitutions of Member States were equal partners, is more deceptive than descriptive. It describes the rhetorical independence of the two legal orders, but ignores the fact that in actual situations – as sources of applicable law – there is in most states an unequivocal ultimate hierarchy. EU law is at best a Constitution without a jurisdiction: it may be the final authority in its own sphere, but that sphere is largely virtual rather than actual.' G. T. Davies (2012), 'Constitutional Disagreement in Europe and the Search for Pluralism', in J. Komarek and M. Avbelj (eds), *Constitutional Pluralism in the European Union and Beyond*, Oxford: Hart Publishing, pp. 269–84, at 271.

[14] There are notable exceptions: see, for example, Barber, who argues that legal systems can contain inconsistent rules of recognition, and that 'such legal systems are more than rare, brief aberrations; that the pluralist model of legal systems is helpful in explaining important features of common legal orders'. However, in his description of the relationships between the EU and

isolation from the other at face value – only resorting to pluralist theorizing when these orders collide or overlap.[15] For example, Přibáň writes:

> Theories of legal pluralism generally criticize the concept of law as a normative order sanctioned by the state's monopoly on political violence. While monistic views look for a clear specification of legal authority and rules of legal validity, pluralistic views claim that these specifications are impossible in the presence of more legal systems operating in the same social environment.[16]

The question whether these specifications might also be impossible within one single legal order is generally ignored. Indeed, constitutional pluralism's questioning of the idea of legal unity and of centralized legal authority only occurs when there is no escape from doing so: namely, at the precise moment that one legal order brings up these questions when confronted with the claims of the other order. As such, it seems a missed chance that such theorizing has not taken (earlier) sociolegal scholarship on pluralism more seriously, and paused to consider whether the very discourse that constitutional courts and constitutional scholars alike have used to bring conflict (or, for that matter, collusion or overlap) to the fore (direct effect, supremacy, unity, ultimate authority) may simply be inadequate to describe and account for the routine workings of law, whether be it within one single legal order or in the interaction between two or more.[17] As such, it may be refreshing to shift our focus away from the explicit constitutionalist discourse that the majority of scholars writing about pluralism in the EU have tended to focus on, and instead concentrate on pluralism at work in a particular policy area. As we shall see below, an analysis of the European regulation of border control exemplifies that the current configuration of political authority in the EU is much too complex to be captured in a language of conflicting plausible claims to ultimate legal authority within a particular political space.

III. THE DEVELOPMENT OF EU LAWS OF TERRITORIAL EXCLUSION: 'SCHENGEN'

This section provides an overview of the development of European lawmaking competences in the area of border control, to contribute to a better understanding of the

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the domestic legal orders, he then takes the competing supremacy claims of the respective legal orders at face value. Barber (2006), at 307.

[15] For example, in terms such as 'EU law thus challenges the supreme position of the national constitution and the autonomous authority of the state'. See Barents (2009), at 438.

[16] J. Přibáň (2015), 'Asking the Sovereignty Question in Global Legal Pluralism: From "Weak" Jurisprudence to "Strong" Socio-Legal Theories of Constitutional Power Operations', *Ratio Juris* 28(1): 31–51, at 32.

[17] A similar point is made by Melisaris: '*All* legal theory ought to be pluralistic. Otherwise, it simply *is not* legal theory but rather a first-person account of intrasystemic coherence.' E. Melissaris (2009), *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism*, Aldershot: Ashgate, at 76.

particular legal instruments discussed in the two sections that follow.[18] Legal instruments dealing with immigration and border control are based upon Title V of the TFEU. Article 67, the first provision under that Title, provides that the EU shall constitute an area of freedom, security and justice. Crucially, it adds that such an area shall be constituted with respect for the different legal systems of the Member States. The second paragraph of Article 67 then specifies that the EU shall ensure the absence of internal border controls for persons, and that it shall frame a common policy on asylum, immigration and external border control. It is apparent from the text of the TFEU that a common policy with regard to immigration, asylum and external border control is closely tied up with the project of abolishing border controls within the EU. As such, it is useful to address the origins of the area without internal frontiers as a distinctly European project, and investigate how it relates to the regulation of the European border as regards the exclusion of third-country nationals.[19]

In the 1984 Commission White Paper on Completing the Internal Market, the abolition of internal border control was primarily put forward as an economic venture, bringing significant market benefits. The reasons for getting rid of border control between the Member States of the EU were found in 'the hard practical fact that the maintenance of any internal frontier controls will perpetuate the costs and disadvantages of a divided market'.[20] At the same time, the Commission underlined that the abolition of internal frontiers would necessitate the 'coordination of the rules on residence, entry and access to employment, applicable to third-country nationals [and] measures on the right of asylum and the position of refugees'.[21] The European Council, meeting at Fontainebleau in June 1984, asked the Council and the Member States to undertake a study of the measures which could be taken to bring about 'the abolition of all police and customs formalities for people crossing intra-Community frontiers'.[22] The symbolic dimension of an area without internal frontiers was clearly acknowledged, seeing that this call was made in the context of a 'People's Europe': the European Council considered it 'essential that the Community should respond to the expectations of the people of Europe by adopting measures to strengthen and promote its identity and its image both for its citizens and for the rest of the world'.[23] Indeed, the ad hoc committee that was set up to investigate the feasibility of abolishing border control was also requested to examine suggestions regarding symbols of the Community's existence, such as a flag and an anthem, and the formation of European sports teams.[24]

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[18] This section uses parts of previous published work: see Cornelisse (2014).

[19] For a clear and detailed overview of the early beginnings, see J. D. M. Steenbergen (1999), 'All the King's Horses … Probabilities and Possibilities for the Implementation of the New Title IV EC Treaty', *European Journal of Migration and Law* 1: 29–60.

[20] COM(85)310 final, 'Completing the Internal Market', White Paper from the Commission to the European Council (Milan, 28–29 June 1985), Brussels 14 June 1985, at 8.

[21] Ibid., at 16.

[22] European Council meeting at Fontainebleau on 25 and 26 June 1984, Conclusions of the Presidency, at 8.

[23] Ibid.

[24] Ibid.

Article 13 of the Single European Act defined the internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital was ensured, and it instructed the Council to take the necessary measures to realize the internal market by 1992. However, serious divergences existed among Member States regarding their views on the extent of their obligations in establishing the area without internal frontiers. The United Kingdom in particular did not want to relinquish its powers to carry out checks on people and goods crossing its national borders. As it was accordingly not possible to reach agreement within the Community legal order, five Member States decided to agree upon the gradual abolition of checks at their common borders under the framework of traditional international law.

The Schengen Agreement, a treaty concluded among France, Germany, Belgium, the Netherlands and Luxembourg in 1985, set out the principal objective of abolishing border controls between the participating States, and detailed the 'accompanying' measures aiming at the reinforcement of the control of the external border. Hence, the area without internal borders initially developed outside the legal order of the EU. Nevertheless, it should be noted that the Schengen Agreement remained firmly linked to the idea of a 'People's Europe'. In the preamble, the participating States underlined that 'the ever closer union of the peoples of the Member States of the European Communities should find its expression in the freedom to cross internal borders for all nationals of the Member States' and referred to the statement of the Fontainebleau European Council on the abolition of police and customs formalities for people and goods crossing intra-Community frontiers.

The Convention Implementing the Schengen Agreement (CISA), signed by the five initial participating States as well as Spain and Portugal, further expanded upon the objective of abolishing internal border controls, and laid down detailed provisions regarding the accompanying measures. These measures consisted of rules on the crossing of external borders, partial harmonization of visa policy, the rights of free circulation for non-EU nationals in the territory of the contracting Parties and the assignment of responsibility for the processing of asylum claims in their territory.[25] The Agreement was actually put into effect in 1995, from which moment on border controls between the participating States were abolished. A long period of inter-governmental cooperation between the participating states ensued, driven by the Schengen Executive Committee, made up of the Justice and Home Affairs ministers of the participating States, and the Central Group, composed of senior officials. Over the course of time more Member States joined Schengen (Italy, Greece, Denmark, Austria and Sweden), as did two non-Member States (Norway and Iceland).[26] Eventually, the Treaty of Amsterdam integrated the Schengen *acquis* (the Convention and the subsequent decisions by the Executive Committee) into the EU legal order, together with (formerly third pillar) EU legal instruments on immigration and asylum.

Legal acts taken in the framework of Schengen were assigned a legal basis in the Treaties, and the bulk of these acts – measures dealing with the abolition of internal

[25] It entered into force in September 1993.

[26] Currently, all EU Member States participate in Schengen, with the exception of the UK and Ireland. In addition, Norway, Switzerland and Iceland participate as non-EU Member States.

borders and so-called flanking measures regarding visas, free movement by third-country nationals, illegal migration and (the management of) external border control – became based on Articles 77 and 79 TFEU.[27] Since then, EU measures in the area of border control and free movement within the Schengen area, visa policy and illegal migration have been considered as building upon the Schengen *acquis*, while none of the measures regulating legal immigration by third-country nationals or concerning asylum have been considered as such.[28] This distinction between rules addressing legal immigration and asylum on the one hand, and measures dealing with controlling access to EU territory, external border control and illegal migration on the other – where only the latter are designated as forming part of the Schengen *acquis* (and thus directly connected with the abolition of internal border control within the EU) – is in contrast with the approach originally advocated by the Commission. As we have seen above, the Commission had urged Member States to coordinate rules on legal migration (including access to employment of third-country nationals) even before the completion of the internal market was envisaged.

The rather narrow focus of this chapter, zooming in on the legal regulation of access to Schengen territory by non-EU citizens and their exclusion from it in the case of irregular migration, thus coincides perfectly with the Schengen *acquis* in the area of immigration by third-country nationals. As explained above, these instances of the regulation of human mobility are among the most tangible forms of migration control, and as such they are most closely bound up with the notion of sovereignty. Interestingly, when seen from this perspective, it is perhaps not surprising that Schengen served as the perfect incubator for the development of European measures concerning access to EU territory, external border control, and illegal migration. Apart from the fact that the guarding of the external border must almost by definition become a shared responsibility once internal border control is abolished, the one-dimensional emphasis on control and exclusion in the Schengen *acquis*, can be explained by taking a closer look at the intergovernmental origins of Schengen cooperation and contextualizing it within the precise period in which it gained momentum.

While economic incentives may have pushed for initial Schengen integration in the early 1980s, at least as regards the abolition of internal border checks, cooperation between states with regard to what were originally intended as 'flanking measures' was soon driven by a different (and independent) rationale: national concerns over increasing immigration from outside the EU, which became especially urgent in the years after the fall of the Berlin Wall. The result was that these flanking measures acquired their own raison d'être – their development was driven by national states' desire to curtail, contain and limit immigration. And where supranational legislative procedures and the existence of judicial powers of the Court of Justice in this area could possibly have served as some sort of correction mechanism by emphasizing the importance of a coherent policy on immigration for establishing an area without internal borders, the intergovernmental character of cooperation ensured that States and their governments

[27] Matters concerning police and judicial cooperation became covered by the then Third Pillar of the EU.

[28] S. Peers, 'The Future of the Schengen System', Swedish Institute for European Policy Studies, Report No. 6, Nov. 2013, at 15.

took into account little more than their own national interests in protecting national territory from unwanted immigration.[29]

Indeed, and as has been described extensively elsewhere, it was precisely the absence of judicial checks and democratic accountability that provided an important incentive for immigration control authorities to pursue policymaking at the European (Schengen) level.[30] This is not to say that Schengen did not lead to some shifts in the nature of political authority, and more particularly its relationship to territory: it actually did – in spite of the fact that intergovernmental cooperation was driven by the wish to enhance national sovereignty over territory. An example of such a shift is provided by the legal obligation to take the shared responsibility for external border control seriously: the CISA provided for an obligation to refuse a person entry if one of the entry conditions mentioned there had not been fulfilled. However, in many other instances of exclusion, for example with regard to irregular immigration, no such shifts were visible. Hence, under the CISA, a Member State was under no obligation to expel a third-country national who was illegally present on national territory.[31]

Since these intergovernmental beginnings, however, considerable time has passed. For the purposes of this chapter, it is interesting to examine how EU laws on exclusion have subsequently developed, after their incorporation within a supranational legal order. Schengen now forms part of the EU legal order, and rules building upon the *acquis* are subject to the ordinary legislative procedure. Besides, there are no longer any restrictions on the powers of the Court of Justice in this area.[32] How do the current rules regulating access to and exclusion from EU territory relate to national decision making with regard to border control? How has the Court of Justice perceived the relationship between the national and the European legal orders in this field? And what does the way in which these legal orders interact tell us about the current configuration of political authority in the EU? In order to answer these questions, the next section will discuss the three main legal instruments on territorial exclusion that have been adopted under Articles 77 and 79 TFEU.

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[29] Incoherence between asylum policies and other migration policies led to other kinds of difficulties later on, in particular with regard to solidarity between Member States in dealing with the so-called refugee crisis, starting with Franco-Italian tensions over migrants reaching Europe in the wake of the Arab Spring and reaching a high point in 2016. See Cornelisse (2014).

[30] A. Geddes (2001), 'International Migration and State Sovereignty in an Integrating Europe', *International Migration* 39: 21–42, at 28; C. Boswell (2003), 'The External Dimension of EU Immigration and Asylum Policy', *International Affairs* 79: 619–38, at 623; V. Guiraudon (2003), 'The Constitution of a European Immigration Policy Domain: A Political Sociology Approach', *Journal of European Policy* 10: 263–82.

[31] Joined Cases C-261 and 348/08, *Zurita Garcia* and *Cabrera*, [2009] ECR I-10143.

[32] The Treaty of Amsterdam provided for some transitional arrangements, according to which the jurisdiction of the Court of Justice was limited.

IV. TRANSNATIONAL REGULATION OF ACCESS TO, AND EXCLUSION FROM, EU TERRITORY

This section will deal with three key European instruments regulating access and exclusion from EU territory: the Schengen Borders Code (SBC), the Visa Code and the Return Directive. It will also consider the case law of the ECJ concerning the interpretation of these instruments.[33] The SBC and the Visa Code are based upon Article 77(2) TFEU, which provides the legal basis for legislative measures regarding, among others, a common policy on visas and other short-stay residence permits and border control. The Return Directive has been adopted on the basis of Article 79 TFEU, which provides the legal basis for measures in the area of illegal immigration and unauthorised residence.

The SBC contains detailed rules on the absence of internal border control, and rules governing border control of persons crossing the external borders of the EU. According to Article 3, the SBC applies to any person crossing the internal or external borders of a Member State of the Schengen area.[34] It establishes a prohibition on internal border checks in Article 20, and it sets out the conditions for entry of third-country nationals at the external borders in Article 5. Article 5 SBC puts down the following conditions for entry by third-country nationals: they should be in possession of valid travel documents and a visa if so required by EU law; they should justify the purpose and conditions of their stay and have sufficient means of subsistence; they have not been the subject of an alert in the Schengen Information System for the purpose of refusing entry; and they are not a threat to public policy, internal security, public health or the international relations of any of the Member States. If the conditions for entry are not met, entry should be refused, according to Article 13 SBC. The strict obligation of Member States to actually exercise the power to exclude was confirmed by the ECJ.[35] However, the obligation to refuse entry has a reverse side as well: according to the ECJ, a Member State is not allowed to 'refuse a third-country national entry to its territory by applying a condition that is not laid down in the Schengen Borders Code'.[36] A European definition of entry conditions is required by the fact that 'border control is in the interests not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border controls'.

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[33] This chapter does not look at instruments that aim at the 'operational coordination at the external borders'. Instruments that have been adopted in this context (such as Frontex Regulation (EC) No. 2007/2004, Eurosur Regulation (EU) No. 1052/2013, and the Sea Borders Regulation (EU) No. 656/2014) In this chapter I am primarily interested in the way in which the power to exclude is legally regulated in overlapping legal orders, not in its actual enforcement. The legal instruments providing for operational coordination and exchange of information have, however, given rise to fascinating case law concerning differentiated integration (with the UK wishing to opt in): see most recently Case C-44/14, *Commission v. Spain*, judgment of 8 September 2015. For more on differentiated integration and ECJ case law on these instruments, see Cornelisse (2014).

[34] See Article 3 SBC. See also Case C-606/10*, ANAFE*, judgment of 14 June 2012, para. 34.

[35] Case C-6060/10, *ANAFE*.

[36] Case C-575/12, *Air Baltic*, judgment of 4 September 2014, para. 69.

The third paragraph of Article 13 SBC provides that persons refused entry shall have the right to appeal against such refusal. According to the ECJ, Article 13 does not provide a right of appeal against infringements committed in the procedure leading to the adoption of a decision authorizing entry. However, by underlining that, while performing their duties, border guards are required, inter alia, to fully respect human dignity according to Article 6 SBC, the ECJ left open the possibility that other provisions of EU law would provide for such a right. Member States are thus obliged to provide for the appropriate legal remedies to ensure, in compliance with Article 47 of the Charter, the protection of persons claiming the rights derived from Article 6.[37]

It thus seems on the face of it that the SBC has fully harmonized the rules regarding external border control, and that EU law completely dictates the conditions under which access to territory must be granted or refused. However, it is worth drawing attention to the exceptions to Member States' duty of strict border control contained in the SBC. To start with, it gives a Member State the power to deviate from the obligation to refuse entry on the grounds of humanitarian considerations or international obligations.[38] More specifically, it emphasizes that EU asylum law has precedence over Member States' obligations with regard to border control.[39] Furthermore, it states that the obligation to refuse entry shall also be without prejudice to the issue of long-stay visas. As we shall see below, the power to issue long-stay visas remains wholly within Member State competence.[40]

According to Article 5 SBC, possession of a valid visa is a condition for entry (if EU law requires so). EU policy on short-stay or transit visas has formed a crucial element of Schengen since its very beginning. It consists of a regulation setting out uniform criteria for considering applications for short-term visa applications, the so-called Visa Code;[41] a Regulation defining a list of third countries whose nationals do not need a visa to visit the Schengen States;[42] and a Regulation that establishes the Visa Information System (VIS), providing for the digital exchange of visa data between the Member States and associated countries applying the common visa policy.[43] I will only focus on the Visa Code here.

The common visa policy is presented by the Visa Code 'as part of a multi-layer system aimed at facilitating legitimate travel and tackling illegal immigration through further harmonisation of national legislation and handling practices at local consular missions'.[44] According to Article 1 of the Code, it establishes the procedures and

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37 Case C-23/12, *Zakaria*, judgment of 17 January 2013, para. 40.

38 Article 5(4). See also ANAFE, para. 39.

39 Article 13(1) SBC and ANAFE, para. 40.

40 Article 13(1) SBC.

41 Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas.

42 Council Regulation (EC) No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

43 Regulation (EC) No. 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning theVisa Information System (VIS) and the exchange of data between Member States on short-stay visas.

44 Recital 3 in the Preamble.

conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding three months in any six-month period. If an application for a short-term visa is in actual fact made with a view to gaining access to the territory of the Member State in order to apply for a right to stay exceeding these three months, such an application falls outside the scope of the Visa Code.[45] Applications for long-term visas fall, for the most part, solely within the scope of national law.

In the examination of an application for a uniform visa, Member States shall ascertain whether the applicant fulfils the entry conditions set out in Article 5 of the SBC (see above), and particular consideration shall be given to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the Member States, and whether the applicant intends to leave the territory of the Member States before the expiry of the visa applied for. Article 32 of the Code lists the grounds for refusal of a visa. Most of these grounds for refusal mirror the entry conditions provided in Article 5 of the SBC. Thus, a visa shall be refused if the applicant: presents false travel documents; does not provide justification for the intended stay; does not provide proof of sufficient means of subsistence; has already spent three months of the current six-month period on EU territory; is a person for whom an alert has been issued in the Schengen Information System for the purpose of refusing entry; is considered to be a threat to public policy, internal security or public health; does not provide proof of medical insurance; or if there are reasonable doubts as to the authenticity or veracity of the supporting documents submitted by the applicant, the reliability of his statements or his intention to leave EU territory before the expiry of the visa that is applied for. If one or more of these circumstances present themselves, Member States are obliged to refuse a visa. Article 32(3) accords applicants who have been refused a visa the right to appeal.[46]

Just as the SBC does, the Visa Code imposes a strict duty upon Member States to exercise their power to exclude. The national discretion to exercise border control has accordingly turned into a European obligation of control. This is also apparent from the requirement in the Visa Code that a visa should be annulled by the issuing Member State in the case that it was fraudulently issued, or where the conditions for its issue were not met.[47] However, and this is also similar to the system set up by the SBC, the ECJ has held that Member States cannot refuse to issue a uniform visa by relying on a ground not provided for in the Visa Code. The Court pointed to Article 34 of the Visa Code, according to which a visa can be annulled or revoked by Member States other than the State which issued the visa, in order to argue that the conditions for the issue of uniform visas should be considered to be harmonized, ruling out differences between the Member States as regards the determination of the grounds for refusal.[48] It also emphasized the Code's aim of facilitating legitimate travel, which would be jeopardized if Member States were free to add extra grounds for refusal, and called attention to the

[45] Case C-638/16 PPU, judgment of 17 March 2017, para. 43.

[46] The ECJ will probably clarify the extent of the right to appeal against refusal of visa in the pending Case C-403/16.

[47] Case C-83/12 PPU, *Vo*, judgment of 10 April 2012.

[48] Case C-84/12 *Koushkaki*, judgment 19 December 2013, para. 45.

probability that such a situation would lead to visa shopping.[49] Moreover, it highlighted the Code's objective of preventing different treatment of visa applicants, which is mentioned in recital 18 of the Preamble.[50]

However, the kind of harmonization the ECJ has in mind may in fact not be capable of bringing about equal treatment of visa applicants over the entirety of the Schengen territory. This is because it has at the same time sanctioned extensive national discretion in applying the conditions for refusal of a visa. In the eyes of the ECJ, assessment of a visa applicant's individual position must be 'scrupulous since any issue of uniform visa allows the applicant to enter the [Schengen] territory'.[51] Therefore, Member State authorities, when examining visa applications, enjoy a wide discretion relating to the conditions for the grounds of application refusal, and also to the assessment of the relevant facts. From the very wording of Articles 21(1) and 32(1) of the Visa Code, the ECJ deduced the intention of the European Union legislature as being to leave a wide discretion for national authorities. These provisions oblige national authorities to 'assess whether the applicant presents a risk of illegal immigration', to give 'particular consideration' to certain aspects of their situation and to determine whether there are 'reasonable doubts' as regards certain factors.

As such, harmonization in the rules regulating access to EU territory appears to involve the supranationalization of national executive discretion. This is fundamentally different from mere endorsement of national discretion by EU law, because the sanctioning of discretion on the part of the executive is directly linked with a strict obligation dictated by EU law (to refuse entry/to grant a visa, etc) on the part of the Member State concerned. A similar mechanism is at work in the application of the Return Directive, as we shall see below.

The Return Directive aims to harmonize the rules applicable to third-country nationals who are unlawfully present in the Member States. It was meant to strengthen EU efforts to return these individuals to their countries of origin. The ECJ has affirmed this objective by underlining in its case law on the Directive the importance of an effective removal policy.[52] The Directive defines 'illegal stay' as the presence on a Member State's territory of a third-country national who does not fulfil, or no longer fulfils, the conditions of entry as set out in Article 5 of the Schengen Borders Code, or other conditions for entry, stay or residence in that Member State. Member States are under an obligation to issue a return decision to third-country nationals illegally staying on their territory.[53] As a general rule, the return decision provides for a period of seven days during which the third-country national can depart voluntarily.[54] Illegally staying third-country nationals who have not departed voluntarily after being issued with a return decision may be removed.[55] Detention may be used in order to secure removal,

[49] Ibid., paras 52 and 53.
[50] Ibid., para. 54.
[51] Ibid., para. 59.
[52] See for example Case C-61/11 PPU, *El Dridi*, judgment of 28 April 2011.
[53] Article and see also Case C-38/14, *Zaizoune*, judgment of 23 April 2015.
[54] Article 7 Return Directive (RD).
[55] Article 8 RD.

under a number of strictly regulated conditions.[56] If a third-country national has refused to leave voluntarily, they will be served with an entry ban, a decision prohibiting entry and stay in the whole Schengen area during a specified period. Member States are free to issue such an entry ban for other reasons, too.[57] The Directive accords third-country nationals a right to an effective remedy to appeal against or seek review of decisions related to return.[58]

The Return Directive seems to regulate the relations between the European and national legal orders in a comparable way to the SBC and the Visa Code. Thus, there is a strict obligation on the part of Member States to issue with a return decision, and ultimately remove, illegally staying third-country nationals; this has been affirmed by the ECJ with reference to the principles of effectiveness and loyal cooperation.[59] At the same time, the Directive gives them the right 'to decide at any moment to grant an autonomous residence permit or other authorization offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory'.[60] The strict duty to exercise exclusionary powers once a person's stay is illegal is therefore accompanied by a significant degree of national discretion, similar to the way in which the SBC contains exceptions to the obligation to refuse entry, and to the discretion the Visa Code grants national authorities in applying the conditions for refusing a visa.

V. RELATIONS BETWEEN THE EUROPEAN LEGAL ORDER AND THE NATIONAL LEGAL ORDERS

In this section I will argue that the transfer of lawmaking powers in the area of border control from the national to the European level has led to the disassembly of the power to exclude, and simultaneously dispersed its territorial effects. As we have seen, the power to exclude immigrants is bound up with sovereignty, in both its internal and external manifestations. The ECJ has consistently justified full harmonization in this area by appealing to what I will call shared territoriality. Shared territoriality connotes a process according to which the logic of an area without internal borders leads to the external border turning into a national border of all Member States. In the first place, shared territoriality gives rise to superterritorialization of national decision-making. The instrument of the entry ban in the Return Directive exemplifies such superterritorialization of national immigration law: national law determines the conditions under which such an entry ban can be imposed, but it is valid for the entire Schengen area. Superterritorialization of national law in the EU seems to apply mainly when it concerns the power to exclude, and not when it concerns inclusion. Thus, when a Member State wants to depart from the conditions for granting a visa as provided in the Visa Code – for humanitarian reasons, for example – the visa granted

[56] Article 15 RD.
[57] Article 15 RD.
[58] Article 13 RD.
[59] Case C-38/14, *Zaizoune*.
[60] Article 6 para. 4 RD.

has limited territorial validity: valid only for the territory of the Member State that has issued the visa.[61]

Secondly, it has become apparent from the discussion above that shared territoriality has only had a limited impact on substantial powers to exclude by the Member States. Indeed, the European instruments of border control discussed above harbour significant room for the exercise of national discretion in granting third-country nationals access to EU territory, or in excluding them from it. In the first place, this is so because all these instruments contain important exceptions to the obligation to return or to refuse entry or a visa. Secondly, the ECJ has explicitly authorized the exercise of national discretion in applying the conditions for inclusion/exclusion. And lastly, the power to decide about legal migration and long-stay visas remains largely a Member State prerogative. Interestingly, the ECJ case law seems to provide an almost precise mirror to the federalist move that was apparent in the US Supreme Court case law at the beginning of the twentieth century, in which the formulation of the plenary powers doctrine aimed to ensure federal control over immigration and resulted in immigration becoming a political question with little possibility of judicial resolution.[62]

The development in Europe is the opposite, as Member States retain substantial decision-making powers over who to admit or not, most clearly corroborated by the fact that they preserve their powers with regard to long-term legal migration,[63] but also evidenced by the scope for national discretion in European legal instruments. At the same time, the exercise of such external sovereignty is considerably limited by requiring States to justify their decision making according to the format provided by European laws. This can be seen as a form of 'juridification' or legalization of migration control.[64] Juridification is the inevitable result of harmonization, because harmonization forces the EU legislature to codify rules in an area large parts of which have traditionally not been not regulated by the formal laws of the nation state. Juridification can be seen in the fact that EU law requires states to justify exclusion by referring to a limited set of requirements. Notwithstanding the discretion they enjoy, they need at the very least to argue that exclusion fits within the categories provided by EU law. Furthermore, European instruments of border control provide third-country nationals with a right to appeal against their exclusion, a right that has largely not been recognized in international or national legal orders.[65] However, juridification or

[61] Articles 25 and 2 para 2 under 4 Visa Code. It may exceptionally be valid for the territory of more than one Member State, but *only subject to the consent of each such Member State*.

[62] See for an overview D. A. Martin (2015), 'Why Immigration's Plenary Power Doctrine Endures', *Oklahoma Law Review* 68(1): 29–56.

[63] According to Article 79 para. 5 TFEU, the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work is not affected by EU law.

[64] See L. Kamar (2015), *Contesting Immigration Policy in Court: Legal Activism and Its Radiating Effects in the United States and France*, Cambridge: Cambridge University Press, and L. Kawar, 'Commanding Legality: The Juridification of Immigration Policy Making in France', *Journal of Law and Courts* 2(1): 93–116, for the symbolic power of legal forms in this particular policy area.

[65] See Case C-166/13, *Mukarubega*, judgment of 5 November 2014; and Case C-249/13, *Boudjlida*, judgment of 11 December 2014.

legalization goes further than that, in some instances even amounting to what one could call the constitutionalization of the power to exclude. Thus, EU law has in some instances required Member States to justify the exercise of external sovereignty in the form of border control in ways that are unparalleled in domestic or international legal discourse. A particularly good example of such constitutionalization is provided by a case in which the ECJ was asked to clarify the rules on voluntary return in the Return Directive.[66]

As we have seen, according to the Directive, a return decision shall provide for an appropriate period for voluntary departure of between 7 and 30 days. However, Article 7(4) of the Return Directive lists some exceptions to the general rule of voluntary departure: Member States may refrain from granting such a period or shorten it to less than seven days, for example if the person concerned poses a risk to public policy, public security or national security. The ECJ has held that states may only shorten or refrain from granting a period for voluntary departure on the grounds of public policy if 'the personal conduct of the third-country national concerned poses a genuine and present risk to public policy'.[67] It is highly significant that the ECJ has placed the right to voluntary return firmly within a fundamental rights context, by designating an appeal to public policy in the context of Article 7(4) as a derogation 'from an obligation designed to ensure that the fundamental rights of third-country nationals are respected when they are removed from the European Union'.[68] As a result, the ECJ continued, this derogation has to be interpreted strictly. When a Member State relies on the concept of a risk to public policy, the burden of proof for the existence of such a risk rests on the Member State. Consequently, a Member State may not rely on a mere criminal conviction or suspicion that a person has committed a crime, without taking account of the third-country national's personal conduct, in order to rely on the exception provided for in Article 7(4).

This case shows that EU law requires that whenever coercion is used in order to exercise the state's sovereign right to exclude, such coercion is to be justified on a case-by-case basis, in which the principle of proportionality is fully respected. This approach has also been apparent from the ECJ case law on detention on the basis of the Return Directive.[69] This is so even when these laws, as is the case with the Return Directive, operate from an assumption of the legitimacy of the right to exclude as such. Over time, the requirement that the exercise of concrete instances of state power, whatever its context, is subject to usual constitutional procedures and norms will impact significantly on Member States' immigration enforcement policies, which so far have to a large extent been exempt from these procedures and norms.[70] As already

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[66] Case C-554/13, *Zh. and O.*, judgment of 11 June 2015.

[67] Ibid., para. 50.

[68] Ibid., para. 48.

[69] See for an overview Cornelisse (2016), *The Constitutionalisation of Immigration Detention: Between EU Law and the European Convention on Human Rights*, Global Detention Project Working Paper No. 15, Geneva.

[70] International human rights law does not regulate the power to exclude as such, only doing so when it has implications for some limited amount of human interests going beyond mere freedom of movement, such as represented by the right to asylum, the prohibition of refoulement in the case of torture, inhuman, or degrading treatment, the right to family life and the

touched upon above, such exemption can be traced back to the fact that the power to exclude immigrants has mostly been designated as a manifestation of external sovereignty, the exercise of which has generally been largely immune to conventional forms of constitutional control.

VI. CONCLUSIONS

By focusing on the legal regulation of border control in the EU through the lens of legal pluralism, I have been able to show that the transfer of lawmaking competences from the national to the EU level has had a number of consequences for the nature of political authority in Europe. In the first place, the interaction between the legal order of the EU and those of the Member States has given rise to a superterritorialization of national decision making, where shared territoriality means that various legal orders are free to determine the conditions under which exclusion from shared territory takes place. In some instances this is the result of the fact that harmonization in this area consists largely of procedural harmonization, for example in the case of the Return Directive, instead of a more substantial harmonization regarding the conditions under which the stay of a third-country national may become (il)legal.

Secondly, the ECJ has sanctioned extensive administrative discretion in national decision making over who has access to and who is excluded from European territory. Thus, integration in this area has resulted in the supranationalization of national executive discretion, both with regard to the granting of rights to third-country nationals and with regard to controlling their entry and stay. This is different from mere endorsement of national discretion by EU law, because the sanctioning of discretion on the part of the executive is directly linked with a strict obligation (to refuse entry/to grant a visa, etc) on the part of the Member State concerned. It is a contradictory development because the European judicial system does not have a mechanism to deal with the resulting fragmentation regarding the substantial conditions under which access to shared territory is granted.[71]

Thirdly, integration has resulted in legalization or juridification of an area large parts of which have traditionally been outside the ambit of legal regulation, both in the national and the international legal orders. As such, European integration has profoundly paradoxical effects on the power to exclude: by reinforcing the external sovereignty of the Member States, it has simultaneously contributed to superterritorialization and juridification of the exercise of such sovereignty. Juridification in turn means that the exercise of external sovereignty may become subject to some of the constitutional constraints that have usually applied solely to the exercise of internal sovereignty. Current theories of constitutional pluralism fail to do justice to the complexity of the picture that has emerged, for a number of reasons. In the first place, they focus in abstract terms on competing claims to ultimate authority, without being

prohibition on collective expulsion. National laws have generally also not regulated the power to exclude beyond these few interests, thus resulting in immigration policies being a 'constitution-free zone'.

[71] Cornelisse (2014), p. 767.

explicit about the ideological assumptions underlying such claims. Accordingly, and paradoxically, by emphasizing that new developments such as European integration require new ways of imagining constitutionalism, they have replicated some of the comforting myths of the nation state, for example regarding the 'mutual exclusivity of peoples, territories and jurisdictions which was emblematic of the original modernist Westphalian constitutional form'.[72] Secondly, their focus on large constitutional questions has resulted in a lack of attention to how sovereign power is regularly and habitually enacted in contexts where its very essence may be at stake, but in much more implicit and subtle ways than can be captured in the language of conflicting plausible claims to ultimate legal authority. As a result, they fail to convey the messiness that emerges in the everyday operations of legal pluralism, as I have attempted to describe in this chapter.

[72] Neil Walker, quoted in M. Avbelj and J. Komárek (2008), *Four Visions of Constitutional Pluralism*, EUI Working Paper Law 2008/21, at 8.