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Veröffentlichungsversion / Published Version
Arbeitspapier / working paper

gesis
Leibniz-Institut
für Sozialwissenschaften

Mitglied der
Leibniz-Gemeinschaft

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The Democratic Legitimation of Immigration Control

CENTER ON MIGRATION, CITIZENSHIP AND DEVELOPMENT

2004

Structure

1   Introduction

The main concerns of this research project are changing *processes of legitimation* in Democratic Constitutional Interventionist States (DCIS) in the light of increasing internationalisation and nationalisation. The majority of research on the democratic legitimation of power in nation states is interested in the polity *per se*. Available studies either focus on the acceptance of the political system by its citizens, on the performance of its main institutions or on an assessment of whether a political order and its constitutive elements meet normative democratic criteria. Most of these studies apply a conventional understanding of political institutions, analysing the control function of parliaments (Harfst and Schapp 2003), the role of political parties (Klingemann, et al. 1994), interest groups (Weßels 2000), governments or the public sphere (Ferree, et al. 2002) and to what degree these institutions meet norms laid down by democratic theory. The project presented here develops a new approach, taking policies as its starting point. The focus is thereby not on particular institutions of a political system, but on the democratic process of policy-making (Fuchs 1993). Attention is therefore directed to the various involved institutions and actors (governments, parliaments, political parties, bureaucracies, interest groups, mass media and social movements) and their roles in these processes. This approach, which shall henceforth be called the *democratic process approach*, is expected to provide new insights into the changing processes of legitimation. Its strength lies in the fact that it gives a more complete picture of political processes, going well beyond the usual focus on election processes (Przeworski, et al. 1999), and in a more demanding normative notion of democratic legitimacy. While on the one hand this approach allows an analysis of legitimation processes in modern democratic nation states, focussing here on the arrangement of democratic processes in DCIS's during their most successful period, on the other hand its focus on policy-making processes provides better information on democratic legitimation in highly fragmented multi-level polities brought about by European integration. It allows an analysis of evolving forms of democracy beyond the nation state while still interrelated with it (Dahl 1994; Held 1991; Zürn 2000). Therefore, the democratic process approach is particularly appropriate for tracing how national legitimation processes are changing under the increasing pressures of internationalisation and nationalisation.

At the centre of our analysis are policies of immigration control. Immigration control policies include all forms of national regulation, but also supranational institutions such as the European Union (EU), that deal with entry into and exit from their respective territories. For analytical purposes, these regulations can be differentiated into five separate policy areas.

These are (1) policies concerning the entry and exit of labour migrants, (2) asylum seekers and refugees, (3) regulations governing family reunification, (4) ethnic migrants as well as (5) policies aimed at reducing and combating irregular migration. Immigration control policies are of particular relevance to the study of processes of legitimisation for a number of reasons. Firstly, only in recent years have migration scholars begun to reveal some of the essential legitimacy deficits in this policy area. Decision-making behind closed doors, the substantial discretionary powers of immigration authorities, ineffective parliamentary control, as well as human rights violations are oft-cited examples (Bade and Bommes 2000; Freeman 1995; Lynch and Simon 2003). Secondly, immigration touches directly on the sovereignty and legitimacy of nation states. It is a policy area that crucially affects the future developments of labour markets, welfare states and national identity (Bauböck 1996; Biersteker 2002). Following Scharpf's (1998) typology, immigration control is a policy area which remains under national jurisdiction. In contrast to other policy areas concerning, say, goods, capital and services, initiatives to supranationalise the regulation of movements of people across borders are severely lagging. Thirdly, notwithstanding this delay, immigration control policies in Europe are increasingly influenced by multi-level policy making. Despite the reluctance of nation states to supranationalise this policy area, the EU is becoming an increasingly important player. This allows an analysis of the impact of Europeanization on changing legitimation processes in a policy area of central concern to national sovereignty and legitimacy (Geddes 2000; Guiraudon 2001).

Over the past few years, immigration research has witnessed an increasing scholarly interest in the politics of immigration. A rapidly growing body of literature tries to explain immigration policies with explicit reference to characteristics of the political system. For example, Gary Freeman (1995) developed a micro-economic approach, explaining the liberal or restrictive orientations of national immigration policies in terms of the respective mode of politics of the country in question. He refers to the influence of pro- or anti-immigration groups on the respective states to explain immigration policies. Other approaches focus on the role of the judiciary (Joppke 1999), the role of political parties (Messina 1989), social movements (Karapin 1999) or of the national publics (Guiraudon 1997). But all these approaches fail to note that ultimately, countries of immigration are procedural polyarchies (Dahl 1999) and that the requirements for legitimacy have serious consequences for the politics and policy of immigration control.

This study is guided by three research objectives: (1) to assess the democratic quality and legitimacy of immigration control policy-making processes; (2) to analyse the changes in the democratic processes of immigration control policy between 1950 and today; and (3) to explain the changes in these processes as well as the differences in the processes of four

Western European countries of immigration. Our research questions are based on a number of hypotheses concerning the democratic legitimation of immigration control policies. In a procedural perspective, one of the hypotheses points to "venue shifts" (Guiraudon 2001; Tomei 2001) from the national to the European level. These shifts enable policy-makers to circumvent national constraints (e.g. constitutional objections, public protest) by transferring decision-making to the European level, which is characterised by expert fora, but also by inscrutable procedures and poor accountability. These multi-level political processes are expected to undermine democratic governance in the member states of the European Union (Börzel and Sprungk 2004). One of the material hypotheses is concerned with the increasing externalisation of immigration control. The last few years have witnessed a shift in emphasis from internal to external control measures (e.g. through intensified border controls, proposals for the establishment of refugee processing centres abroad etc.). These changes in control policy are brought about by problems encountered in legitimising the detention and deportation of asylum seekers and irregular migrants, not only because of the heavy financial burdens of these measures but also due to related human rights concerns.

2   Research Approach

Research on legitimacy traditionally focuses on the role of political institutions (e.g. parliament, political parties) and the degree these institutions meet norms defined by democratic theory. The focus of the *democratic process approach* applied in this project, however, is not on individual institutions but on policy-making processes in particular policy areas. For the empirical analyses of complex democratic processes and their compliance with democratic norms of legitimacy the project is built up around a two-dimensional conceptual framework (Table 1). It differentiates between a normative and an empirical perspective as well as between a procedural and a material dimension.

Table 1: Conceptual Framework for the Analysis of Legitimation Processes

	Normative	**Empirical**
Procedural	Area 1: *Normative-Procedural*	Area 3: *Empirical-Procedural*
Material	Area 2: *Normative-Material*	Area 4: *Empirical-Material*

The first differentiation is a common differentiation between two research traditions in the context of legitimacy studies, with normative and normative empirical studies on the one hand analysing the validity of a political system (Habermas 1973) on the basis of abstract normative ideas, and empirical studies on the other hand analysing the acceptance of a political system by its constituents (Kaase and Newton 1998). Normative approaches derive their criteria from democratic theory and thereby create ideal-type models of democratic political order. Normative studies also often test their criteria in the "real world" in order to give an evaluation of existing political orders or their constitutive elements such as laws, political decisions or policies (Dahl 1971). The research on 'measuring democracies' largely falls into this category of normative approaches, i.e. the available democratic indices are mostly constructed on normative conceptions of democracy (Berg-Schlosser 2000; Freedom House 2003; Vanhanen 1997). The "Democratic Audit" is a recently developed, more thorough, qualitative tool for the assessment of democracy (Weir and Beetham 2000). In contrast to other more quantitative measures of democracy, the audit applies an in-depth analysis of the transparency, accountability and responsiveness of democratic governments. The studies in the empirical tradition of legitimacy research have a different starting point. They examine the support for a polity or its elements by focusing on public opinion or public discourse. These empirical studies usually work with a Weberian term of 'belief in legitimacy' (Legitimitätsglauben). Most of these studies generally conclude that acceptance rates for democratic institutions are high (Klingemann 1999), but also reveal increasing dissatisfaction with the performance of these institutions and "the way democracy works" from the 1990s onwards (Pharr 2000).

The *democratic process approach* in this project applies both perspectives of the first differentiation. The normative perspective applied in this project sets out from the notion of democratic legitimacy corresponding to an ideal type of democracy, and involves an empirical analysis of policy-making processes and their compliance to norms laid down by democratic theory. The empirical perspective allows an assessment of the *de facto* acceptance of policies by involved actors and the public. Here, the focus is placed on the discourses in the public and among the main actors supporting, criticising or rejecting a policy, i.e. on the attribution of legitimacy to the policy-making process and the output and outcome of this policy.

The second differentiation in our conceptual framework follows a distinction most prominently established by Fritz Scharpf (2000), who differentiates between input legitimacy and output legitimacy. For a closer approximation to normative democratic theory we shall use the terms procedural legitimacy and material legitimacy. Most of the available studies on legitimacy concentrate on the input side of the democratic system, i.e. the procedures applied, citizen

participation, representation modes, the balance of interests or aspects of deliberation. A minor number of studies focus on the outputs. They are interested in the extent to which policy outputs express democratic values, and whether they have to or actually do refer to a common good, fundamental human rights or efficiency (Ostrom 1999; Scharpf 2000). Although it can be assumed that approaches focusing on the procedural aspects of democracy bear in mind that democratic procedures lead to democratic outputs, most of them do not explicitly refer to material aspects. These, however, are essential to democracy, as procedural criteria cannot control for specific deficits in real-world democracies. As an example, fundamental human rights are closely related to democracy in modern societies (Habermas 1992). In order to establish whether, in spite of procedural shortcomings, policy-making processes lead to results that are in accordance with human rights standards, material criteria must be applied. This aspect is even more important in the light of the democratic deficit of the EU's decision-making procedures. Given the considerable importance the EU places on human rights aspects in its treaties, they must be taken into account in the assessment of legitimation processes. Of particular relevance to the policy area with which we are concerned here is the lack of compliance with the criterion of full inclusion. A crucial requirement of a democratic decision is that all members be treated as equals and may take part in decision-making processes as equals. However, in immigration affairs this is obviously not the case in the non-ideal world of nation states and supranational EU regulations, not least because would-be immigrants are not represented. Here, the observance of international human rights norms serves as a substitute.

The *democratic process approach* applies both perspectives discussed in this second differentiation. The procedural perspective constitutes the heart of a democratic political system. The compliance of political processes with procedural democratic criteria is imperative for a democracy defined as an expression of popular sovereignty. The material perspective must also be included, however, because of the problems relating to inclusion, the effects of closed policy-making procedures and the democratic deficit of EU decision-making processes.

The resulting conceptual framework thus identifies four separate research areas (Table 1). Research areas one and two are related to the normative perspective. They build upon democratic theory which defines the principal legitimacy criteria with which democratic processes must comply. These criteria are based on Dahl's meta-criteria for procedural democracy. They are differentiated into procedural criteria and material criteria, and these in turn are operationalised and broken down into a set of empirically observable indicators. (1) The first research area focuses on the *normative procedural* aspects of democratic processes of immigration policy-making. Its focus is on public will formation as well as on

decision-making processes. It analyses whether actual decision-making procedures meet the defined normative criteria. One focus will be on the transparency of political processes for the public and other political actors. In general, immigration policy is characterised by a low degree of public participation. However, it is also obvious that some immigration-related regulations involve large numbers of different actors who discuss proposals at great length and with a high degree of public interest. The project aims to explain which issues and sub-policies show which tendencies and whether these patterns change over time. (2) In its study of the *normative material* aspects of policy-making processes in immigration issues, the second research area takes a similar perspective to the first. Here, however, the focus is on the output and outcome of the policies, examining the compliance of policy outcomes with the defined norms. An important aspect here is the consideration of political regulations for fundamental human rights. Recently, security aspects have gained greater importance, and there is a danger that these considerations will outweigh human rights concerns. Our analysis will show whether and to what extent these observations apply to different issues, and whether they have changed over the past few decades.

Research areas three and four are related to the empirical perspective. Here, the focus is on the assessments of democratic processes by the actors involved. This part of the analysis is essential to understand the relevance of democratic criteria for the actors involved. The project aims to establish whether similar patterns can be identified in the concerns of actors for normative criteria as in the first two research areas. (3) The *empirical procedural* research area analyses the public discourse of actors involved in decision-making processes. The actors' comments are categorised according to the same normative criteria put forward in democratic theory, e.g. whether actors complain about the disregard for constitutional requirements or demand greater transparency in a specific political process. (4) The fourth research area focuses on the *empirical material* aspects of legitimacy. It analyses the public comments and assessments of involved actors concerning the actual or expected outcome of a policy and whether they correspond with normative criteria, e.g. whether actors criticise the inhumanity of particular policy measures concerning refugees.

3   Research Design

3.1   Case Selection

The study is comparative in design and applies a "most different systems design" (Przeworski and Teune 1970) with a common dependent variable but largely different independent variables. The changing democratic legitimation processes in immigration control policy-making constitute the dependent variable in this project. The main independent

variable on which the case selection is based is the type of democracy (Colomer 1996; Lijphart 1999). For the purposes of our study, a helpful tool for the classification of democracies is Lijphart's two-dimensional model (1999), which distinguishes between majoritarian and consensus democracies and between unitary and federal state democracies (Table 2). This yields four different types of democracy. Type 1 is a unitary, majoritarian state characterised by joint powers and fast decision-making procedures. In this project the United Kingdom represents this type of democracy. At the other end of this scale are federal, consensus-based democracies (Type 4) comprising divided powers with a large number of veto players and comparatively lengthy decision-making procedures, as is the case in Germany. Federal majoritarian systems (Type 3) involve fast decision-making procedures restricted by federal powers, as for example in the Spanish case. Finally, unitary, consensus-based democracies (Type 2) are characterised by large numbers of veto-players and the demand for consensual decision-making. The unitary political system, in contrast, gives rise to relatively fast decision-making procedures, as, for example, in Sweden.

Table 2: Case Selection according to Type of Democracy

	Unitary States	**Federal States**
Majoritarian Democracy	Type 1: *United Kingdom*	Type 3: *Spain*
Consensual Democracy	Type 2: *Sweden*	Type 4: *Germany*

This case selection stands in stark contrast to most scholarly migration studies which as a rule identify the immigration history of a state as the main independent variable (Cornelius, et al. 1994). It is expected, however, that this classic factor only plays a minor role in coming to understand the legitimation of democratic processes. Nonetheless, however, the different immigration patterns of the countries in question do take these influences into account, with the United Kingdom a classic post-colonial immigration country, Germany and Sweden clearly representatives of immigration countries dominated by guestworker migration, and Spain a relatively new country of immigration. Similarly, the role of each country in the European integration process may influence the ways in which legitimation processes evolve. While Germany is one of the founding members of the EU (1957), the United Kingdom, despite joining the EU as early as 1973, plays a more peripheral role in the EU, particularly in immigration issues, and Spain and Sweden, which joined the EU in 1986 and 1995 respectively, are most strongly influenced by the European *acquis communitaire*. The

empirical analyses will also take into account the degree of involvement of the four countries in focus in the European integration process and, in turn, the effects of this process on national democratic processes.

3.2   Period of Analysis

The analysis covers the period between the 1950s and today, thus taking two aspects into account. Firstly, it embraces the period when the DCIS was most fully established. Secondly, it covers the crucial developments in the Western European immigration experience. In the British case this includes the largely unregulated period of post-colonial migration in the 1950s and early '60s, as well as the efforts to restrict both primary and later on also secondary migration to Britain in the 1960s and early '70s. In Sweden this period was characterised by guestworker migration from southern European countries as well as from other Scandinavian countries and the subsequent migration restrictions in the early 1970s. Germany was also a major receiver of guestworkers until the early 1970s. However, Germany's migration experience also comprises large-scale ethnic migration from Eastern European countries. The Spanish case is different in so far as Spain was a major emigration country until the mid 70s. Parallel to its joining the EU Spain developed an immigration policy some years before it experienced a steadily growing stream of migration. During the 1980s the so-called "new migration" (Massey, et al. 1998; Salt 1989) changed the immigration experience of all four countries. Although labour migration was at its lowest levels during these years, the numbers of refugees and asylum seekers and the reunification of families led to increasing immigration figures which were then further boosted by the breakdown of the Soviet Union. During the 1990s, some European countries started to launch new programmes for low-skilled and highly skilled labour migrants. Such efforts, understood as an attempt at "managing migration" (Spencer 2003), were part of a new approach in immigration policy-making that brought with it potential impacts on the democratic processes of immigration policy.

3.3   Research Methods

The central methodological innovation in this study is that it provides a convincing operationalization of normative democratic criteria which is then applicable to the empirical analysis of democratic processes. The resulting *checklist* of indicators will be used for an analysis of a representative sample of legislation in each case study.

One of the methodological obstacles in this study is the long time period under consideration. This rules out the use of particular sources of data (such as interviews with involved actors)

and reduces the focus to available historical primary and secondary material (parliamentary papers, governmental green and white papers, statements by trade unions, employers, non-governmental organisations, mass media coverage, scholarly analyses etc.). The results of the analysis of the available material will be discussed with experts and political actors of each respective country in focus.
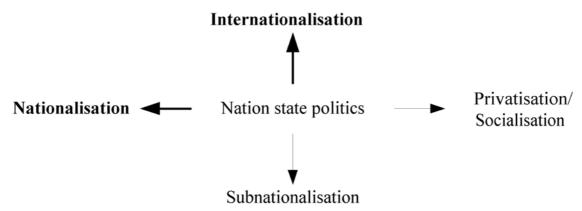
4   Context of the Project within the Collaborative Research Centre

The basic premise of the Collaborative Research Centre (CRC) is a reconfiguration of modern statehood along two dimensions: (1) a vertical dimension, where responsibilities are transferred from the nation state to sub-national or international fora and (2) a horizontal dimension which describes a shift away from the nation state towards private actors, or nationalisation in policy areas formerly largely untouched by state regulations. These reconfigurations of jurisdiction are also observable in immigration control policies. In migration studies, the debate on the externalisation of immigration control focuses on shifts away from the classical DCIS and in particular towards an increasing internationalisation and nationalisation (Figure 1). These opposing developments are partly a reflection of nation states' interests in regaining control over their borders. More fundamentally, they imply an increasing interest by nation states in controlling their own borders – starting in the United Kingdom as early as the 1960s, Germany and Sweden in the early 1970s and Spain at the end of the 1990s. Increasingly, moreover, these developments include specific forms of internationalisation as in the construction of buffer zones (e.g. safe third country regulations) and the integration of immigration control policies into the European *acquis communitaire*.

In methodological and theoretical terms, our analysis differs from the other studies carried out in Project Area B. Most projects in Project Area B can be either categorised as benchmark studies which have a clear standpoint in terms of democratic theory and assess empirical reality in relation to these normative criteria. Project B3, for example, focuses on the public sphere as one of the preconditions of a democratic political system. It analyses whether the economic and political integration of Europe is accompanied by a growing European public sphere. And B5 compares the possibilities for non-governmental organisations to participate in supranational institutions with deliberative democratic criteria. Other projects apply an empirical notion of legitimacy. Here B1 is the best example, focussing not on the correspondence of some empirical reality with normatively established criteria, but on communication in the political and public spheres over political institutions and their legitimacy. Here, modified public statements would correspond to a changing mode of legitimacy in DCIS.

The project presented here also shares common features with both approaches applied in the other projects. Like Project B4, it applies a normative as well as an empirical notion of legitimacy. However, while the objective of Project B4 is to understand how legitimacy changes in a denationalised context (in this case the Internet), immigration control – the object of interest in our project – is a policy area characterised by a comparatively low degree of internationalisation. On the other hand, compared to the Internet, immigration control policies are traditionally of the greatest importance to nation states' legitimacy and sovereignty, which renders that policy area particularly significant for an understanding of changes in the legitimacy of democratic nation states. Furthermore, the explicit focus of our study on the EU facilitates an analysis of the impact of this evolving polity on national democratic processes.

Figure 1: Externalisation of Immigration Control Policy

5   Literature

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