

## **Does the dividing line between 'high' and 'low' politics mark the limits of European integration? - The case of Justice and Home Affairs**

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The development of justice and home affairs (JHA) as a European Union policy-making field has gone from a pragmatic and unobligated type of collaboration outside the European Community towards a closer cooperation within the EU. Effective 'laboratories' such as the Council of Europe, TREVI and Schengen have been active parts in the development. Further, we can see driving factors as overcoming transnational challenges, spillover effects from the internal market and Europeanization contributing to the quite rapid development of the JHA. Still, there is a way to go for creating an effective arena of freedom, security and justice in Europe. There is evidence that the partition of 'high' and 'low' politics confines the European integration, put in proof from the more lately British, Irish and Danish opt-outs from the Reform Treaty. I will in this essay give a brief historical overview of the historical development of the JHA, then a more analytical approach for understanding the status-quo and I will use the Reform Treaty as an example of my belief that state sovereignty still is valid as a restraint for transiting this area from intergovernmentalism into the Community method.

An important object of the European Union is to offer an area of freedom inside without internal borders. The area of justice and home affairs can be stated as crucial to develop a legitimate area of freedom, with protected individual rights and countered organized crime. Supranational execution on Justice and Home Affairs (JHA) is a challenge for the EU. This area of high politics is in the core of the nation states, where the democratic state has a monopoly on the legitimate use of force. The strong connection between the nation state, the control of the police and the area of state jurisdiction is a hindrance to cross-border cooperation and emitting state power at the expense of the EU-level (Ahnfelt 2006).

High politics is by definition the Hobbesian ingredients that matters to the very survival of the nation state, as national and international security concerns. Policing,

criminal law and immigration policy are matters of such concerns (Kostakopoulou 2006). Low politics are matters of more economical and cultural concerns, not threatening to the viability of the nation state. This can be economic integration, the single market program, and EU social and environmental regulation (Hix 2006).

The origin of the JHA cooperation goes back to the 'swinging sixties', a period of economic growth, and initiatives set up to tackle fraud within the Community, advance judicial cooperation and a strengthening of the customs authorities. Further, political extremism led the way of an establishment of the TREVI (terrorism, radicalism, extremism, violence international) in 1975, a forum where the states could exchange strategies and expertise in counterterrorism. The TREVI as a laboratory paved the way for the third pillar structure developed through the Maastricht treaty and also the Europol is today seen as both a product of the TREVI cooperation and the Union's third pillar (Kostakopoulou 2006, Monar 2003). In the second phase of development, the establishment of the internal market had spillover effects to the JHA area. The abolition of internal borders required compensation in form of tightened external border controls and internal surveillance. The Schengen Agreement was established, an initiative concerning the external border frontiers, visa harmonization and common rules on asylum and migration-related issues. The removal of physical control of the four freedoms makes it more difficult for the national governments to pursue independent policies on the area. As stated by Hix (2006); *Open internal borders means that one government's immigration policy has a potential impact on the number of migrants to other EU states.* This gives an incentive to handle the migration policy collectively through a 'burden-sharing'. The costs of common initiatives and public goods are being shared by the member states (Hix 2006). The countries did not just need necessary common mechanisms and standards, but they also needed the confidence in each other's capacities of guarding their respective parts of the external borders of the Schengen area (Monar 2003). The creation of Schengen is supported by both the liberal intergovernmentalist, claiming that states will only cooperate if they have similar interests, and the neofunctionalists stating that rather than self-interest, this is a spillover effect due to common interests shared by the member states.

Schengen was the primary laboratory for the European JHA cooperation, parallel with the framework of the European Community. The building of a culture of trust

were seen as highly important for a further development, and it seemed to outweigh the accountability and transparency deficit associated with its development. The exclusion or limited control by the European Court of Justice (ECJ) on European level areas shows that institutions, once created, do not take on a life of their own, with automatic spillover effects. Opt-outs from the ECJ rulings undermine the legal order of the EU and reduce the accountability and transparency within the area, and can be explained by liberal intergovernmentalism. The member states cooperate only if similar interest and this can be used for understanding the difficulties of cooperation on the high politic issues (Kostakopoulou 2006, Monar 2003).

With the Maastricht Treaty in 1992, under the established third pillar, the EU's new intergovernmental structure collected visa policy, immigration, right of asylum, judicial cooperation, customs and police cooperation under one scope, and Europol was founded. The treaty opened for transferring JHA into the first pillar, but bargaining made them the areas accepted as a part of the intergovernmental method, with unanimity as the rule in the new Council. The Commission got the right to initiate alongside the member countries in low politics areas, whereas in high politic areas, it had an observer status (Kostakopoulou 2006, Ahnfelt 2006).

The Amsterdam Treaty (1997) transferred migration-related issues into the first pillar<sup>1</sup>, while police and juridical cooperation still remained an intergovernmental issue in the third pillar<sup>2</sup>. The term JHA was replaced by an area of freedom, security and justice (AFSJ). Even though AFSJ reached over both the community and the third pillar, giving up state sovereignty was not acceptable to most member states. Within the third pillar, the Commission, Parliament and the ECJ have over time acquired more influence, but it is still limited (Kostakopoulou 2006, Ahnfelt 2006).

As mentioned, another obstacle to cooperation in the third pillar, which is not an issue of state sovereignty, is the issue of mutual trust and cooperation in the areas of information handling and exchange. Communication is an important mean and cooperation includes language, technical, and formal possibilities. A deeper European integration also requires such issues to be handled, not exclusively issues

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<sup>1</sup> Title IV in TEC; Strategic Committee on Immigration, Frontiers, and Asylum, High Level Working Group on Asylum and Immigration and the Committee on Civil Law Matters

<sup>2</sup> Title VI in TEU; Police and Customs Cooperation, Juridical Cooperation in Criminal Matters and Multidisciplinary Working Group on Organized Crime (MDG)

of high politics. Law enforcement agencies are national and they are unable to cross internal EU borders. There is lack of trust between different police forces, and each police force might be insisting on protecting its own sources of information. Further, if governments need to allocate resources to combat international crime, there must also national care needs to be taken in the same time. Politicians want to win national elections and can be unwilling to divert resources away from their own country. (ibid, ALDE 2008).

AFSJ is supposed to be based on the principles of transparency and democratic control. The social constructivist argument of having a dialogue and support from EU-citizens, the people in the civil society, is important to strengthen citizen's acceptance and support. When this policy area is more legitimized in the civil sphere, the increased support can be an integrative factor. Institutional actors have learned that the appropriation of associational claims and interests can improve their credibility and strengthen their position (Ahnfelt 2006, Eder and Trenz 2003).

The new Reform Treaty is to continue the working on the AFSJ. Britain has decided to exercise an opt-out in the areas of criminal law and police cooperation, and the Irish Minister of Foreign Affairs claimed they also needed an opt-out because they have the same common law systems, different from traditions existing within the Union. Because of the British decision to absent itself from justice measures, "*the Government had to weigh up its options and to decide on the best course of action*". The mandate for the current negotiations gave Ireland the opportunity to join the new opt-out on criminal law and police cooperation. "*As Justice and Home Affairs is a relatively new area of EU activity, we have decided to review our participation in this particular opt out after three years. This will give us a chance to see how European policy evolves under the new Treaty arrangements and to make a fuller assessment of the potential risks to aspects of our common law system*" – a quite clear statement of protecting the nation's sovereignty (Irish Times 2008). The UK states that the most important veto abolition comes in the area of AFSJ, since the where police and judicial cooperation in criminal matters will now be subject to qualified majority voting. Therefore they have an opt-out from the Charter of Fundamental Rights and are exempted from the AFSJ in the Reform Treaty (EU Observer 2008, BBC 2008). Denmark has an opt-out from this area, and the UK has negotiated the right to pick and choose which EU policies to sign up to. If the UK do

not sign up to a piece of legislation, they will not be affected by any rulings made by the ECJ interpreting that legislation. Britain has secured the ability to opt in to new EU policies on justice and home affairs on a case by case basis to stop it being used to change British law and to protect British sovereignty (BBC News 2008, Times online 2008).

Even though effective laboratories have been active parts in the development and with contribution from driving factors as spillover effects, there still are hindrances for using the Community method on high politic issues. The EU development of justice and home affairs has gone through several phases since the early days of ad hoc cooperation. Threat from political extremism legitimated TREVI, Schengen compensated for the removal of the internal borders and the Amsterdam Treaty transferred migration-issues into the supranational level. This indicate that the development of JHA have been through steps from a fair collaboration, to a step where member states have agreed to some supranational agenda setting and transferring some power to the EU-level. But if looking at why this has happened, I would state that the states have cooperated because they had similar interests. TREVI was to combat extremism the nation state could not manage in the same order themselves. Migration-policy was collectively solved through a 'burden-sharing', reducing costs for the member states since one government's immigration policy has a potential impact on the number of migrants to other EU states. But as seen with the Reform Treaty and the opt-outs, there is evident statements of that the division of high and low politics still mark the limit of European integration.

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