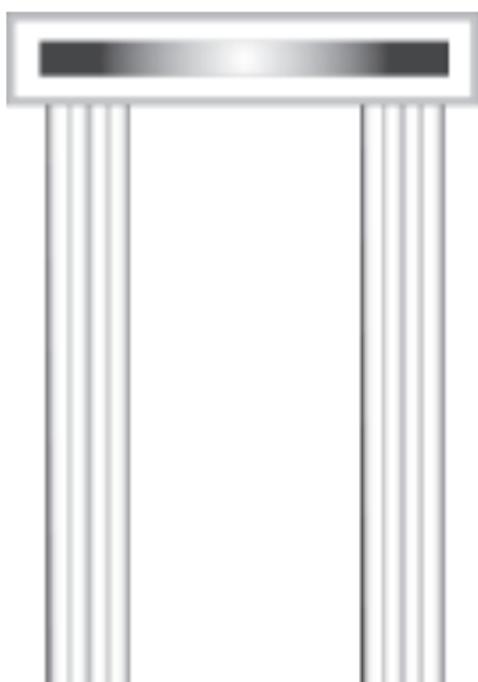


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David Heathcoat-Amory

**Who Controls Britain's
Borders?**



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Before that he served as the UK Parliamentary Representative to the Convention on the Future of Europe (2002–03) and was Shadow Minister for Work and Pensions (2005). He has been Paymaster General (1994–96) and Minister of State at the Foreign and Commonwealth Office (1993–94). For Politeia he has written *The EU Constitution: What it Means for Me* (2003).

Who Controls Britain's Borders?

At the start of this year Bulgaria and Romania joined the European Union. This, the latest accession, brought renewed interest in the question of immigration. Rates of immigration, the numbers involved and the prospects for assimilation are once again being debated. The Government, meanwhile, has introduced measures to control immigration. But the debate has a fatal flaw: it assumes we control immigration. For the UK, that is no longer true; the powers have largely been given away. The danger now is of reaction against the democratic process. For if the electorate cannot change things, or a new incoming government cannot make a difference, the public will grow disillusioned with the political system.

The nation state: The citizen and democracy

Most people believe that the state is the natural unit to monitor and control migration. Why do they not prefer a larger unit which might be able to take a wider view or act more efficiently? The reason is that most people live in a nation state. The state on its own is a legal, political construct. The nation state is a slightly different entity because it is also a cultural and historical creation, implying a shared experience, a common loyalty and identity, and often a single or dominant language. States and nations do not always exactly coincide. There are nations without states; and states, like Iraq, which do not embody a nation. Though untidy, the nation state is the primary and most successful mechanism through which human beings can govern themselves.

The essential characteristic of the nation state is that it is self-governing. The origin of the self-governing state has been traced to the 1648 Peace of Westphalia which ended the 30 Years' War in Europe, a series of violent religious wars in which civilian populations suffered worst of all. The Peace signalled the end of

the Holy Roman Empire and created for the first time a system of sovereign, self-governing states which would decide their own religious practice.

The Westphalian system has had many critics. For those who prefer governing units to be on a continental scale, its emphasis on the sovereignty of states is an irritation. Hitler, for example, was a harsh critic, claiming it kept the German states weak and divided. The Soviet Union acted in defiance of the Westphalian system in its attempt to create a huge artificial state founded on ideology. Spokesmen for Al Qaeda have criticised the Westphalian order, because it gets in the way of a universal Islamic Caliphate based on Sharia law.

Others claim that globalisation has made the nation state obsolete, with its distance-defying technologies, its international corporations and its huge monetary flows across borders. No state alone can control globalisation, so the argument runs, therefore the system is dead and must give way to a supranational order.

But the nation state was never all powerful. Nation states have never been little islands. All of them have engaged with the outside world, by alliances and treaties, to advance common interests and tackle problems, often by membership of international organisations. So the fact that a nation state can't conquer global warming on its own, or defend itself without allies, is not a strong argument for its abolition.

What the state does do is ensure that international obligations are entered into on terms acceptable to its citizens, not imposed from outside. This matters for trade negotiations. Though I am personally convinced of the advantages of free trade, other people often feel threatened by the austere and impersonal forces of global free trade which can

destroy jobs as well as create them. So it is vital that people, particularly in the developing world, agree to these choices and disciplines, rather than having to conform to an international ideology. This is one facet of a general point: nation states are necessary, indeed indispensable, for democracy. They give legitimacy to the making of laws. We agree to observe and obey the law because, however indirectly, we control the way it is made. The laws are “our laws”. They are subject to scrutiny under a system of which we are part, they are framed in a language we understand, and ultimately we can reject or change them. In other words, we belong to a unit, a community, which is appropriate for self-government.

So the nation state has proved remarkably resilient. It has endured the assaults of theorists and empire-builders. It has not withered before the forces of globalisation. Rather it responds to the human need for identity and belonging; for a sense of time and place; for democracy and legitimacy in government. It does this while allowing the fullest possible international engagement and co-operation.

One essential attribute of this self-governing entity is that it decides who can settle permanently in it, and on what terms; who qualifies for citizenship, and in what numbers. In other words, it controls its own borders. If this is removed then by definition self-government has broken down and the voters are no longer in control of their own country. In our own case, here in the UK, I believe we have reached that point.

Immigration – Losing control, in principle and practice

Britain is experiencing the largest tide of inward migration in her history. Roughly 1,500 people arrive every day to live and work, and 1,000 leave.

Net immigration on this scale is unprecedented and is the chief reason why our population is projected by the Government to increase by seven million over the next 25 years. Some people, usually employers, say this is economically beneficial. Others point to the strain on our housing, education and health systems. Others again point out that we are not simply an economy; we are also a society, and one that could fragment if immigration grows beyond a certain point.

It is not my purpose here to judge the right level of immigration. Some nation states have successfully absorbed very large numbers of immigrants. For others it can lead to insecurity, resentment and the rise of extremist parties. What is essential is that the management and level of immigration are under our political control, so that if changes are thought necessary by this generation or a future one then those changes can be made. It would be very damaging to the mainstream political parties if their promises proved to be worthless because the powers necessary to implement them had been given away. So the question "who controls our borders?" goes to the heart of the debate about democracy.

The chief beneficiary of the loss of national powers has been the European Union. Its mission is to transfer authority to the centre from member states, and build a supranational order. It is a dynamic process, fuelled by directives and regulations, and coupled with an activist European Court of Justice which responds to the EU treaty ambition of "creating an ever closer union". The process has gone so far that the question, "who does what?" is often not understood even by government ministers.

Immigration provides an example of our loss of power to the EU. The last Home Secretary, Charles

Clarke, lost his job over his failure to deport foreign criminals as promised. The Prime Minister, when expressing full confidence in Mr Clarke, told the House of Commons on 3rd May 2006 that in future, “those who are convicted of a serious criminal offence are deported automatically”.¹ Three days before, the Government had implemented EU regulations which explicitly prevent anyone being deported to the 28 countries of the European Economic Area just because they have got a criminal record.² So what Tony Blair promised to the House of Commons was illegal under regulations his own Government had just enacted.

There is now the additional question of Bulgaria and Romania. These two countries joined the EU on 1st January 2007 and the British Government wants to control the numbers of people coming here from them. The reason for Government sensitivity about numbers is that for the last EU enlargement – when Poland and nine other countries joined in 2004 – the Home Office estimate of inward migration was almost comically wrong. The Government had predicted a net inflow from Eastern Europe of between 5,000 and 13,000 annually. The official figure now is that 427,000 came here during the first two years (not the 10,000–26,000 predicted).³ The number is likely to be well over 600,000 if families and the self-employed are included.

This means that the Home Office upper estimate was exceeded by more than 20 times. The Government is, as a result, worried by the prospect of another 30 million East Europeans having free right of access as a consequence of Bulgaria and Romania joining, coupled with concerns over organised criminality and people smuggling.

¹Hansard 3.5.06 Col. 961

²Immigration (EEA) Regulations 2006

³House of Commons Library Research Paper 06/49

Workers from these two countries will therefore have to register here under a new quota scheme, and numbers will be limited.

However, there is a contradiction between what is being attempted and what is possible. The immigration regulations (mentioned on page 8), implemented on 30th April 2006, give an unconditional, unrestricted right of residence to all citizens of the European Economic Area (EEA) – the EU plus Norway, Iceland, Lichtenstein and Switzerland – about 500 million people in all – and now includes Bulgaria and Romania from January 2007. Anyone from those countries can legally come and live here with their families and receive free education and health care. In the case of the most recent two alone, Bulgaria and Romania, we intend that they pay a fee and register to work. There is no way they can be deported if they fail to register. As a means of controlling immigration this is bizarre, and largely an exercise in gesture politics. It is another example of the Government's desire to control immigration colliding with its inability to do so. We will get into the same muddle if Turkey joins the EU, although that looks increasingly unlikely.

Does such immigration matter, some might ask, because although the European Economic Area contains half a billion people, these are mostly Europeans and therefore the cultural divide is less sharp? Most people, it is argued, worry about immigration from outside Europe. The logic is faulty. It assumes that this unit, the EEA, is well-defined and has a secure external border. Indeed a secure border is necessary because that external frontier has effectively become our own frontier with the rest of the world. However, it is not secure. Anyone who has been there and witnessed the controls or rather lack of them, knows how leaky it is and how easy it is to penetrate that external border.

Amnesties are a further source of weakness. Over the past ten years, Spain has granted six amnesties to illegal immigrants from outside the EU. The one held in 2005 attracted 700,000 applicants. Over the same ten-year period Italy has conducted five amnesties, France and Portugal have each held two, Belgium and Greece one each.⁴ These amnesties covered some 3.7 million workers in all, and the total if family members are included will be much higher. Nearly all of the people concerned obtain documents which eventually give them an unrestricted right to residence here.

This means that the regulations which allow anyone in the EEA to come and live here, apply not to a defined and limited population but to an undefined and growing number of people from the wider world. Again, all this is entirely outside our control.

What about direct immigration from outside Europe to the UK? To an unnoticed extent that, too, has started to slip beyond our control. In the 1998 Amsterdam Treaty, certain changes were made to the structure of the European Community. Immigration, visas and asylum ceased to be inter-governmental matters decided between member states by unanimity: they were transferred to the main body of the EC Treaty and became subject, therefore, to majority voting and the scrutiny of the European Court of Justice. Britain and Ireland were granted a special arrangement, or protocol, whereby they are allowed to opt into such measures on a case-by-case basis. This has become a very active area of Community law and the British Government has opted into 48 immigration and asylum measures since 1998.⁵ Though these measures do not directly seek to control or impose immigration

⁴Home Office Online Report 58/04 Table 5.1, updated

⁵House of Commons parliamentary answer, 2.11.06

numbers, they do lay down who qualifies as a refugee and the procedures for granting asylum, harmonisation of visa requirements, the setting up of a border management agency and a shared Refugee Fund.

Once a decision has been taken by the Government to opt into a particular EU measure, it is irreversible: it is a one-way street. And, under a doctrine established by the European Court of Justice, the EU automatically acquires the right to represent member states internationally once an internal measure is agreed. For instance, the Directives on asylum and refugees will not only apply uniform rules in all member states, but will also give the EU the sole right to negotiate such matters with, say, the United States, or India or Afghanistan on behalf of all member states. In the jargon of European politics, the EU acquires exclusive competence in these areas. This, too, is irreversible. Powers acquired by the EU are never given up or returned to member states.

For the sake of completeness I should mention two other international conventions which we observe: the 1951 UN Convention on Refugees, and the 1950 European Convention on Human Rights (ECHR). The Prime Minister has expressed frustration with the Convention on Refugees, saying, "on asylum in my view the Geneva Convention is just completely out of date. It doesn't meet the problems any more."⁶ However, nothing has been done to carry forward any reforms. The ECHR contains a provision which may prevent the UK returning a criminal to the country of origin. In article 3 there is a complete ban on sending anyone to a country where they may be tortured or face inhuman or degrading treatment. This has been widened by the Strasbourg court to prevent someone being

⁶PM's monthly press briefing, 23.10.03

deported to a country where they may be executed, such as the United States. No exceptions are permitted, even if the security of the state is threatened, and no signatory state can derogate from article 3. Again, the Government has expressed frustration with this aspect of the ECHR, and efforts are being made to get round the problem by negotiating “memorandums of understanding” with foreign governments to permit deportations.

These are further examples of how government, accountable to the public, is devolving decisions to judicial bodies, but they are not central to my case. It is right that countries conform to certain international standards, and although the government is worried by the spread of judge-made law, it should be much more worried by the spread of EU law.

The EU and the nation state: From coercion to co-operation

To summarise, it is an essential attribute of a functioning nation state that it controls its borders, defines who its citizens are, and has an immigration policy which is under political control and can therefore be changed. For this country, these powers have been given away bit by bit. Immigration control is largely a fiction in respect both of immigration from within the EU and from outside.

Freedom of movement in the EU has been refined and extended into a general right of residence for all EU nationals and for the wider category of the EEA. These residency rights carry with them an entitlement to education, health care and most social security benefits. And now, 30 million Bulgarians and Romanians have acquired the same residency rights, which makes a nonsense of attempts by the Government to restrict immigration from those two countries by hoping that workers will sign up to a registration scheme. Nor can we exclude or deport

criminals, contrary to claims by the Prime Minister. Leaky borders and repeated amnesties mean that immigration from the EU in practice also means immigration from outside the EU.

EU legislation increasingly affects our immigration and asylum policy. The EU applies majority voting and European judicial scrutiny. Britain has opted into 48 of these measures, although it is not compelled to do so. The legislative process is remorseless and will accelerate as more aspects of immigration and asylum become subject to majority voting in the EU.

The UK's freedom to control its borders is now rather less than that of its colonies. Bermuda, for instance, according to an MP from that country, has in the past taken measures to tighten its immigration system and define who is, or who is not, entitled to residency rights or citizenship. Bermuda is a UK Overseas Territory, in other words a colony. Yet it has more control over its affairs than we, the mother country, and supposedly the cradle of Westminster democracy do. Which is the colony now?

The debate about immigration illuminates a wider problem in the UK – that of where power lies and whether a change of government will lead to an equivalent change of policy. Unless it does, turn out at elections will fall and public confidence in the political system will continue to decline. This should be of great concern to a Conservative party hoping to win office on an agenda for change.

It does not have to be like this. Five years ago, the Convention on the Future of Europe was launched to create a democratic European Union. Instead, the Convention wrote a European Constitution, transferring even more powers to the centre. That Constitution has been thrown out by the voters of France

and Holland in two referendums in 2005. The real and necessary reform of the EU has so far not even been attempted. Instead, there are moves to bring back the discredited European Constitution.

The opportunity is there to dismantle the politicians' Europe and create a Europe where the people are back in charge. This requires an association of self-governing states, co-operating together but not surrendering their power. In tackling an issue like immigration, all of the supposed benefits of European action could be achieved by co-operation between member states. That is the model for the rest of the world. Only in Europe do politicians feel the need to surrender their power to a central law-making body which lacks both efficiency and democracy.

There is still, therefore, another Europe waiting to be born, founded on the principle of the self-governing nation state. Whoever achieves this will not only be freeing Europe, but paying homage to the Peace of Westphalia. This time it will not be the Holy Roman Empire that is supplanted, but its successor, the European Union.

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With the expansion of the EU to include Romania and Bulgaria, the UK Government seeks to curb the numbers coming into the country. But, says this pamphlet, there is nothing our politicians can do to stem the tide. They have ceded their powers to the EU and other bodies. Any citizen of the EU has the right to settle and work in the UK. And, even when immigrants have come here illegally, Parliament is powerless.

The author, David Heathcoat-Amory, explains that, due to a series of treaties and agreements, the UK has abandoned control of its borders. We need, he says, a change of direction. Power must be returned to national parliaments to determine law in this crucial area. In this way Europe can be reborn on the principle of self-governing, and free, nation states.

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