SECURING FREEDOM OF MOVEMENT OF PERSONS IN THE EU: A GOVERNMENTALITY PERSPECTIVE

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ABSTRACT

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This thesis examines how the right of free movement of persons is governed through surveillance databases represented as security measures by applying the governmentality perspective. In order to do that, the study focuses on the relationship between freedom of movement, security and surveillance databases in the European Union such as Schengen Information System (SIS), European Dactylographic System (EURODAC) and the Europol Computer System (TECS). The main argument of the thesis is to analyze the role of surveillance databases in controlling the free movements of certain kinds of people that are seen as a "threat" to the European internal security.

Keywords: European Union, Free movement of persons, Security, Schengen Information System (SIS), European Dactylographic System (EURODAC), the Europol Computer System (TECS), Governmentality, Surveillance

ÖZ

AB'DE KİŞİLERİN SERBEST DOLAŞIMININ GÜVENCE ALTINA ALINMASI: YÖNETİMSELLİK PERSPEKTİFİ

ARCAN, Özge

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Bu tez, yönetimsellik perspektifini uygulayarak, kişilerin serbest dolaşım hakkının, güvenlik tedbirleri olarak sunulan gözetim veritabanları tarafından nasıl yönetildiğini incelemektedir. Bu amaca yönelik olarak çalışma, serbest dolaşım, güvenlik ve Schengen Bilgi Sistemi (SIS), Avrupa Daktilografik Sistemi (EURODAC) ve Europol Bilgisayar Sistemi gibi Avrupa Birliği'ndeki gözetim veritabanları arasındaki ilişki üzerinde durmaktadır. Tezin temel argümanı, gözetim veritabanlarının, Avrupa iç güvenliğine karşı tehdit olarak görülen bazı kişilerin serbest dolaşımlarını kontrol etmekteki rollerinin analiz edilmesidir.

Anahtar Kelimeler: Avrupa Birliği, Kişilerin serbest dolaşımı, Güvenlik, Schengen Bilgi Sistemi (SIS), Avrupa Daktilografik Sistemi (EURODAC), Europol Bilgisayar Sistemi (TECS), Yönetimsellik, Gözetim

To Cin

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CHAPTER I

INTRODUCTION

The European Union (EU) is a very specific example in providing the right of freedom of movement to its citizens. Starting from the early days of the European Economic Community (EEC), with the Treaty of Rome of 1957 which was the constitutive treaty of the EEC, workers who were nationals of the Member States of EEC were granted the right of free movement. After that time, a set of measures for the sake of increasing the free movement of persons throughout the EU territory have been adopted. Especially from the 1985 Schengen Agreement onwards, a gradual shift from the right of free movement of workers to the right of free movement of persons in general has been on the agenda although the workers' freedom of movement remained as the most necessary one.

However, these measures do not fully cover the right of immigrants and some nationals of the Member States to move and reside freely within the Union. Rather, a closer examination of the EU treaties, specifically the Maastricht and Amsterdam Treaties, and certain directives and regulations concerning free movement of EU citizens and third country nationals[1] (TCNs) in relation to migration and asylum policies of the EU indicates that exclusive, rather than inclusive practices prevail in the scope of free movement right. These exclusive tendencies are criticized by many academics and human right scholars (Besselink 2006; Bhabha 1998; Bigo 2002, 2005; Carrera 2005, 2009; Ceyhan & Tsoukala 2002; Crowley 2001; Groenendijk 2004; Guild 1997, 2004, 2005; Halleskov 2005; Huysmans

[1] Third-country national means any person who is not a citizen of the Union (Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents).

2000, 2004, 2006; Kostakopoulou 2000, 2002; Lodge 2004; Martiniello 2001; Uğur 1995; Walters & Haahr 2005). Almost all criticisms are concentrated on exclusive nature of free movement based on nationality/identity and economic sufficiency. In consequence, the authors argue that TCNs and Union citizens especially the ones who are economically disadvantaged are excluded from the European integration process. Due to these reasons, although free movement of persons is regarded as a fundamental right within the EU framework, authors such as John Crowley discusses that it is a *differential* movement (2001, 19) meaning that certain groups of people can enjoy freedom of movement very differently. The categorization of people with respect to the enjoyment of the right of freedom of movement will be a significant point of this study.

Furthermore, in recent years, the critics mostly focus on the issue that from the Amsterdam Treaty onwards, the exclusion of TCNs from the right of free movement is institutionalized with a security framework and certain steps such as incorporation of Schengen *acquis* into the Treaty of Amsterdam and increased police and judicial cooperation in the areas of migration have been taken to control rather than to facilitate the free movement of certain groups whose free movement is viewed as a threat to the so-called European internal security. In other words, certain authors stress that the EU official discourse highly focuses on the control of free movement of certain groups such as the poor and non-Europeans for the sake of maintaining an 'area of freedom, security and justice'. The assumption of the dominant discourse of the EU is that the right of free movement should be accompanied with a security framework. In other words, in the dominant discourse of the EU, there is a *direct* relationship between measures establishing freedom of movement of persons and the specific measures seeking to combat and prevent crime. This natural linkage emerged firstly from the abolition of internal borders between the signatory states of the Schengen Agreement in 1985, continued with the blurring of the lines between internal and external security after the

Cold War and gained momentum as a response to the terrorist attacks of September 11th.

From Schengen Agreement onwards, according to the official discourse of the EU, abolition of internal borders and thus free movement of persons and enlargement process to Central and Eastern Europe would lead to increase of massive irregular immigration, transnational organized crime and terrorist activities. In other words, as Didier Bigo explains, security is interpreted through the evolution of insecurity such as threats, dangers, fears and so on (2001, 92), therefore the issue was no longer "on the one hand terrorism, drugs, crime and on the other, rights of asylum and clandestine immigration, but they came to be treated together in the attempt to gain an overall view of the interrelation between these problems and the free movement of persons within Europe" (Bigo 1994, 164). In consequence, what is at stake is the securitization[2] of freedom of movement.

The securitization of freedom of movement coincides with the establishment of surveillance databases to control borders and populations and their access to the EU territory. Certain authors argue that these institutions aim not only protecting and surveilling borders, but also the population itself because they aim at collecting data about the individuals, especially about people who are seen as threats to the smooth implementation of the internal market. For this reason, to control the population and their access to certain rights within Europe, different officers across Europe become surveillants and controllers

[2] The theoretical model of "securitization" emerges from the writings of Barry Buzan, Ole Waever and Jaap de Wilde who are the representatives of the Copenhagen School. In their book, *Security: A New Framework of Analysis*, Buzan, Waever and de Wilde define securitization as "the transformation of a phenomenon from a non-security issue into a security question so that the issue is dramatized as having absolute priority" (Buzan, Waever & de Wilde 1998, 23). The authors state that securitization "is the move that takes and frames the issue either as a special kind of politics or as above politics. Securitization can thus be seen as a more extreme version of politicization" (Buzan, Waever & de Wilde 1998, 23). As Walters and Haahr explain, to study securitization is to analyze the way in which particular issues such as the economy, immigration and drugs are framed as security issues; "constructed as matters of survival for a particular community whose boundaries and identity are defined through acts of securitization" (2005a, 95).

through databases. Here, with the discourses of control technologies and security, surveillance gains a new level of importance. In this sense, electronic technologies are seen to create a new sphere for social control. Due to this fact, in the literature, it is believed that there is an increase in creation of databases in Europe. To be more explicit, in order to control the population within Europe and to provide information transmission between member states of the EU, databases such as SIS (Schengen Information System), EURODAC (European Dactylographic System) and EUROPOL (European Police Office) files called TECS (The Europol Computer System) were constituted.

Under the light of this framework, this thesis aims to analyze how surveillance databases as security measures govern the freedom of some persons, i.e. immigrants and asylum seekers for the sake of providing the free movement of some other persons.

The reason I chose to study the relationship between free movement of persons and operation of new surveillance mechanisms is that European enlargement and integration process are historically constructed and ongoing which affect not only Western European countries, but also Central, Eastern Europe, and Turkey. Although with the European citizenship, European integration is institutionalized by providing some additional rights to union nationals such as the freedom of movement; it excludes large numbers of non-citizens from and within the European integration. The exclusion of "non-Europeans" from the EU citizenship rights coincides with the usage of new surveillance practices in the EU as an outcome of the actions of the member states to guarantee first single market then the area of security, freedom and justice against the "outsiders". In this sense, the concern with the control of migration-related issues in the disappearance of the internal borders becomes one of the dynamics of European integration. In this respect, the logic of controlling both the boundary and the population embodied in the SIS, TECS and EURODAC becomes the key dynamic of

the European integration process. In my opinion, by examining the role of these databases, it is possible to grasp the construction of European identity around the axis of security discourse which is not inclusive but exclusive to certain non-Europeans. In other words, being a European becomes largely a matter of exclusion since Europeanness is constructed in opposition to the non-European. Therefore, a dichotomy of self and other occurs. Moreover, with the examination of new surveillants, we can see that "there is a belief in technologies of profiling, of computer data bases and their capacities to describe who will be 'enemy' and who is 'normal', who is allowed to benefit from freedom of movement and who is excluded or controlled before they can use their freedom of movement" (Bigo 2005a, 86).

The theoretical background of the thesis is based on Michel Foucault's neologism 'governmentality'. Indeed, governmentality perspective is very useful in grasping the relation between freedom and security and surveillance. For one thing, this approach focuses on 'population' itself rather than the 'territory'. Second, governmentality implies that the relationship between freedom and security are not contradictory, rather complementary to each other. Thirdly, this perspective takes freedom of the individuals as a necessary condition of liberal governmentality. However, while providing freedom, as we will see in the neo-liberal governmentality, the authorities also try to minimize some persons' freedom for the sake of the others' freedom. This understanding is very useful for understanding EU's notions of freedom and security and the emergence of surveillance databases as important figures in conducting the free movement of persons. Lastly, governmentality perspective stresses that governing is diffused among different authorities in various sites and with various objectives. As will be seen in the EU case, power relations are diffused and fragmented among different Member States and EU institutions such as the Council, the Commission and the European Court of Justice (ECJ). Their interests are sometimes the same, but sometimes differ from each other. Moreover, there are also security professionals and surveillance institutions that determine

people's access to certain rights such as freedom of movement, work, residence, employment and benefitting from social security systems.

The selected literature of the thesis will be legal documents, mainly treaties, directives, regulations, communications and case-laws related to the free movement of persons, security measures and surveillance databases in the EU. In addition, secondary literature based on the works of authors working within the scope of the thesis will be frequently used. It is important to note that the analyses in this field are mostly descriptive explanations provided by authors working critically on the issues of free movement, security and migration-related issues in the EU. Due to this fact, it is sometimes hard to find concrete examples to support the arguments derived from descriptive explanations. Although this is the case, in my point of view, the clauses of the legislative documents used in the thesis and case-laws of the ECJ can still provide satisfactory instances for grasping the logic of EU governmental rationality and the way it constructs the relationship between freedom, security and surveillance.

The thesis includes five chapters. In addition to this Introduction chapter, in Chapter II, I would like to provide a framework on the governmentality perspective. With this perspective, Michel Foucault brings a critical and different approach to the notion of 'government'. Rather than analyzing government as solely the management of the states, governmentality perspective points out that government should be considered as the 'conduct of conduct', meaning that any activity that try to regulate the activities of the individuals. For this reason, in the first section, understanding of government as the 'conduct of conduct' will be examined. After this examination, in the second and third sections, the notion of governmentality will be explained in two supplementary meanings that are used by Foucault. The first meaning is a more general and abstract one, which links government and thought and in doing so, governmentality is understood as an 'art of government'. This kind of understanding is very fruitful since here, Foucault emphasizes that

governing is a collective activity and rather than thinking state as the only body for the conduct of individuals, the focus should be on the various authorities that govern in different sites and with different objectives. In this respect, there emerge following questions for analyzing actions of the political authorities: Who and/or what should be governed? In what logics they should be governed? With what techniques and/or practices? Toward what ends? These will be the core questions that are tried to be answered within the scope of the subject matter of the thesis.

After examining governmentality as an art of government, the third section will be dedicated to another meaning of governmentality which is governmentality as a specific form of power. Here, governmentality refers to a specific form of governing related to economy, population and apparatuses of security. This new form of power, to Foucault, emerges in the 18th century Western European societies which coincide with the emergence of liberalism. Indeed, this section is very crucial for grasping the relation between freedom and security since in Foucauldian understanding, freedom and security are not contradictory rather complementary to each other in liberal art of governing. Moreover, liberalism and neo-liberalism will be examined from governmentality perspective around freedom and security questions. Within this framework, this section will be divided into sub-sections including certain important Foucauldian terms in conjunction with the subject matter. The first sub-section will be concentrated on the notion of population, security and bio-politics. Then, I will attempt to compare governmentality with other forms of power developed by Foucault, namely sovereignty and discipline. After that, I would like to mention briefly the 'reason of state' which reflects the first emergence of governmental idea of governing in Foucault's understanding. In the last sub-sections, liberal art of governing and theorizing neo-liberalism as governmental power will be discussed with a special focus on freedom and security.

In Chapter III, I will seek to analyze the relationship between freedom of persons together with migration-related issues and security concerns in the EU within the framework of governmentality. Keeping the conclusions derived from the second chapter in mind, I will try to prove that free movement of persons in general and freedom of movement of TCNs in particular and security measures in the EU are complementary to each other for the sake of smooth implementation of internal market in an area of freedom, security and justice. In this respect, the first section of the chapter will concentrate on drawing a general framework of free movement and security in the EU. This section will be generally descriptive by stressing that there prevails an exclusion mechanism for TCNs and certain EU nationals when they wish to enjoy their right of free movement. This exclusion is especially implemented to the ones who are economically disadvantaged so it comes from the fact that the notion of freedom of movement is mostly dependent on financial self-sufficiency of the person moving. In this sense, I will emphasize that EU governmentality shares similar features with neo-liberal rationality of governing. This means that while the EU grants the right of freedom of movement to its citizens and to some categories of TCNs such as long-term residents, it also regulates their freedom of movement through security rationality. To be more concrete, in the second section of the chapter, I will make a historical examination of the development of freedom of movement right by focusing on creation of Schengen space, European citizenship, Justice and Home Affairs and Area of Freedom, Security and Justice. While analyzing these historical periods, I will provide examples from related treaties, certain directives and regulations, presidency conclusions and case laws of ECJ and conclude that there is a 'security continuum' at the stake. Lastly, in the third section, I will focus on the conditions that pave the way for the creation of 'security continuum' with a specific reference to the notion of 'governmentality of unease' developed by Didier Bigo.

After mentioning the important features of governmentality perspective and analyzing the relation between free movement right and security through this perspective, in the following chapter, my aim will be to support my findings by providing a descriptive examination of surveillance databases in the EU. Due to this fact, in Chapter IV, firstly, I will concentrate on the meaning of surveillance by mentioning modern and contemporary surveillance. Although surveillance is as old as human history, it becomes formal and systematic in the 18th century with the emergence of modern states. For this reason, I will start to examine surveillance in modern times with a specific reference to the metaphor of 'Panopticon' developed by Foucault in the first section. After that, I will concentrate on contemporary surveillance starting from the later part of the 20th century. In this period, the dominance of Panopticon in surveillance theories begins to be questioned due to changes in political and economic processes and globalization. Due to this fact, I will focus on the changing rationality of surveillance together with processes that give way to it. While doing so, concepts such as surveillance society, risk and social sorting and dataveillance will be taken into account. This kind of examination will be the theoretical basis of the second part of the Chapter, namely surveillance in an area of freedom, security and justice in the EU.

In that part, I will analyze new surveillance databases in the EU, namely SIS, EURODAC and TECS in detail for emphasizing that the EU surveillance basically focuses on the exclusion of certain groups that are seen as a threat to freedom of movement of some groups with the help of these databases. Firstly, the logic of the databases as the new surveillants will be explained. As I will mention, SIS, EURODAC and TECS mainly aim at collecting personal information from TCNs, i. e. identifying their country of origin with an aim to send them out of the EU territory. For this reason, there is a process of labeling and sorting certain groups and individuals as 'risky' in the name of security and in that sense the databases can be seen as effective tools for the EU authorities that do not prefer to provide certain rights such as social assistance and residence to economically inactive groups as

students, retired persons, unemployed and asylum seekers. This is a good illustration of EU governmentality based on neo-liberal rationality indeed.

For proving the role of the databases in labeling and sorting certain TCNs, the second section of that part will be dedicated to examine SIS, EURODAC and TECS one by one in detail. To be more specific, their legal background based on certain directives and regulations, how they operate and type of information that they record will be mentioned. What is so crucial in making such examination is that in recent years, there is an increase in the tendency of granting more powers to these databases in the process of categorization of people into 'normal' and 'abnormal'. Moreover, these databases gradually merge the questions of migration and asylum into security concerns such as terrorism and drug trafficking. In other words, as Boswell mentions, "systems for monitoring and gathering data on migrants have been harnessed as a part of the EU's anti-terrorism strategy" (2007, 590). In this framework, surveillance databases will support the examinations of this study, namely securitization of free movement of persons in general and securitization of migration-related issues in particular in an era of governmentality of unease.

Lastly, in the conclusion chapter, I will conclude the purposes and the findings of the thesis with a specific reference to the concept of 'ban-opticon' developed by Didier Bigo for building up the relations between free movement, security and surveillance databases in the EU governmental rationality.

CHAPTER II

GOVERNMENTALITY

Starting from the 1978 lectures at the *Collège de Paris* in France, Michel Foucault concentrated on the exercise of power over territories and populations. In this domain of analysis, he maintained his own neologism, governmentality which brought a new perspective to the notion of government.

In this chapter, firstly I will examine government as the conduct of conduct, which is a different approach to the notion of government. Then, I will focus on what should be understood from governmentality as an art of governing. Thirdly, I will concentrate on governmentality as a specific form of power emerged in the 18th century Western European States together with analyzing freedom and security in two rationalities: liberal art of governing and neo-liberal governmentality.

2.1 Government as the 'conduct of conduct'

In his article entitled "Subject and Power", Foucault defines government as the "conduct of conduct" (Foucault 2002a, 341; Gordon 1991, 2; Dean 2010, 17). As mentioned by Dean, as a verb, 'to conduct' means to lead, to direct or to guide and as a noun, the word equals to behaviors and actions (2010, 17). In turn, to Foucault, government is "an activity that undertakes to conduct individuals throughout their lives by placing them under the authority of a guide responsible for what they do and for what happens to them" (2002b, 68).

This definition means that unlike the traditional perceptions of government, according to Foucault, government should not be understood as state politics alone; rather it comprises "any attempt to shape with some degree of deliberation aspects of our behavior according to particular sets of norms and for a variety of ends" (Dean 2010, 18). Indeed, government includes "techniques and procedures for directing human behaviour" (Foucault 2002c, 81). In this sense, governing is not only an activity of the state but it also includes a multiplicity of governing authorities, laws, norms and regulations and it deals with "the means of calculation, the type of governing authority or agency, the forms of knowledge, techniques and other means employed, the entity to be governed and how it is conceived, the ends sought and the outcomes and consequences" (Dean 2010, 18).

At this point, Dean emphasizes that governing is directly related with *human conduct* that is "conceived as something that can be regulated, controlled, shaped and turned into specific ends" (Dean 2010, 18) (emphasis added). To be more explicit, Foucault claims that

> 'Government' did not refer only to political structures or to the management of states; rather, it designated the way in which the conduct of individuals or of groups might be directed - the government of children, of souls, of communities, of the sick… To govern, in this sense, is to control the possible field of action of others (Foucault 2002a, 341).

Governing human conduct includes a form of rationality. In this sense, rationality refers to "any form of thinking which strives to be relatively clear, systematic and explicit about aspects of 'external' and 'internal' existence, about how things are or how they ought to be" (Dean 2010, 18-19). As discussed by Dean, rather than focusing on a universal standard or single reason, there is "a multiplicity of rationalities, of different ways of thinking in a fairly systematic manner, of making calculations, of defining purposes and employing knowledge" (Dean 2010, 19).

Since government refers to the "conduct of conduct", it includes "not only how we exercise authority over others or how we govern abstract entities such as states and populations but also how we govern ourselves" (Dean 2010, 19). In other words, government deals with not only the practices of government but also the practices of the self. This means that, there is also a notion of "self-government" in the activity of governing so government includes not only relations of power and authority but also issues of self and identity.[3] As Foucault explained, what traditional political theory missed was the ways in which government was also a product of multiple "technologies of the self",

> technologies which permit individuals to effect by their own means or with the help of others a certain number of operations on their own bodies and souls, thoughts, conduct and way of being, so as to transform themselves in order to attain a certain state of happiness, purity, wisdom, perfection, or morality (Foucault 1988, 18).

In short, according to Foucault, government emerges when the various actions of the state coincide with the various technologies of self government. Due to this fact, the definition of government as Gordon presents can be expanded as follows;

> Government as an activity or a practice could concern the relation between self and self, private interpersonal relations involving some form of control or guidance, relations within social institutions and communities and, finally, relations concerned with the exercise of political sovereignty (1991, 2-3).

To Foucault, "when one defines the exercise of power as a mode of action upon the actions of others, when one characterizes these actions as the government of men by other men – in the broadest sense of the term – one

[3] Within the scope of the thesis, I prefer focusing on practices concerned to conduct the conduct of others rather than those concerned to conduct one's own conduct. Thus, I will deal with 'practices of government' in a narrower sense.

includes an important element: *freedom*" (Foucault 2002a, 341-342, emphasis added). As Dean mentions, government as the 'conduct of conduct' presupposes the subjects or the governed "who are free in the primary sense of living and thinking beings endowed with bodily and mental capacities" (2010, 21-22). This means that the governed should be free in acting and thinking in a variety of ways. In this respect, an activity of government attempts to regulate or conduct the freedom of individuals. As will be argued in more detail in the liberal art of governing, government generally takes the freedom of the subjects as a technical means of securing the ends of government. In consequence, "liberal rationalities generally attempt to define the nature, source, effects and possible utility of these capacities of acting and thinking" (Dean 2010, 24).

As a result, defining the notion of government as the 'conduct of conduct' gives the way to suppose the primary freedom of acting and thinking of the individuals who are governed. This is also valid for those who act the governing activity, meaning that those who govern. In other words, when someone governs him/herself and others, s/he exercises his capacities for acting and thinking. These capacities bring us to the notion of govern/*mentality,* mentalities of government.

2.2 Governmentality as an "Art of Government"

In general, Foucault used the term governmentality in two broad meanings (Dean 2010; Walters and Haahr 2005). The first one is a more general and abstract meaning focusing on the relation between government and thought and the second one is a historically specific version of the first meaning. I would like to begin with the first definition of governmentality and then concentrate on the second one which refers governmentality as a form of specific power.

Firstly, governmentality deals with how we think about governing (Dean 2010; Gordon 1991; Rose and Miller 1992). So, as Dean mentions, governmentality deals with calculating and responding to a problem in any way of reasoning or way of thinking about (2010, 24).

Thinking about governing occurs with different rationalities or mentalities of government (Dean 2010; Rose and Miller 1992). Gordon explains that mentalities of government imply

> a way or system of thinking about the nature of the practice of government (who can govern; what governing is; what or who is governed), capable of making some form of that activity thinkable and practicable both to its practitioners and those upon whom it was practiced (Gordon 1991, 3).

As Gordon points out, Foucault used rationality of government interchangeably with 'art of government" (1991, 3). To refer to the art of government, says Dean, is "to suggest that governing is an activity that requires craft, imagination, shrewd fashioning, the use of tactic skills and practical know-how, and the employment of intuition and so on" (Dean 2010, 28). Thus, as an art of government, governmentality perspective seeks to identify "different styles of thought, their conditions of formation, the principles and knowledges that they borrow from and generate, the practices that they consist of, how they are carried out, their contestations and alliances with other arts of governing" (Rose, O'Malley and Valverde 2006, 84). From such a perspective, there occur questions for the political authority discussed by Rose, O'Malley and Valverde: How should we govern? Who and/or what should be governed? Why do we need to govern? To what ends they should be governed? (2006, 84-85). By involving a way of thinking about the practice of governing around these questions, governmentality marks that the activity of governing uses "particular techniques and tactics in achieving its goals" (Dean 2010, 28).

Furthermore, Dean points out that the notion of "mentalities" emphasizes the idea that thinking is a collective activity (2010, 24). To say that the mentalities are collective, according to Dean, means to say that "the way we think about exercising authority draws upon the expertise, vocabulary theories, ideas philosophies and other forms of knowledge that are given and available to us" (Dean 2010, 25). It is also to say that, for Rose, O'Malley and Valverde, rather than thinking state as a single body for the conduct of individuals, the emphasis is on the variety of authorities that govern in different sites and according to different objectives (2006, 85). In consequence, the following questions arise for the authors: Who governs what and in what logics? With what techniques and/or practices? Towards what ends? (Rose, O'Malley and Valverde 2006, 85). Due to these facts, Rose, O'Malley and Valverde mention that rather than being a theory of power or authority, governmentality asks particular questions of the phenomena and in turn, it tries to "understand and questions amenable to precise answers through empirical inquiry" (2006, 85). For this reason, governmentality perspective can be understood as a critical approach to political research. It questions and in turn, problematizes certain kinds of activities and practices.

2.3 Governmentality as a specific form of power

2.3.1 Population, Security and Bio-Politics

Foucault introduced 'governmentality' for the first time in the fourth lecture of 1978 as a part of a course on *Security, Territory and Population* at the *Collège de Paris* in France. In this lecture, Foucault used governmentality to identify a particular way of thinking and exercising power emerged in the 18th century Western European societies "when the art of government of the state becomes a distinct activity, and when the forms of knowledge and techniques of the human and social sciences become integral to it" (Dean 2010, 28).

While analyzing governmentality, Foucault mentioned that firstly, governmentality means;

> The ensemble formed by institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex, form of power, which has as its target population, as its principal form of knowledge political economy, and as its essential technical means of apparatuses of security (Foucault 2002d, 219).

Due to this fact, governmentality refers to a particular form of power which refers to "the emergence of a distinctly new form of thinking about and exercising of power in certain societies" (Dean 2010, 28). This form of power is related to the economy, concerned with the population and uses the apparatuses of security while conducting the population.

Related to the economy, says Dean, it is crucial for the government to govern through a particular register, namely economy for ensuring the happiness and prosperity of the population (2010, 29). In addition, the government itself has to be "economical, both fiscally and in the use of power" (Dean 2010, 29).

By focusing on population**,** governmental power refers to a form of government of "each and all" rendering not just individuals but also population. What is crucial is that Foucault focuses not only on the individual but also on subjects as members of population. Here, as Walters and Haahr mention, population does not only refer to individuals but to phenomena and variables such as birth and mortality rates and statistics that emerges as "both a means and an end for political authority" (Walters and Haahr 2005b, 293). As Gordon points out, population encompasses the whole field of the social (1991, 28) which defines "the whole network of social relationships" (Foucault 2002a, 345). Thus, social becomes the target of governmentality analysis.

Governmental power also seeks to conduct the population within the apparatuses of security. Dean explains that these apparatuses of security includes all the practices and institutions that ensure the optimal and proper functioning of the economic, vital and social processes that are found to exist within that population and would include not only armies, police forces, intelligence services but also health, welfare and education systems (2010, 29). At this point, together with population and apparatuses of security, another crucial term, bio-politics came to the scene.

Bio-politics firstly emerged in Foucault's article *The Will to Knowledge, The History of Sexuality, Volume I.* Valverde explains that literally, 'bio-politics' is best understood "as the politics of life – the politics through which some lives are maximized and cared for and other lives are discounted…" (2007, 175). For this reason, unlike the sovereign power which aimed at oppressing its subjects and enlarging its capacities over them, bio-politics deals with the enhancement of lives of the individuals. To Foucault, bio-politics is "a power bent on generating forces, making them grow, ordering them, rather than one dedicated to impeding them, making them submit, or destroying them" (Foucault 1998, 136). Thus, bio-political power is "the attempt, starting from the eighteenth century, to rationalize problems posed to governmental practice by phenomena characteristic of a set of living beings forming a population: health, hygiene, birthrate, life expectancy, race" (Foucault 2008, 317). So, it can be said that bio-politics is about management of life of the population. It deals with the "matters of life and death" (Dean 2010, 119) such as health, illness, birth and propagation. In this respect, bio-politics concern "the social, cultural, environmental, economic and geographic conditions under which humans live, procreate, become ill, maintain health or become healthy, and die" (Dean 2010, 119).

According to Dean, there is an internal and external side to bio-politics. The internal side deals with governing the life and welfare of populations that are assigned to certain states and the external side concerns to govern the

movement, transitions and settlement of various populations such as refugees, migrants, tourists and guest workers. This is a kind of international bio-politics indeed (2010, 119). To Dean, it is also here that we can locate the division of populations into sub-groups as the criminal and dangerous classes, the abnormal and the unemployed (2010, 119). Bio-politics attempt to prevent or contain these kinds of sub-groups for the sake of welfare and life of the population. For this reason, as Foucault points out, those who were seen as threats to the life of the 'normal' citizens have become targets of the brutish techniques of 'death' which could be illustrated in Nazism (Foucault 1998, 137). In this respect, we can say that there are two aspects of bio-politics: enhancing the life of some individuals and excluding some others seen as threats.

2.3.2 Triangle: Sovereignty, Discipline, Governmentality

According to Foucault, the notion of governmentality implies a certain relationship between other forms of power, namely sovereignty and discipline. In his understanding, these three forms of power should be seen as "a triangle: sovereignty, discipline and governmental management which has population as its main target and apparatuses of security as its essential mechanism" (Foucault 2007, 107-108).

To Foucault, sovereignty marked the period of feudal societies until the end of 18th century and organized around the absolute right of the sovereign to "take life or let live" (Foucault 1998, 136). Due to this fact, the body of the individual is the main point for the sovereignty type of power. This form of power consists in "laying down a law and fixing a punishment for the person who breaks it, which is the system of the legal code with binary division between the permitted and the prohibited, and a coupling, comprising a code, between a type of prohibited action and a type of punishment" (Foucault 2007, 5). As Walters and Haahr mention, in the mentality of sovereign power, "the problem is how to perpetuate one's rule over a given territory

and its subjects" (2005b, 9). In this sense, law and punishment were used as main instruments for maintaining sovereign's rule over the subjects (Walters and Haahr 2005b, 9). For this reason, the authors emphasize that breaking the law was regarded as an attack directly to sovereign and it was punished through violent techniques such as public execution and torture (Walters and Haahr 2005b, 9).

On the other hand, in his works *Discipline and Punish: the Birth of the Prison* and *The Will to Knowledge,* Foucault mentions disciplinary power which is contradictory to the idea of sovereignty. The disciplinary power came to the scene in the 18th century with modernity. As Mills mentions, discipline is "a set of strategies, procedures and ways of behaving which are associated with certain institutional contexts and which permeate ways of thinking and behaving in general" (2003, 44). Unlike the sovereign power, disciplinary power is productive and useful since it regards life as the central point and in turn, it targets the body to have productive subjects in social, political and economic senses. For this reason, disciplinary power uses surveillance techniques to achieve its end.

Although the body is again the focus point of power in disciplinary power, what is at stake is a bio-political power. Foucault says that the body is subject to a microphysics of power (1979, 26), meaning that the subjectification of the individual is provided through rational techniques. To be more specific, discipline involves a series of surveillance techniques that emphasize a continuous supervision, examination and normalization of behavior. Disciplinary power normalizes the individuals by using methods, i.e. surveillance techniques on the basis of the individual's knowledge. In short, disciplinary power works through surveillance mechanisms since for gaining the knowledge of the individuals, surveillance methods are used. Moreover, a sense of self-observation is created by surveillance. Foucault uses the concept of panopticon to make this point clear. The panopticon will be discusses in detail in Chapter IV.

Indeed, while Foucault analyses disciplinary power, he concerns the exercise of power over the individual and the body. So, his main target is the body of the individual. Yet, governmentality focuses on governmental power and population. This shift from discipline to government can be viewed as a matter of scale. As Gordon points out, "whereas discipline concerns a 'microphysics' of power where the target is the subject, governmentality deals with a 'macrophysics' of power where the target is population" (1991, 28). Moreover, although Foucault locates the emergence of disciplinary power in the 16th century and the rise of governmental power in the 18th century, he does not suggest that one form of power has been replaced totally by the latter one. Instead, as Oels mentions, Foucault emphasizes that each form of power uses and recodes the technologies of earlier governmentalities. Thus, "elements of all three types of governmentality are present at any one time after the 18th century in a form of triangle that governs population, but the function performed by each element may have shifted" (Oels 2005, 190). This is the logic of the triangle, "sovereignty-discipline-government".

2.3.4 Reason of state

Secondly, to Foucault, governmentality refers to "the tendency that over a long period and throughout the West, has steadily led to pre-eminence over all other forms (sovereignty, discipline and so on) of this type of power which may be termed "government" (Foucault 2002d, 219). Here, Foucault undertakes a historical examination of liberal form of government which began to flourish from the middle of the 16th century (Foucault 2002d, 201) since from that date, questions such as "how to govern oneself, how to be governed, how to govern others, by whom the people will accept being governed, how to become the best possible governor" began to be addressed (2002d, 202). So, as Gordon explains, "the state has its reasons which are known neither to sentiment nor to religion" (1991, 9). In consequence, apart

from the theological-cosmological order of the sovereign power, the question of '*how* to govern' became problematic.

To Foucault, it is in the late 16th and early 17th centuries that the art of government crystallizes for the first time around the notion of 'reason of state' in a full and positive sense: "the state is governed according to rational principles that are intrinsic to it and cannot be derived from natural or divine laws" (2002d, 213). The aim of such an art of governing is to reinforce the state itself and "more than the problems of sovereign's legitimate dominion over a territory, what will appear more important is the knowledge and development of state's forces" (Foucault 2002e, 74). Reason of state, says Foucault, "had sought in the existence and strengthening of the state, the end capable both of justifying a growing governmentality and of regulating its development" (2002e, 74). So, the assumption of the state of reason is that "the State was able to have an adequate and detailed knowledge of what had to be governed – that is to say, a knowledge of itself – on the basis of which it could direct and shape that reality in accordance with its, the State's own interests; increasing its wealth and strength" (Burchell 1996, 22).

2.3.5 Liberal Art of Governing and Notion of Freedom

In Foucault's understanding, liberalism is not an ideology or a philosophy but an art of governing. In this case, Hindess mentions that Foucault did not deal with how liberalism structures "relations between rational and autonomous individuals and their government" but in "the multiplicity of ways in which individuals, groups and organizations within the population are subject to government of their conduct, by state and non-state agencies and, of course by themselves" (Hindess 1997, 263).

Liberal rationality of government abandons the mentality of total administration of a society as in the reason of state. Foucault implies that against the reason of state liberalism argues that "order should not be

manufactured through continuous intervention in the affairs of society but through the stimulation of free conduct" (2002f, 352). This means that rather than a total intervention, the state should be limited in its capacity to know and control the social and economic affairs of its population. In this sense, liberalism is "not to impede in the course of things, but to ensure the play of natural and necessary modes of regulations which permit natural regulation to operate: *manipuler, susiter, faciliter, laissez-faire"* (Foucault, cited in Gordon 1991, 17, original emphasis).

As Rose mentions, the necessity to limit the state intervention comes from the fact that "government confronts itself with realities – market, civil society, citizens – that have their own internal logics and densities, their own intrinsic mechanisms of self-regulation" (Rose 1996, 43). Due to this fact, according to liberal mentality of rule, "the objects, instruments and tasks of rule must be reformulated with reference to these domains of market, civil society and citizenship" (Rose 1996, 44). Most importantly, liberalism differs from reason of state in the sense that "it starts from the assumption that human behavior should be governed, not solely in the interests of strengthening the state, but in the interests of society understood as a realm external to the state" (Rose, O'Malley and Valverde 2006, 84). To put it in another way, for early liberalism, says Burchell,

> [the] problematique of 'how to govern' involves the principle for rationalizing governmental activity to *the rationality of the free conduct of governed individuals themselves*. That is to say, the rational conduct of government must be linked to the *natural*, private-interest-motivated conduct of free; market *exchangin*g individuals because the rationality of these individuals' conduct is, precisely, what enables the market to function optimally in accordance with its nature (Burchell 1996, 23, original emphasis).

Therefore, historically, a concern for the conduct of freedom can be traced back to the liberal governmentality in the 18th and 19th centuries. As Barry *et. al.* mention, freedom is neither an ideological fiction of modern societies nor

an “existential feature of existence” within them, rather it must be understood as a formula of rule. It is also stated that “Foucault’s concern here might be characterized as an attempt to link the analysis of the constitution of freedom with that of the exercise of rule” (Barry *et al.* 1996, 8).

In this respect, a liberal form of governing is an activity that aims to shape freedom. For the liberal state, the notion of freedom is not against the objectives of government; rather it is a need for government. To Foucault, “power is exercised only over free subjects, and only insofar as they are free” (2002a, 342). Due to this fact, as Aradau mention, the state creates and guarantees a series of liberties/freedoms for the sake of enhancing its prosperity and the welfare of the population. This means that, Aradau says, liberal art of governing does not only guarantee certain freedoms, it consumes freedom (Aradau 2005, 4). In other words, “liberal governmentality can only function if it produces certain liberties: freedom of market, freedom of expression, of movement, of the right to property, etc.” (Aradau 2005, 4).

However, there is another side of the coin. In order for individuals to enjoy their freedom in liberal state, they need protection from other individuals who may try to interfere with the enjoyment of freedom. For this reason, in order to create the space in which individuals can govern themselves, the state also needs to engage in the process of government by making laws and enforcing them, taking away the freedom of some for the sake of guaranteeing the freedom of others. Thus, liberal art of governing has to organize freedom. This organization or conduct of freedom is managed through the imperative of security. In this respect, Gordon says that for Foucault, security is a specific principle of political method (1991, 20). To put it another way, “the freedoms created in society for its prosperity need to be controlled and regulated against excessive use or misuse by certain categories of the population” (Aradau 2005, 5). For this reason, security in

the liberal art of governing, says Munster, is about creating and assuring the free conduct of individuals and "the function of security is no longer to 'create order' but to 'guide disorder'" (2005, 3). As Foucault states, "liberal thought starts not from the existence of state, seeing in government the means for attaining that end it would be for itself, but rather from society with respect to the state" (2002e, 74).

Here, to Foucault, the idea of society enables "a technology of government to be developed based on the principle that it itself is already 'too much', 'in excess' – or at least that it is added on as a supplement which can and must always be questioned as to its necessity and its usefulness" (cited in Rose 1996, 42). As an array of technologies of government, says Rose,

> governmentality is to be analyzed in terms of the strategies, techniques and procedures through which different authorities seek to enact programmes of government in relation to the materials and forces to hand and the resistances and oppositions anticipated or encountered. Hence, this is not a matter of the implementation of idealized schema in the real by an act of will, but of the complex assemblage of diverse forces (legal, architectural, professional, administrative, financial, judgmental), techniques (notation, computation, calculation, examination, evaluation), devices (surveys and charts, system of training, building forms) that promise to regulate decisions and actions of individuals, groups, organizations (Rose 1996, 42).

2.3.6 Neo-Liberalism as Governmentality

In 1980, Thatcher defined the neo-liberal government as follows:

> The first principle of this government…is to revive a sense of individual responsibility. It is to reinvigorate not just the economy and industry but the whole body of voluntary associations, loyalties and activities which give society its richness and diversity, and hence its real strength… [We] need a strong State to preserve both liberty and order… [But we] should not expect the State to appear in the guise of an extravagant good fair at every christening, a loquacious and tedious companion at

> every stage of life's journey, the unknown mourner at every funeral (Thatcher 1980, 10-11 cited in Rose 1999, 138-139).

The idea of neo-liberalism outlined by Thatcher emphasizes the notion of responsible individuals in the sense that one must be responsible for him or herself and should not be dependent on the state during his or her life. This idea is a criticism of welfare liberalism since according to neo-liberals; welfare liberalism is seen "as something that enhances dependence upon the state instead of promoting liberty from the state" (Munster 2005, 4).

To better grasp the emphasis on the notion of responsible individuals, it is important to mark some differences between early liberalism and neo-liberalism in terms of economy. As Gordon points out, the logic of market in neo-liberalism "concerns all purposive conduct entailing strategic choices between alternative paths, means and instruments; or yet more broadly, all rational conduct and economies is understood as an 'approach capable in principle of addressing the totality of human behavior" (1991, 43). Moreover, while early liberalism considers state as the regulator of market freedom, neo-liberalism gives the power of arbitration to the market. As Lemke mentions, neo-liberalism offers the free-market as "the organizing principle for the state and society" (2001, 200).

In consequence, in neo-liberal art of government, the market is considered as the ultimate domain in which citizens operate. In this sense, citizens are expected to be responsible for them. As Hindess mentions

> A liberal rationality of government…can be expected to promote the search for indirect means of ensuring that the behavior of the subject population conforms to the standards which in turn can be expected to promote security – for example through education, training and the provision of specialized advice so that individuals can acquire suitable techniques for analyzing and regulating their own behavior… (1997, 269).

The model of subjective behavior marks the one in accordance with the market logic. In this context, subjects are assumed to be economic actors and explain human behaviors within the logic of the market so as to construct a strong relationship between "a responsible and moral individual and an economically rational individual" (Lemke 2002, 59). Similarly, Burchell notes that for neo-liberalism, "the rational principle for regulating and limiting governmental activity must be determined by reference to *artificially* arranged forms of the free, *entrepreneurial* and *competitive* conduct of economic-rational individuals" (Burchell 1996, 23, original emphasis).

As Munster mentions, in the neo-liberal governing, individuals are not regulated by making them conform to social obligation as in the welfare liberalism rather they are regulated by motivating them to choose and live their own life style (2005, 4). In other words, "they are encouraged to become self-governing, self-regulating and self-securing by differentiating between products, services and careers that are made available to them as choices (Munster 2005, 4-5) since individuals are concerned with the principles of "responsibility, autonomy and choice" (Rose 1996, 54). In this sense, neo-liberalism seeks to act upon people through "shaping and utilizing their freedom" (Rose 1996, 54).

In consequence, according to the rationality of neo-liberalism, individuals are not only free rather they are obliged to be free. Nevertheless, there are also individuals who are not enough competitive and entrepreneurial and who cannot cope with the operation of market relations. This group of individuals is defined as 'risk' to the society and they must be controlled. For this reason, "security does not aim at the population as a whole – which is considered costly and ineffective – but only at those groups" (Munster 2005, 5) who are considered as risks. Such differentiation between people who are free and people who needs to be controlled, says Munster, "establishes a

security relation between the self and other that is mediated by the objective of freedom" (Munster 2005, 5).

To conclude this chapter, governmentality perspective provides insights in examining various techniques, attempts and procedures for managing the population. These techniques, attempts and procedures are only applicable to the ones who are free. Due to this fact, the notion of free individuals is an indispensable element of governmental power. This is explicit specifically in Foucault's and his followers' analyses on liberalism and neo-liberalism. What is crucial is that the notion of freedom is accompanied with security rationality in the writings of Foucault and his followers in the English-speaking world. Indeed, the relation between freedom and security seems to create a constitutive paradox, especially in neo-liberal art of governing since for the sake of providing certain kinds of freedoms to individuals who are self-regulating and self-managing, security emerges as a political technique to limit the freedoms of individuals that cannot cope with market relations. The logic of neo-liberalism continues around this kind of constitutive paradox between freedom and security. This kind of governmental approach to freedom and security will be illustrated in the EU in the next chapter.

CHAPTER III

GOVERNING FREEDOM OF MOVEMENT IN THE EU

Analyzing the construction and governing of the right of free movement of persons in the EU from a governmentality perspective poses questions as follows: How is freedom of movement governed? Who governs the freedom of movement and in what logics? What are the techniques and/or practices used? Towards what ends? Throughout the chapter, I will seek to examine the governmentality behind conducting the free movement of persons in the EU by keeping these questions in mind.

Freedom of movement is governed through the imperative of security in EU rationality. Indeed, as I will mention throughout the chapter, in the EU case, freedom and security is not contradictory rather complementary to each other. Since the notion of freedom of movement inevitably involves the issues of immigration and asylum policies, my focus will be also on these issues. By analyzing the freedom of movement in general, and migration-related issues in particular, I will try to emphasize that the EU governmentality is highly concentrated around securitization of migration-related issues in the name of organizing freedom of EU citizens who are obliged to be free.

In the first section I would like to draw a general framework of free movement and security in the EU. Then, I will focus on historical examination of evolving freedom of movement with a security discourse. The historical review includes construction of the Schengen area, establishment of European citizenship and cooperation in the Justice and Home Affairs and lastly, construction of an Area of Freedom, Security and

Justice (AFSJ). Finally, I will concentrate on the theme "governmentality of unease" developed by Didier Bigo to grasp contemporary relationship between freedom and security in the EU.

3.1 General Framework of Free movement and Security

Freedom of movement is an objective of the EU rationality of governing. From the very beginning, the EU's attempt is to create an area without internal border controls and in doing so, the main attempt is to reach the condition for free competition between "societal and economic interests across the EU" (Huysmans 2004, 304). In turn, providing the free movement of persons is an inseparable part of a wider project, European integration project that is basically formulated on market-based understanding of the EU.

Due to this fact, from the early days of the European Economic Community (EEC), a set of measures to allow for the gradual increase of free movement of persons (from free movement of workers to free movement of EU citizens) have been adopted since EU governmentality can only function by producing the freedom of movement.

However, the EU does not only produce the freedom of movement, it also regulates and organizes it in a systematic manner. This regulation or conduct of free movement is provided by the security rationality. Within the similar logic in liberal art of governing, in order for individuals to enjoy their freedom of movement in an area without internal border controls, they need protection from other individuals who are seen as a threat to their freedom of movement. For this reason, security becomes a precondition of freedom of movement of certain persons. In other words, security is used as a technique for governing freedom. In this view, "security framing modulates as relation between freedom and security rather than one of the terms of this relation, i.e. security. This conceptual move implies that security rationality is always

also a rationality of practical realization of freedom" (Huysmans 2006, 148). Indeed, a closer examination of certain directives and regulations concerning the freedom of persons reveals that TCNs especially the ones economically disadvantaged are excluded from the right of freedom of movement through certain security measures. This exclusion also shows the construction of EU migration and asylum policies in particular and construction of an EU identity based on exclusive practices in general. However, it is important to point out that the right of free movement is also exclusive even for some nationals of the Member States. This exclusion comes from the fact that the principle of free movement is dependent on a degree of financial self-sufficiency of the person moving. To illustrate, the conditions for granting a residence permit change according to the status of the citizen such as if the person employed or self-employed person, student, retired or inactive. For instance, Guild states that if a citizen wants to reside in another Member State without exercising any activity or to study, she or he should prove to have sufficient financial resources not to become a burden for the host Member State's social assistance system and to have a sickness insurance policy (1997, 34). For this reason, Guild criticizes this differentiation since "the group of people most notably excluded from the exercise of free movement rights is the unemployed and apparently unemployable who are reliant on state social assistance benefits (1997, 34).

This kind of exclusion shows that the EU rationality has similarities with the rationality of neo-liberalism. That is, as Munster points out, the policies of the EU do not try to integrate free individuals into a political community as in the welfarist principle of solidarity; rather it integrates EU citizens who are self-sufficient and cope with free competition of the internal market within the EU-order through the promotion of freedom and autonomy *qua* mobility. In this sense, the individuals are not only free to move but they are also expected to do so (2005, 4-5).

As Munster states, economically, the idea of freedom as mobility marks EU-efforts to correct excessive state interference in the economy in order to allow individuals to exercise their own economic freedom across national boundaries. Socially, the freedom of movement underpins the idea that the EU should become a kind of 'animator state' within which agents actively try to implement their strategies for social problems themselves (2005, 5). In this sense, "individuals are encouraged to become self-governing, self-regulating and self-securing by choosing and differentiating between products that are made available to them to the market place" (Munster 2005, 5).

As is mentioned, the exercise of freedom of movement does not only depend on facilitating measures for providing the conditions in which individuals can govern their conduct of freedom in a full sense, rather it increasingly depends on conducting of the ones who are considered as improper and irresponsible for exercising this kind of freedom. This means that "freedom is not just something to be let loose and canalized in the internal market; it is also something to be managed through the constant monitoring of the things that are identified as a threat to the autonomous exercise of freedom and mobility" (Munster 2005, 5). For this reason, Munster states that security is seen as an important technique in governing populations that are denied the exercise of the conduct of freedom in the ideal of the EU as a smooth space where individuals can conduct their freedom in a responsible way (2005, 7).

Thus, EU governmentality can be seen as a part of wider rationality; neo-liberalism. However, it is also crucial to analyze EU governmentality in its own different rationalities, techniques and practices while examining the construction of freedom of movement and security. Since governing includes different rationalities, different ways of thinking and a plurality of governing agencies, authorities, laws and regulations, it will be helpful to analyze the relationship between freedom of movement and how it is constructed as a need for security practices within a historical perspective. This necessity of

a historical examination comes from the fact that the techniques and practices of power relations that establish the EU policies are historical. This means that, as Walters & Haahr mention, "they are not eternal but invented in a particular time and under specific conditions" (2005a, 93). Similarly, in "Security, Territory and Population", Foucault stresses on the historicity of security. According to Foucault, security, territory and population have varied over time (2007, 69). As to the EU, the period starting with the Schengen Agreement reflects the historicity of freedom of movement and security. In other words, the construction of 'Schengen space' or what Walters & Haahr call 'Schengenland' (2005a) refers to a particular regime of security and power relations. At this point, it is necessary to examine the specific conditions that gave the way to securitization of freedom of movement at the EU level. Firstly, the abolition of internal borders and construction of Schengen space will be examined. Then, I would like to focus on the construction of European citizenship which is believed as a key stone by focusing on construction of European identity based on not only economical but also political terms. Lastly, I would like to concentrate on the construction of an area of freedom, security and justice in which security measures becomes more related to the freedom of movement.

3.2 Historical Examination of the Free Movement of Persons

As will be examined throughout the chapter, there is an evolution from free movement of workers to free movement of persons together with increased security measures and this process is directly influenced by the abolition of internal borders between the Member States of the EU. Specifically, 1985 Schengen Agreement and 1986 Single European Act created a Schengen space in which abolition of internal borders and free movement of persons were provided. However, before examining this kind of space, it is crucial to focus on the emergence of the right of free movement in the EU legislative framework in brief so that certain continuities and discontinuities in the logic of right of free movement up till present day can be better grasped.

3.2.1 Before Schengen Agreement

1957 Rome Treaty includes the right of freedom of movement of EC workers so that it indicates the aim of EC for the establishment of an internal market from the beginning. As is mentioned in the Article 39[4] (ex 48) of the Treaty, EC workers have the right to look for a job in another member state, to work in another Member State, to reside there for that purpose, to remain there and to have equal treatment in respect of access to employment, working conditions and all other advantages which could help to facilitate the worker's integration in the host Member State (Article 39 (3)).

Due to these rights acquired by the EC workers, Kostakopoluou argues that the Treaty of Rome establishes an "embryonic form of European citizenship" since it mentions that right of freedom of movement could be enjoyed by workers throughout the Community (2002a, 445).

Nevertheless, the Article 39 includes two important limitations for the free movement right. First, this right was given only to nationals of the member states' workers (Article 39 (2)) meaning that workers who were not nationals of the member states were excluded from the right of freedom of movement. Second, freedom of movement was given to workers (Article 39 (1)), meaning that the right did not grant to persons who were not workers, namely self-employed persons, students, retired or non-active persons. Indeed, this limited scope of the Treaty on providing the free movement right exclusion pointed out that the right of free movement was constructed on a market-based understanding of the Community and as Baldoni mentions, it showed a conception of the individual primarily as an economic actor (2003, 6) in the framework of the EC during the 1950s and 1960s.

[4]Article 39 of the Treaty establishing the European Community (Nice consolidated version), OJ C 325, 24.12.2002.

The additional measures for implementing free movement for workers started to take place in the late 1960s. The Council Regulation 1612/68[5] prohibited all discrimination (i.e. any conditions of employment and work, social and tax advantages, membership of trade unions, rights and benefits in matters of housing) between workers of Member States based on nationality as was mentioned in the Articles 7- 9. Moreover, as discussed by Baldoni, Articles 10 and 11 of the Regulation extended the right of free movement to family members of the worker, included the responsibility for them to reside with the worker and allowed any kind of subordinate activity for the family members including non-EC nationals in the host country (2003, 7). This also means that, TCNs could enjoy their freedom of movement and access to certain rights only if they were family members of a worker who was a Community national.[6]

In addition to Regulation 1612/68, Directive 68/360[7] was adopted. Articles 2 and 3 of the Directive recognized the workers' and their family members' right to enter a host member state by showing a valid passport or an identity card without showing a visa except for family members who were not citizens of a member state.[8] In this respect, from beginning of the European

[5] The Council on Freedom of Movement for Workers within the Community 1612/68/EEC of 15 October 1968.

[6] In Article 11 of the Regulation, it is stated that "where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and those of the children who are under the age of 21 years or dependent on him shall have the right to take up any activity as an employed person throughout the territory of that State, even if they are not nationals of any Member State". In addition, in Article 12, it is mentioned that "the children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory".

[7] Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, *OJ L 257,* 19.10.1968.

[8] Article 2 (2) of the Directive states that "Member States shall grant the nationals…the right to leave their territory in order to take up activities as employed persons and to pursue such activities in the territory of another Member State. Such right shall be exercised simply on production of a valid identity card or passport". Moreover, in Article 3 (1), it is stated that

Community, it can be claimed that there is a differentiation between the right of free movement of nationals of Member States and the right of free movement of TCNs. Uğur argues that this differentiation laid the foundation for 'Fortress Europe' in the area of immigration (1995, 977).

It is important to mention that since the 1970s, the European Court of Justice (ECJ) started to play a crucial role in widening of the scope of free movement right, by shifting its focus gradually from the free movement of workers to the free movement of persons. As Baldoni mentions, ECJ gave a broader interpretation of Article 39 and Regulation 1612/68 by emphasizing social and individual dimensions of free movement (2003, 8). To illustrate, Baldoni indicates that the definition of a worker has expanded to include persons who take up or intend to take up a subordinate activity for a reduced time period and who were given or could be given a payment inferior even to the minimum payment guaranteed in the sector concerned, together with persons who take up a paid apprenticeship, who enter university in a member state different from their own after having taken up a job activity and seasonal workers (2003, 8-9). Moreover, within the efforts of ECJ, in 1975, the right of freedom of movement was also extended to the self-employed (Baldoni 2003, 9).

3.2.2 Creation of 'Schengen Space'

As Huysmans notes, before the mid-1980s, the role of the EC was very limited with regard to the immigration policy and Member States applied their own migration policies (2000, 753). Indeed, the policies of Member States towards immigrants were not restrictive in the 1950s and 1960s. As Huysmans mentions, immigrants were primarily an extra workforce in most Western European countries since the economic situation and the labour

"Member States shall allow the persons referred to in Article 1 to enter their territory simply on production of a valid identity card or passport". For the family members, Article 2 (1) mentions that "members of the family shall enjoy the same right as the national on whom they are dependent".

market required “a cheap and flexible workforce that did not exist in the domestic market” (Huysmans 2000, 753). In the late 1960s and the 1970s, Huysmans states, the economic climate had changed in Europe due to the economic recession and increased unemployment. In consequence, there was a shift from a permissive immigration policy to a control-oriented, restrictive policy since the labour migrants were not useful for the new economy any longer (2000, 753). However, during these years the role of European Community was very limited with regard to the immigration policy. The main reason was that free movement of persons did not have priority in the development of the internal market. As Uğur mentions, the free movement of workers from third countries was even a more marginal issue in the construction of the internal market (1995, 901) during this period.

Since the mid-1980s, a significant Europeanization process emerged with the Community’s aim to establish a common single market. For this purpose, 1985 Schengen Agreement abolishing the internal border controls was signed and this development shaped the Community’s practices and policies on migration-related issues together with free movement of persons.

1985 Schengen Agreement, an intergovernmental agreement, mainly aimed at removing internal border controls of Member States. To put it another way, its purpose was to provide free movement of persons within the territory of the European Community (EC). The signatory states were Germany, France and Benelux countries (Belgium, the Netherlands and Luxemburg). Together with the Single European Act signed in 1986, the priority of the EC became to transform the European Community into a unified space, where “freedom of circulation is the rule and restrictions to it, the exception” (Anderson and Apap 2002, 3). To illustrate, Article 3 of the EC Treaty states that “for the purposes set out in Article 2, the activities of the Community shall include… (c) an internal market characterized by the

abolition, as between Member States, of the obstacles to the free movement of goods, persons, services and capital". [9]

For this reason, as Carrera mentions, traditional internal border checks of persons who were not nationals of the Member States had to be abolished for the establishment of a common market (2005a, 700).[10] Although this unification of the European space was seen as a major achievement in political discourse, it had some negative implications, meaning that abolishing controls created new opportunities for illegal activities such as illegal immigration and drug trafficking. In other words, since the nation-state borders were challenged by the free movement of persons, Member States transferred their concerns on migration and asylum at a transnational, namely the EU level so that they could cope with these issues in a more cooperative way. To illustrate, Article 7 of the Schengen Agreement of 1985 states

> The parties endeavour to approximate as soon as possible their visa policies in order to avoid any adverse consequences that may result from the easing of controls at the common frontiers in the field of immigration and security (cited in Huysmans 2000, 755).

The Article 7 emphasized that internal security risks had to be redefined and dealt with at the European level. As Carrera mentions, the dismantling of the border checks as well as the increased permeability of frontiers also led to many fears at the national level of the potential increase of massive irregular immigration and transnational organised crime so it was believed that the right to move and reside freely within the EU needed to be accompanied by a

[9] Article 3 of the Maastricht Treaty, Provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, 07.02.1992.

[10] European Commission (1985), "Part One: The Removal of Physical Barriers", *Completing the Internal Market*, White Paper from the Commission to the European Council, COM (85) 310 final, Brussels, 14 June (cited in Carrera, 2005a: 700).

security or control framework (2005a, 700). Thus, Schengen Agreement was supplemented by the Schengen Convention of 1990 and it came into force in 1995. Thirteen Member States have signed up to Schengen except the United Kingdom and Republic of Ireland. This means that there are disagreements among the Member States regarding the Schengen measures. However, within the scope of this study, the focus will be on the measures of the Schengen Agreement and Convention related to free movement and security. In addition to the 13 Member States, Norway and Iceland, the two non-EU Member States, also applied the Schengen provision on the basis of a special agreement. The aim of the Convention was to abolish controls on people at the internal borders of the signatories, to harmonize controls at the external borders of the Schengen area, and to introduce a common policy on visas in order to reconcile freedom and security. For this reason, the freedom of movement, emphasized in the Schengen space, without being submitted to checks at internal borders was accompanied by 'compensatory measures'. These measures involve setting a common visa regime, improving coordination between the police, customs and the judiciary and taking additional steps to combat problems such as terrorism and organized crime. Moreover, an information system known as the Schengen Information System (SIS) was set up to exchange data on immigrants' identities and descriptions of objects which were either stolen or lost. So, what we see is enhanced security control for the sake of free movement within the territory of the EU. As Tirse'n points out, only 4 articles in the Schengen Convention are about open borders and 138 are about increased control (1997, 1). Similarly, Pellerin implies that the constitution of the Schengen space was designed to promote economic liberalization, particularly the greater mobility of labour by elimination of border controls among member states, but at the same time, external controls between Schengenland and the peripheries were reinforced. For this reason, Pellerin argues "security controls constituted as the counterpart of the liberalization of internal frontiers" (2005, 52). Due to these measures, it can be stated that the Convention focused much on the control of free movement and as Bigo

notes, Schengen logic was clearly against freedom of movement of people (2005a, 67). Nevertheless, the connection between free movement and security cooperation has been a stable one within the EU since the 1985 Schengen Agreement.

Kostakopoulou claims that as in the case of Schengen, the formation of national preferences does not always precede interstate cooperation. That is, "objectives have been formulated and strategies pursued only *after* protracted European discussions within a highly specialized elite drawn from national justice and interior ministries" (2002b, 234, original emphasis). She adds that "the embedded beliefs shared by members of this elite matter" (Kostakopoulou 2002b, 234). Moreover, Kostokopoulou emphasizes that the link between the increased crime and illegal immigration and the abolition of internal border controls has rarely been verified by empirical search or called into question. Nevertheless, she mentions, "the single market became a pretext for restrictive measures, including new mobile controls internally and the erection of new barriers externally" (Kostakopoulou 2002b, 234).

In line with the aims of creating the internal market and abolishing border controls, starting from the early 1980s, migration policies became an important issue in intergovernmental fore. Indeed, from 1975 onwards, intergovernmental cooperation began to develop for dealing with immigration together with police and judicial cooperation. Kostokopoulou states that informal arrangements were established for sharing experiences, exchanging information and expertise and setting up networks to facilitate contacts between Member States (2002b, 233). To illustrate, in 1975, TREVI (Terrorism, Radicalism, Extremism and Violence International) Group was established. As Kostakopoulou mentions, TREVI became a policy forum for the exchange of expertise and strategies of the Member States in counterterrorism (2002b, 233). After 1984, says, Kostakopoulou, "police and customs officers established 'a chain of equivalence with TREVI between the single market and security deficits" (2002b, 233). As Anderson *et al*.

mention, TREVI had been influential in pushing the agenda beyond traditional concepts and adding new security threats such as immigration (1995, 157). That is, as Anderson *et al.* state, although the original remit of TREVI Group was to cover terrorism and internal security, in 1985 its scope was extended to cover illegal immigration and organized crime (1995, 157). In addition, *Ad Hoc* Working Group on Immigration was created in 1986 "to promote cooperation on terrorism, policing, customs, drugs, immigration and asylum and legal cooperation" (Lodge 2002, 49). The establishment of this group was coincided with the abolition of internal borders between the nation-states that signed Schengen Agreement and the agreement of compensatory measures. As Lodge mentions, *Ad Hoc* Working Group on Immigration was very effective in controlling migration-related issues (2002, 49). To illustrate, says Lodge, in 1987, the group proposed sanctions against airlines bringing in undocumented asylum seekers and in 1990, it produced a draft convention to prevent 'asylum shopping' (2002, 50). It is important to note that these intergovernmental groups are very crucial actors in viewing migration-related issues as security problems such as terrorism or drugs crime so causing the migration-related issues to be securitized.

Different from the above-mentioned restrictive migration policies and construction of a natural link between migrants and insecurity, the extension of free movement and residence rights to persons who are EU nationals other than workers took under consideration in 1990. With the Directives 90/364,[11]

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[11] The Council Directive on the right of residence, 90/364/EEC, 28 June 1990.

[12]The Council Directive on the right of residence for employees and self-employed persons who have ceased their occupation activity, 90/365/EEC, 28 June 1990.

[13]This Directive was replaced by the Council Directive on the right of residence for students, 93/96/EEC, 29 October 1993.

90/365,[12] and 90/366,[13] free movement and residence rights were granted to persons who were not economically active, namely students, pensioners and employees or self-employed persons who have ceased their occupation activity, in other words, the unemployed. However, economic considerations were still dominant since Baldoni mentions that such arrangements were subject to two conditions which were not imposed on workers: students, pensioners and the unemployed must have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State and they must have sickness insurance covering all risks in the host Member State (2003, 9). Also, there were no implementations on the right of migrants in the Directives.

3.2.3 Justice and Home Affairs

In 1993, Maastricht Treaty came into force. This treaty is very crucial since for the first time, cooperation on internal security and police matters is officially recognized in the EU with Justice and Home Affairs (JHA) Pillar, the so-called third pillar. Kostakopoulou mentions that the lack of coordination between various working groups and the difficulty of agreeing binding measures led to the creation of a new institutional architecture. In consequence, she says, nine areas of JHA cooperation became matters of common interest located in a separate intergovernmental 3rd pillar. These areas were asylum policy, migration policy, rules on crossing external borders, drug addiction, international fraud, civil judicial cooperation, criminal judicial cooperation, customs cooperation and police cooperation (2002b, 235). As a result, migration-related issues became an explicit subject of intergovernmental matters of common interest within the EU. The 3rd Pillar is described as the intergovernmental level in which the national policies are autonomous. So, the right of free movement of persons together

with the regulation of migration policies depended on the jurisdiction of the Member States. Kostakopoulou criticizes intergovernmental method because of its being ineffective in policy-making due to unanimity vote, the absence of parliamentary involvement, judicial supervision and binding legal instruments and the lack of enforcement mechanisms (2000, 499). As Guild and Peers argue, "intergovernmental approach" preceded the Community obligation with the effect of "moving the issue of movement of persons within the EU into the central sphere of the interior and justice ministries and out of the Community sphere with its mandatory control by the Court of Justice" (Guild & Peers 2001, 268). Within this process, the interior and justice ministries confronted the ECJ which continued to "claim jurisdiction over the provisions addressing workers in treaties between the Community and third states, holding that such provisions could be directly effective and interpreting them relatively liberally" (Guild & Peers 2001, 270) A consequence of this confrontation was that these ministries, "already concerned that the accommodation of their sovereignty and security interests could not be found within the existing Community structures were further convinced of the need for a dramatic change of the Community into a Union and the virtual exclusion of the Court of Justice form extra Community immigration and asylum" (Guild & Peers 2001, 270). In a similar vein, Kostakopoulou argues that the marginal role accorded to EU institutions with the Maastricht Treaty allowed to the Justice and Home Affairs Ministers of the Member states to put in a place an institutional framework which lacked "coherence, consistency, democratic accountability, respect for the rule of law and for human rights and effectiveness" (2000, 498). In consequence, she mentions, "nation-states built upon past domestic experiences and national restrictive laws, and to adopt an EU-wide restrictive and law enforcement policy" (Kostakopoulou 2000, 498).

The negative effects of the intergovernmental approach can be best viewed in the asylum policies of the EU. Firstly, the asylum policy is based essentially on instruments with no legal force, e.g. the London Resolutions

of 1992 on manifestly unfounded applications for asylum. Secondly, there is a contradiction between asylum policies of the EU and human rights since granting asylum is not perceived as an individual right, rather it is an entitlement provided by the nation-states. The only binding norm is the non-refoulment principle. As an international commitment for recognizing the rights of asylum-seekers, the EU signed 1951 Geneva Convention Relating to the Status of Refugees and 1967 New York Protocol. As Guild mentions, "Article 1A of the Convention defines a refugee a person who is outside his or her country of origin and has a well founded fear of persecution there on the ground of race, religion, membership of a social group or political opinion. The duty, contained an Articles 32 and 33 is not to return such a person to a country where he or she would be persecuted" (Guild 2005, 34), the so-called non-refoulment principle. In addition to Geneva Convention and New York Protocol, principle of non-refoulment was emphasized in "the European Convention on Human Rights as interpreted by the European Court of Human rights at Article 3 prohibiting return of a person to a country where there is a substantial risk that he or she would suffer torture, inhuman or degrading treatment" (Guild 2005, 34). Nonetheless, Member States' tendency towards asylum seekers is mostly preventive and constructed on a securitarian basis as in immigration policy. At the first sight, they apply pre-entry preventions such as visa requirements to asylum seekers and carrier sanctions[14] to carrier agencies so that Member States aim to prevent to grant the status of refugee before an asylum-seeker entered in their territories. If an asylum-seeker managed to enter in the territory of a state for the sake of protection, Member States mostly apply the measure of safe third country for rejecting to receive an application for asylum within the EU countries and sending the asylum seeker to a host third country as a post-entry prevention. A good example of restrictive and control-oriented policies towards asylum-

[14] To illustrate, Directive 2001/51/EC of the Schengen Implementing Agreement provides at Article 26 that "…The contracting Parties undertake ... to impose penalties on carriers who transport aliens who do not possess the necessary travel documents by air or sea from a Third State to their territories" implementations and post-entry preventions such as safe 3rd country measures.

seekers at the EU level is 1990 Dublin Convention which aims to prevent multiple asylum applications. Asylum seekers could have their applications only one time and only to one member state. As Huysmans indicates, making it impossible to submit applications for asylum in different Member States "reduces the chances of being accepted, which obviously will deter some refugees from seeking asylum in Western Europe" (Huysmans 2000, 756). Later, Dublin convention was replaced with the Dublin II Regulation, which was adopted in 2003. Again, says Huysmans, the restrictive and control-oriented basis of the Dublin II Regulation was emphasized by the development of EURODAC, a database designed to collect the fingerprints of asylum seekers and illegal immigrants (2000, 756) that I would like to discuss in the Forth Chapter.

3.2.4 European Citizenship and Rights of EU Citizens

1993 Maastricht Treaty formally established European citizenship and granted the EU citizens "the right to move and reside freely within the European Union" (Article 18) as one of the fundamental rights of the EU citizens. According to Dwyer, this shows a gradual shift in language from an emphasis on workers' rights "towards a more general enunciation of concern for the right of citizens" (2004, 151). The other fundamental rights were as follows: The right to vote and stand as a candidate in municipal elections and in elections to the European Parliament in the state where she or he resides under the same conditions as nationals of that state (Article 19); the right to protection by the diplomatic and consular authorities of any Member State where the state of which person is a national is not represented in a non-member country (Article 20); the right to petition to European Parliament and apply to the Ombudsman (Article 21).

The basic aim of the Treaty was to strengthen the link between the EU and its citizens, so as to provide a European identity not only based on economic but also political terms. Vink argues that European citizenship has a strong

connection with the agenda of bringing the Union closer to its citizens, traditionally centered on the idea of a 'People's Europe' and particularly with the political will to go beyond a process of 'mere' economic integration (2005, 42). However, among the fundamental rights, only "the right to petition to European Parliament and apply to the Ombudsman" was granted to TCNs. In that sense, although the EU aimed to strengthen the link between the citizen and Europe so that it could develop a political European identity, the citizenship of the union excluded migrants, even if they were legally residents in any of the Member States. Therefore, we can see that there are two levels of citizenship in the sense that first, one should have a national citizenship of one of the member states and after that, she or he can become a European citizen. Indeed, this understanding is exclusive since nationality is equated with citizenship. In this sense, European citizenship formally established a differentiation between Europeans and non-Europeans. In consequence, the question of being a citizen of a Member State remained exclusively a jurisdiction of national law. For this reason, Guild criticizes the exclusive character of union citizenship by stating that "the national laws of member states as regards acquisition and loss of citizenship, which vary from state to state, create the parameters of citizenship of the Union" and "it is the exclusive domain of the member states to decide to whom the Union belongs and who belongs to it" (Guild 1997, 45). In other words, since the nation states are the decisive mechanisms of the membership issue, Delanty rightly mentions that European citizenship is a second-order citizenship resting on the more sovereign national constitutions (1998, 354). In line with these thoughts, Bhabha emphasises that the problem with this derivative character of "European rights" is that "10-13 million third country nationals who have cast no coherent set of rights within the EU structure" are excluded. Due to this fact, they remain as "aliens" and "their right to permanent residence – however long their stay – is conditional" (Bhabha 1998, 716). Due to this reason, Kostakopoulou notes that instead of designing a pluralistic and heterogeneous political community European citizenship made national

citizenship more valuable (2002a, 447). Indeed, this situation reflects the construction of a European identity on an essentialist understanding. As Delanty stresses, according to this understanding, Europe is defined not by reference to the citizenship in the sense of the members of civil society, but "by reference to a cultural discourse whose reference points are, the geopolitical framework of the European continent, the cultural heritage of Europe, and a strong sense of the uniqueness of Europe. In this sense, says Delanty, "'Who is a European' is largely a matter of exclusion and in the dichotomy of self and other which constitutes the discourse of European identity, Europeanness is constructed in opposition with the non-European, in particular Islam" (1997, 297). To put it another way, Martiniello indicates that European culture is assumed "as if it is given which is based on Judeo-Christian and humanist experience" (2001, 64). To Martiniello, this leads to "the exclusion from 'Europeanity' of those citizens living in Europe who supposedly come from non-Judeo-Christian civilizations, such as the immigrant-origin populations that come from countries where Islam is the principal religion" (Martiniello 2001, 64). In consequence, Martiniello notes that "the problem of combining social and political unity with cultural and identificational diversity remains unsolved at the European level" (Martiniello 2001, 64).

In line with the criticisms of the authors, the ECJ also mentioned the exclusive character of EU citizenship and the competence over the nationality matters by the Member States. At this point, as discussed by Carrera and Merlino, the *Micheletti case*[15] should be paid attention. Mr. Micheletti has a dual Argentinean and Italian nationality that arrived in Spain for the sake of profiting from his right to freedom of establishment as an orthodontist. The Spanish authorities refused to grant him a residence permit due to the fact that Spanish legislation refers to the last or effective

[15] Case C-369/90, M. V. Micheletti and others v. Delegacion del Gobierno en Cantabria [1992] ECR I-4239 (cited in Carrera & Merlino 2009, 48).

residence, which in this case was Argentina (Carrera & Merlino 2009, 48). At the first sight, the ECJ confirmed that determination of nationality falls within the exclusive competence of the Member States. Yet, the Court also declared that this competence must be exercised in compliance with EC Law.[16] Due to this fact, the Court held that nationality of one of the EU Member States was sufficient and that a citizen did not have to choose between the two nationalities (Carrera & Merlino 2009, 48). As Carrera mentions, this judgment is important in the sense that it "put into question the total exclusivity Member States have had over nationality and their discretion to exclude some categories of persons" (2005a, 704).

Another crucial case is *Zhu and Chen case.*[17] Mr. and Mrs. Chen were Chinese nationals. Mr. Chen is a director and the majority stakeholder of a company established in China. He travels frequently to various Member States, specifically to the UK due to his work (paragraph 7 of the Judgment 2004). Catherine Zhu was born on 16 September 2000 in Ireland and automatically gained Irish citizenship (paragraphs 8 and 9 of the Judgment 2004). Mrs. Chen, her mother moved with her to the UK and applied for a long-term permit to reside in the UK but she was refused (paragraph 2 of the Judgment 2004). The ECJ ruled that, "as regards the right to reside in the territory of the Member States provided for in Article 18(1) EC, it must be observed that right is granted directly to every citizen of the Union…Purely as a national of a Member State, and therefore as a citizen of the Union, Catherine is entitled to rely on Article 18(1) EC" (paragraph 26 of the Judgment 2004). In addition to this basic right of Catherine Zhu as an EU

[16] It is stated in paragraph 10 of the Judgment that "Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is *not permissible* for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty" (emphasis added).

[17] Case C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department, 19.10.2004.

citizen, the Court also declared that "Directive 90/364 grant a right to reside for an indefinite period in the host Member State to a young minor who is a national of another Member State, those same provisions allow a parent who is the minor's primary carer to reside with the child in the host Member State". In other words, denying residency to her mother when Catherine is "dependent both emotionally and financially to her mother" (paragraph 13 of the Judgment 2004) would conflict with her rights as an EU citizen. In this sense, as discussed in the website of EU Case Law[18], the court focuses that all EU citizens will benefit from the right of residence, irrespective of the way the nationality was acquired, their ages and the source of their means of subsistence (2007).

Actually, union citizenship concerning free movement is exclusive for some nationals of the Member States although it is stated in Article 18 that the right to move and reside freely within the European Union is one of the fundamental rights of the union citizens. This exclusion comes from the fact that the principle of free movement is still dependent on a degree of financial self-sufficiency of the person moving. The conditions for granting a residence permit change according to the status of the citizen such as if the person is employed or self-employed person, student, retired or inactive. In other words, Carrera states that residence rights will not be granted to those EU citizens who lack sufficient resources to cover themselves in the hosting state (2005a, 701). In addition, Guild mentions that there is no right or protection for these persons to move across the EU for searching better social assistance benefits, only for an initial period while looking for work (1997, 34-35). To illustrate this issue, the *Sala case*[19] should be mentioned. Mrs. Sala was a Spanish national who had lived in Germany since May 1968. She had various jobs there between 1976 and 1986 and was unemployed from 12 September 1989 to 24 October 1989. Since then she

[18] http://www.eucaselaw.info/zhu-and-chen-2004/.

[19] Case C-85/96, Maria Martinez Sala v. Freistaat Bayern, [1998].

had received social assistance from the City of Nuremberg and Nuremberg Rural District Authority (paragraph 13 of the Judgment 1998). In January 1993, Mrs. Sala applied for child-raising allowance for her child born during that month (paragraph 15 of the Judgment 1998).

However, her application was rejected under the German social security law on the ground that she did not have a German nationality or a valid residence permit (paragraph 16 of the Judgment 1998). As is mentioned in the opinion of the Advocate General,[20] the ECJ was asked "to decide whether the child-raising allowance provided for under German law constitutes a family benefit within the meaning of Regulation (EEC) No 1408/71 or a social advantage within the meaning of Regulation (EEC) No 1612/68" (European Court Reports 1998).

As Carrera and Merlino state, the ECJ rejected the limiting condition upon access to child allowance and based on Articles 17 and 18 EC Treaty on EU citizenship and article 12 EC Treaty on non-discrimination and "extended the protection against discrimination based on nationality to every citizen of the Union" (Carrera & Merlino 2009, 45). It was stated in the Judgment of the Court that "as a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the scope ratione personae of the provisions of the Treaty on European citizenship" (paragraph 61 of the Judgment 1998). Regarding the issue of discrimination, the ECJ stated that

> …for a Member State to require a national of another Member State who wishes to receive a benefit such as the allowance in

[20] Opinion of Mr Advocate General La Pergola delivered on 1 July 1997. - María Martínez Sala v Freistaat Bayern. - Reference for a preliminary ruling: Bayerisches Landessozialgericht - Germany. - Articles 8A, 48 and 51 of the EC Treaty - Definition of 'worker' - Article 4 of Regulation (EEC) No 1408/71 - Child-raising allowance - Definition of 'family benefit'- Article 7(2) of Regulation (EEC) No 1612/68 - Definition of 'social advantage' - Requirement of possession of a residence permit or authorization. - Case C-85/96.

> question to produce a document which is constitutive of the right to the benefit and which is issued by its own authorities, when its own nationals are not required to produce any document of that kind, amounts to *unequal treatment*" (paragraph 54 of the Judgment 1998, emphasis added).

At the website of EC case law,[21] it is stated that Sala case is very crucial since by including the situation of Mrs. Sala within the scope of application of the EC Treaty, the ECJ enlarged that scope in two respects. Firstly, the simple fact that Mrs. Sala was a Union citizen lawfully residing in another Member State was enough for her to fall under the scope of application of the EC Treaty. Secondly, the ECJ ruled that a benefit previously granted only to workers should also be granted to a person other than a worker (2007).

Another important case is *Grzelczyk case*[22] which dealt with the right of economically inactive persons to reside in another Member State. Rudy Grzelczyk was a French national who had studied in Belgium. During the first three years of his studies, he had worked at Belgium to pay for his costs of maintenance, studies and accommodation (paragraph 10 of the Judgment 2001). At the fourth and last year of his study, he stopped working and applied for the minimex which is the minimum subsistence allowance (paragraph 11 of the Judgment 2001) but he was rejected on the ground that Mr. Grzelczyk did not satisfy "the legal requirements for the grant of the minimex, and in particular the nationality requirement" (paragraph 12 of the Judgment 2001). Moreover, he was "an EEC national enrolled as a student" (paragraph 12 of the Judgment 2001), meaning that he was not a Belgian national and was economically inactive person. The national court asked ECJ whether the refusal to grant the so-called minimex was contrary to the

[21] http://www.eucaselaw.info/martinez-sala-1998/.

[22] Case C-184/99, Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001].

EC Treaty rules on EU citizenship and the prohibition of discrimination on grounds of nationality mentioned in Article 12 EC Treaty.

ECJ considered that the condition which had been imposed discriminated on grounds of nationality since it did not apply to Belgian nationals. ECJ found that articles 12 and 18 EC Treaty precluded "entitlement to a non-contributory social benefit, such as the minimex, from being made conditional, in case of nationals of Member States other than the host State where they are legally resident, on their falling within the scope of Regulation No 1612/68 when no such condition applies to nationals of the host Member State" (paragraph 46 of the Judgment 2001).

As a result, to some extent, the ECJ enhanced the scope of free movement right of the EU citizens. Nevertheless, Member States remain the main decision-makers on providing the right of free movement and the other rights granted for enjoying the freedom of movement in their countries. As is seen, in the EU, different legal regimes apply different categories of persons. Particularly, someone's nationality and economic sufficiency determines his/her right to free movement and in consequence, the right to work, to reside, to have access to social welfare, health care and education.

Towards the end of 1990s, the human right scholars as well as the European institutions, especially the European Parliament criticized the exclusive and derivative characters of the European citizenship rights and insisted that this would lead to human rights problems. Especially, exclusion of TCNs from the enjoyment of certain set of rights would lead to marginalization and exclusion of them from the European integration process at the EU level. To illustrate, Bhabha emphasises the "multi-tiered" system of rights and their derivative character as the most critical human rights issue. First, she claims, "the free movement provisions and all the measures related to implementation of the single market generally apply to nationals of member states and members of their family". Therefore, third country nationals have

“no European community law rights as such” (Bhabha 1998, 713). Secondly, “member states have…concertedly opposed the intervention of the European Commission in the formulation of migration and integration policies for non-nationals” (Bhabha 1998, 713). This kind of a differentiation between nationals and non-nationals led to a “multi-tiered system of rights, to mobility, to family reunion to eligibility for social security payments, which is profoundly discriminatory and politically problematic” (Bhabha 1998, 713).

3.2.5 Area of Freedom, Security and Justice

As a response to these criticisms, the Amsterdam Treaty signed in 1997 and entered into force in 1999, gave for the first time a formal recognition to human rights. The Treaty proclaimed that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States” (Article 6(1)). Moreover, the Treaty aimed to create an “area of freedom, security and justice" without controls at internal borders for individuals, irrespective of their nationality. Although these were positive developments, the Treaty of Amsterdam added to Article 17 that ‘citizenship of the Union shall complement, and not replace national citizenship’. So, it is clear that the exclusive and derivative characters of union citizenship have prevailed.

The most important feature of the Amsterdam Treaty is that the EU itself has given new powers due to the changes in the Area of Justice and Home Affairs Cooperation. First of all, as Apap and Carrera mention, the fields of “visas, asylum, immigration and other policies related to the free movement of persons” came from the third to the first pillar, and thus within the competence of European Community law, under the new title, namely Title IV of the EC Treaty, Articles 61-69 (2003, 1). The authors point out that “for the first time the EU legislative machinery had a mandate to enact EU

legislation on TCNs" (Apap & Carrera 2003, 1). The Amsterdam Treaty provides for a transition period of five years before the co-decision procedure applies, subject to a Council decision. Moreover, the Court of Justice, on its own, will be competent for issues provided by the Title IV.

Although the Amsterdam Treaty transferred migration-related issues to the Community level, certain authors mention that the transition period of five years indicates that Member States continue to be the main actors in the fields of free movement and migration-related issues since before the transitional period, the Council will make decisions by unanimity vote. In this respect, Kostakopoulou argues that the new system shares many intergovernmental features of the Maastricht Treaty, at least during the transitional period (2000, 501). For instance, as Kostakopoulou mentions, immigration policies concerning the right of resident of long-term resident TCNs do not fall within the Community's exclusive competence (2000, 503). Under Article 63 EC, "Member States are allowed to maintain or introduce national provisions which are compatible with the Treaty and with international agreements" (Kostakopoulou 2000, 503). For this reason, Geddes notes that "far from weakening EU member states or symbolizing some 'loss of control', EU cooperation and integration helped member states to consolidate and reassert their ability to regulate international migration through use of new EU level institutional venues" (2001, 21-22). What is more, in line with the Maastricht Treaty, Article 68 of the new Title IV limits the jurisdiction power of the ECJ in the field of asylum and immigration. As Gortazar explains, "concerning the preliminary procedure laid down in Article 234 EC, the new article 68 lays down that, instead of any judge or court, only the judges or the internal courts of final instance will be able to transfer preliminary questions and, moreover, they will request the intervention of the ECJ if they 'consider it to be necessary'". In addition, says Gortazar, "the ECJ will not have jurisdiction over decisions adopted as regards the abolition of internal borders relative to the maintaining of public order and safeguarding internal security" (Gortazar 2001, 133).

Secondly, from the Amsterdam Treaty onwards, it is explicitly pointed out that security cooperation was no longer just viewed as a compensatory measure for the abolishment of internal frontiers. Rather, it was considered a core precondition for the exercise of freedom in a more general sense. Hence, security cooperation became a central element in the establishment of the EU as an area of freedom, security and justice.

To illustrate, in 1998, it was stated in the European Council's and European Commission's Action Plan on *How Best to Implement These Provisions of the Amsterdam Treaty* that

> Freedom loses much of its meaning if it cannot be enjoyed in a secured environment and with the full backing of a system of justice in which all Union citizens and residence can have confidence… It should be noted in this context that the treaty instituting the European Communities (art. 6 ex art. 731a), makes a direct link between measures establishing freedom of movement of persons and the specific measures seeking to combat and prevent crime (art. 31e TEU), thus creating a conditional link between the two areas (European Council's and European Commission's Action Plan on How Best to Implement These Provisions of the Amsterdam Treaty 1998).

In addition, the new Title IV of the Amsterdam Treaty is linked up with one of the objectives set out in Article 2 which stated that "the Union should be maintained as an area of freedom, security and justice in which the free movement of persons is assured in conjunction with *appropriate measures* with respect to external border controls, immigration, asylum and combating of crime" (emphasis added). As Kostakopoulou argues, "this link reveals a much clearer correspondence between free movement of persons and 'flanking measures'" (2000, 507). She mentions that "the communitarized areas of the third pillar come to support the first pillar: they are indispensable flanking measures to the abolition of internal border controls and the preservation of security of the citizens of the EU" (Kostakopoulou 2000, 507). In a similar vein, Crowley argues that the free movement of persons is equated with the security concern. He notes that 'appropriate measures' to

control external borders, to regulate asylum and immigration, and to prevent and combat crime are explicitly given the same status as free movement in the arrangement of the area of freedom, security and justice (2001, 16).

The most relevant example of increasing security concerns at the EU level is the incorporation of the Schengen *acquis*[23] into the Treaty. As Boer mentions, the emphasis on security becomes more obvious from the French insistence on a declaration relating to Schengen protocol, namely that the level of protection and security within the New Area should remain the same as under Schengen (Dec. 41) (1997, 9). In consequence, the Schengen provisions regarding the abolition of checks on persons at internal borders and certain accompanying measures, particularly regarding checks at external borders and visas, are set out under Title IV of the EC Treaty.[24] Huysmans states that one of the interesting aspects of the Schengen process was that the participants increasingly aimed to control rather than facilitate free movement and connected issues of border control, migration, terrorism etc. under security umbrella (2000, 294). In a similar vein, Lavenex underlines that "the EC was set up as a primarily economic construct and its founding treaties contained no provisions regarding the individual rights of third-country nationals not resident in one of the Member States" (2001, 858). Lavanex goes on stating that "the absence of countervailing humanitarian provisions in the EU treaties favoured the securitarian approach" (2001, 858).

In addition to the incorporation of the Schengen *acquis* to the Treaty, with the Amsterdam Treaty, Boer mentions that police and judicial cooperation such as Eurojust and European Judicial Network in criminal matters have been intensified. In Title VI of the Treaty, "intensified cooperation between

[23] As Baldoni mentions, 1985 Schengen Agreement, 1990 Schengen Convention and various protocols of adhesion as well as declarations and decisions adopted by the executive committee of the Schengen area form the *acquis* of Schengen (2003, 13).

[24] The United Kingdom, Denmark and the Republic of Ireland opted out of the new measures on the free movement of persons provided by the Treaty of Amsterdam.

police forces, customs authorities, and 'other competent authorities'" (Article K.1) was mentioned (1997, 10). Furthermore, Boer notes that the deepening of police cooperation finds its basis in a number of new provisions, "the most spectacular of which are the possibility of having operational cooperation between competent authorities (Art. K.2 (1)) and the assignment of 'operative' powers to Europol and joint teams (Art. K.2 (2) (a) and (b))" (1997, 10).

To sum up, as Anderson and Apap mention, with the Treaty of Amsterdam coming into force, the European internal security entered a dynamic phase of transformation (2002, 5). This transformation is marked by the stronger role of EU institutions by the incorporation of the Schengen *acquis* into the Treaty and communitarization of migration-related policies. Furthermore, there was an intensified police and judicial cooperation together with security professional actors such as liaison officers, senior police officers, judges and prosecutors. This means that a European internal security discourse has been constructed by a variety of actors.

3.2.6 Developments after the Amsterdam Treaty

Following the Amsterdam Treaty, two main developments occurred within the scope of free movement of persons together with enhanced emphasize on security discourse in the EU legal framework. One development is on the EU citizens' side and the other one is on the TCNs' side. Before beginning, it is once more important to point out that regarding the right of free movement, different legal regimes apply to different categories of persons within the EU based on nationality and economic sufficiency.

3.2.6.1 Free Movement for EU Citizens

The first development is Directive 2004/38/EC for EU citizens. Within this Directive, EU citizens can be viewed as the most privileged ones in enjoying the right of freedom of movement. For eliminating the categorization of EU citizens into workers, self-employed, students or other economically inactive persons, in 2004, Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States was established.[25] This Directive provides a comprehensive legislative framework by bringing all legislative provisions governing the right of EU citizens and their family members to enter and reside in Member States. By doing so, the Directive does not distinguish people into categories rather it covers the rights of free movement of EU citizens and their family members as such. This seems to be a positive step in terms of equal treatment of all EU citizens.

To summarize the new innovations of the Directive; first, it acquires the right of permanent residence for EU citizens and their families after 5 years of residence (Article 16). Second, for residence of less than 3 months, the only requirement is the possession of a valid identity document and for residence of more than 3 months, the need to hold a residence card is abolished, if provided by national legislation.[26] Nonetheless, the requirement for family members who are not nationals of any Member State, entry visa is still applicable (Article 5.2).

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[25] Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004, on the right of citizens who move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158/77, 30/04/2004.

[26] Before the 2004/38/EC Directive, Member States asked for an identity card or passport for EU citizens and their family members according to the Directive 68/360/EEC, the Council Directive on the abolition of restrictions on movement and within the Community residence for workers of Member States and their families, 68/360/EEC of 15 October 1968.

Although this is the case, there are some critical points of the Directive with regard to providing equal treatment to all EU citizens irrespective of their being worker, student, self-employed etc. For one thing, Article 7 of the Directive states that

> All Union citizens shall have the right of residence on the territory of another Member state for a period of longer than three months if they: (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during the period of residence and have a comprehensive sickness insurance cover in the host Member State.

Due to this fact, as Carrera mentions, students, retired persons and those dependent on social allowances will face with unequal treatment once more under the new regime and "the much-criticized economic aspect of EU citizenship will remain untouched" (2005a, 716).

3.2.6.2. Free Movement for TCNs

As was mentioned, the Treaty of Amsterdam could not frame a coherent approach to non-EU citizens. However, before the Amsterdam Treaty, TCNs were not covered by provisions of Community Law. This also shows that TCNs do not represent a homogenous group so their rights vary with their country of origin. Before the Amsterdam Treaty, Guild mentions that the privileged groups of TCNs who could enjoy indirectly the right of free movement as a derivative right for more than three months can be distinguished into three categories. The first category includes TCNs with a family relationship with an EC citizen. The second group comprises TCNs who are employees of a Community based company meaning that if their employer requires them to go to another Member State to carry out service provision for the employer (2005, 22). Nevertheless, as Guild mentions, there is no individual right for the employee (2005, 22). Lastly, as Groenendijk, Guild and Barzilay mention, TCNs are granted the right of

entrance and residence within the Member States of the EU by virtue of Association or Cooperation Agreements between the EU and third countries (2000, 4).[27] Due to this fact, there are categories of TCNs and these categories of people are exercising different kinds of free movement right. For instance, TCNs coming from countries which have special agreements with the EU may be subject to a different set of rights than those who do not come from countries with such arrangements. Indeed, based on association agreements, nationals of those third countries enjoy "a privileged position with regard to the right to work, the right to social benefits and the right to stay within the EU territory" (Brouwer 2005, 224).

Apap and Carrera mention that there are two aspects which are central to the immigration policy at the EU level: control and openness which represents two sides of the same coin (2003, 1). As will be mentioned below, these aspects can well-define the notions of freedom of movement for TCNs and migration-related issues after the Amsterdam Treaty.

Following the Amsterdam Treaty, Tampere Summit was held in 1999 "in order to discuss the newly created 'area of freedom, security and law'" (Rosenow 2009, 147). Due to this purpose, integration of TCNs into European political identity becomes a top agenda at the EU level. In brief, Tampere Conclusions focused on the partnership with countries of origin,

[27] As Groenendijk, Guild and Barzilay mention, these arrangements are 1991 European Economic Area Agreement between the EC and Iceland, Liechtenstein and Norway on the basis of which nationals of those states enjoy the same right to move to any member states and remain there for economic purposes (2000, 4). Furthermore, 1963 EEC-Turkey Association Agreement and its 1970 Protocol "through its subsidiary legislation, provides the system of protection of third country nationals already resident in the Member States of the Union, protecting security of residence of workers and their family members and guaranteeing non-discrimination in working conditions and social security" (Groenendijk & Guild & Barzilay 2000, 4). In addition, discuss the authors, the Co-Operation Agreements with the Maghreb countries provide the free movement and residence rights in the Member State where they have been admitted but no rights were conferred as regard to move to another member state. The CEEC agreements provide for a right of free movement to Central and Eastern Europe citizens for the purpose of self- employment and a degree of protection from discrimination in working conditions Groenendijk & Guild & Barzilay 2000, 4).

the fair treatment of TCNs and the management of migratory flows. It included "the creation of a uniform set of rules through which fair treatment of TCNs residing legally in the EU would be ensured" (Apap & Carrera 2003, 1-2) as follows:

> The European Union must ensure fair treatment of third-country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should be aim at granting these individuals rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia (Tampere European Council 1999, paragraph 18).

Moreover, Tampere Conclusions also declared that

> A person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens (Tampere European Council 1999, paragraph 21).

With the mentioning of near-quality, as Halleskov mentions, a "hope for a more communitarian and inclusive Community approach towards TCNs" has risen (2005, 181) since in the legal framework of the EU, the mentioned aim is to diminish the differences between TCNs' status and EU citizens' status.

On the other side, Tampere European Council also emphasized in the context of migration flows, the issues of combating illegal immigration and trafficking in human beings (Articles 3, 22 and 23). This emphasis indicated the perception of the immigration issue as a security threat such as illegal migration, organized crime, drug trafficking etc.

Following the Tampere Conclusions, two major binding directives that regulated for the first time the rights of TCNs at the EU level were adopted.

The first directive is Directive 2003/86/EEC on Family Reunification.[28] For the first time, TCNs also have the right of family reunification. As Brinkmann notes, family unification can be seen "on the one hand as a humanitarian or human rights issue, and, on the other as an immigration matter which might place a strain on the labour market and social facilities, such as housing, education and medical facilities" (2001, 243). Brinkmann mentions that due to the prevailing of the second view, the Commission's draft Directive met with resistance from Member States and in consequence, a Directive with a limited scope was adopted (2001, 243).

To begin with, there is a very narrow definition of the family member in the Directive. Only sponsor's[29] spouse and the minor children[30] of the sponsor and of his/her children can benefit from the family reunification right (Article 4(1)). For the other family members including first-degree relatives in direct ascending line who are dependent, the adult unmarried children as well as unmarried partner, Member States "*may* authorize the entry and residence" (emphasis added, Article 4(2)).

Moreover, there is an expression of "condition of integration" for the children of age over 12 that must be criticized (Article 4 (1))[31]. As Apap and Carrera stress, the condition of integration remains open to interpretation by the Member States exclusively according to their national legislations (2003, 10). Due to this fact, the authors criticize the Article 4(1) since this provision

[28] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

[29] Sponsor means a third-country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her (Article 2 of the Family Reunification Directive).

[30] Minor children should be below the age of majority set by the law of the Member State and not been married, as well as taking into considerations the wording provided in Article 4.1.c.

[31] "By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member States may, before authorizing entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of the Directive"

may be considered as "being contrary to international and European set of rules which have defined the concept of minor and the special protection that has to be granted to them" (Apap & Carrera 2003, 10).

It is important to note that regarding the status of EU citizens related to family unification, the rights conferred to their family members will be granted "irrespective of their nationality and which is only derivative of the original right conferred to the EU citizen involved, to the spouse and descendants who are under the age of 21 years or are dependants, as well as dependant relatives in the ascending line of the worker and his spouse".[32]

Another aspect of the directive that is critical is the waiting period for the family members. According to the Article 8, Member States may take between two and three years between the receipt of the application for family reunification and the issuing of the pertinent residence permits for the family. As Apap and Carrera mention, this provision may contradict the European Social Charter "because by specifying such a long period of time, the main substance and aim of the right of family reunion, which is to make family life possible, would be clearly undermined" (2003, 11).

The second directive, namely Council Directive 2003/109/EC[33] concerning the status of TCNs who are long-term residents was adopted on 25 November 2003.[34]

The Directive highlights that "long-term residents should enjoy equality of treatment with citizens of the Member States in a wide range of economic and social matters, under the relevant conditions defined by this Directive".

[32] Article 10(1) of the Council Regulation 1612/68 on freedom of movement for workers within the Community.

[33] Council Directive 2003/109/EC of 25 November 2003 [2004], OJ L 16/44.

[34] The United Kingdom, Ireland and Denmark did not participate in the adoption of the Directive.

In this respect, the main aim of the Directive is to establish "the conditions subject to which the right to reside in another Member State may be acquired by TCNs who are long-term residents" so that this would contribute "the effective attainment of an internal market as an area in which the free movement of persons is ensured" (Article 18).

The Directive mentions how a TCN residing legally in a Member State can acquire long-term resident status. In addition to this, it points out the requirements to enjoy residence in a host Member State other than the Member State that a TCN has already gained the long-term residence status.

At the first sight, the Directive seems to be a great achievement for providing the right of free movement to TCNs legally resided in the EU since before the adoption of the Directive, TCNs could only move to another EU Member State for three months. However, a closer examination of the Directive reveals the fact that the Directive is inadequate and unsatisfactory in the integration of TCNs.

To begin with, Article 3(2) of the Directive defines the TCNs to whom the Directive does not apply as follows:

> 1) Those who reside in order to pursue studies or vocational training;
> 2) Those who are authorized to reside in a Member State on the basis of temporary protection;
> 3) Those who are authorized to reside in a Member State on the basis of subsidiary form of protection;
> 4) Those who are refugees or have applied for recognition as refugees;
> 5) Those who reside solely on temporary grounds such as au pair or seasonal worker, or as workers posted by a service provider for the purposes of cross-border provision of services, or as cross-border providers of services;
> 6) Those whose residence permit has been formally limited (Directive 2003/109 2004).

So, those who are refugees, students, meaning that those who are economically inactive are once more excluded from the integration process. Moreover, the clause regarding "TCNs whose residence permit had been formally limited does not apply for long-term resident status" is very crucial since as Halleskov criticizes, Member States do not grant TCNs as unlimited residence permit. Rather, they are usually limited by the economic activity, time or both (2005, 184-185). This means that nation states will say the last word on the inclusion of TCNs. To illustrate this issue, on 21 January 2008, the Full Bench of the Supreme Court of Cyprus decided by majority that a migrant woman (domestic worker) was not eligible for long-term residence because irrespective of the fact that she had been legally and continuously residing in Cyprus for five years; her residence permit was temporary and formally limited in time (2008). [35]

Secondly, in Article 4 (1) of the Directive, the duration of residence is mentioned as follows: "Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application". Regarding the issue of period of absence, in (Article 4(3)), it is stated that periods of absence from the territory of the Member State did not interrupt the five years period when they were no longer than six consecutive months. However, the total period of absence cannot be exceeding 10 months although Member State may accept a longer period of absence (Article 4(3)).

TCNs who have resided legally and continuously within the territory of a Member State for five years also have to provide evidence for stable resources and sickness as is defined in Article 5(1) so that they will not be burden to the social security systems of the Member State. Moreover, as is defined in Article 5(2), Member State may require TCNs to comply with

[35] http://www.kisa.org.cy/EN/news/561.html.

'integration conditions', in accordance with national law. At this point, Carrera and Wiesbrock emphasize the role of certain Member States during the negotiations in the Council (2009, 9). The authors mention that the outcome of the negotiations led to the introduction of references to 'integration conditions' in the Directive. Specifically, Austria, Germany and Netherlands managed to transfer integration policies and legal policies existing in their national immigration laws to the EU level (Carrera & Wiesbrock 2009, 9). The wording of 'integration conditions' is criticized by many authors since as Boelaert-Suominen mentions; there are no stated limits on the significance of the integration conditions (2005, 1023). In this way, says Groenendijk, Member States are authorized to ask the TCNs "to pay, either fully or partially, the costs of integration measures" (2004, 122). Furthermore, Adam and Devillard state that the integration conditions vary from country to country and they can be divided between language requirements and civic knowledge requirements (2008, 52-53). Carrera and Wiesbrock mention that integration conditions includes a programme, exam or both about history, institutions and values of the country that TCNs need to pass. Here, as the authors indicate, the emphasis is on access to social protection and security of residence (2009, 4). In consequence, "the most powerful sanction of this dimension is the expulsion from the country" (Carrera & Wiesbrock 2009, 4). In this sense, "discourse about integration has become discourse about admission and residence and is now even extended to be a discourse about expulsion" (Besselink 2008, 5). Due to this fact, Member States can use the integration condition to avoid presenting equal rights to TCNs who have been lived for a long time in the Member State. In consequence, Guild criticizes the wording of 'integration conditions' by pointing out that "before the immigrant is allowed entrance into a more secure status, he or she must abandon attributes of being a third-country national" (2004, 234).

Article 11 deals with the equal treatment for TCNs who acquired the long-term resident status with nationals. Nevertheless, this article also mentions

that the equal treatment can be restricted by the Member States on many cases. To begin with, access to employment and self-employed activity is limited as such activities do not "entail even occasional involvement in the exercise of public authority" (Article 11(1)). Second, although long-term residents shall enjoy equal treatment with national in "education and vocational training, including study grants in accordance with national law" (Article 11(1)), Article 11(2) limited this right by stating that "Member States may require proof of appropriate language proficiency for access to education and training".

Regarding these mentioned points, Halleskov criticizes the Directive in the sense that the Directive "accords long-term residents absolute right of equal treatment with nationals in very few areas of life" (2005, 200) since as Carrera also mentions, there are many grounds that Member States can restrict the rights of long-term residents (2005b, 16).

In consequence, with the two new directives, the distinction between EU citizens and TCNs in terms of their rights began to be eliminated. Nonetheless, as Rosenow mentions, "a completely equal status has not been achieved yet because of a series of optional clauses in the directives allows the Member States to use more restrictive measures against TCNs than against EU nationals" (2009, 135-136).

Meanwhile, as Maas mentions, progress on a common immigration policy remains "sporadic, with most coordination concerning illegal immigration" (2008, 591). Especially, after the events of September 11th 2001, immigration and asylum issues become to be more associated with security concerns. To illustrate, since the 2002 Seville European Council, most of the migration-related policy developments mainly focused on the fight against irregular migration, the trafficking and smuggling of human beings as well

as enhancing border controls and security.[36] Furthermore, at the Presidency Conclusions of the Hague Programme which aims to attain closer cooperation in justice and home affairs at the EU level, it is stated

> The security of the European Union and its Member States has acquired a new urgency, especially in the light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004. The citizens of Europe rightly expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal immigration, trafficking and smuggling of human beings, terrorism and organized crime, as well as prevention thereof. Notably in the field of security, the coordination and coherence between the internal and the external dimension has been growing in importance and needs to continue to be vigorously pursued (The Hague Programme 2004, 12).

Indeed, one of the main focuses of the Hague Programme is setting up a common immigration and asylum policy for the EU Member States. Above-mentioned extract from the introduction to the Hague Programme is interesting because immigration and various threats are mentioned in the same paragraph so that these issues are not only being connected but also represented as being the same types of issues, namely issues of security. In consequence, migration is viewed as an undesirable movement, a security problem that needs to be controlled in the name of EU citizens' right to move freely within the EU. As a result, what we observe is the securitization of the free movement of persons, and more specifically migration and asylum in the EU. In other words, as Bigo emphasizes a 'security continuum' in which immigrants and asylum seekers are perceived as a threat to the entire existing social order has been created. To Bigo, the security continuum is an "institutionalised mode of policy making that allows the transfer of the security connotations of terrorism, drugs traffic and money-laundering to the area of migration" (2002, 76). In consequence, as Bigo mentions, the issue was no longer "on the one hand terrorism, drugs,

[36] See paragraph 30 of the Presidency Conclusions of the Seville European Council, 2002.

crime and on the other, rights of asylum and clandestine immigration, but they came to be treated together in the attempt to gain an overall view of the interrelation between these problems and the free movement of persons within Europe" (Bigo 1994, 164).

3.3 Governmentality of Unease

As a result of the creation of 'security continuum', Anderson and Apap argue that a peculiar, homogenous and cohesive "internal security regime" has been produced (2002, 3). The authors state that the basic features of such regime are lifting of systematic police controls on movements of people and goods at internal borders; strengthening of international police cooperation, particularly in internal cross-border regions; pooling of police data and information among national law enforcement bodies such as Schengen Information System (SIS) and Europol's 'computerised system of collected information'; and lastly, harmonisation and reinforcement of external border controls conceived as a 'system of concentric security lines' (Anderson & Apap 2002, 3).

According to many authors, the new 'continuum' of internal security is not a natural domain. For instance, migration has no natural link with terrorism. Walters and Haahr claim that asylum-seeking has been institutionalized in the same policy domain as issues like transnational crime in the EU, however "it can, of course, be governed otherwise, for instance as a question of human rights, or international development" (Walters & Haahr 2005a, 93). For Bigo, one needs to recognise that the links between them are the effect of security knowledges, practices and institutions which make them all knowable as "threats" and "risks". There is, a "governmentality of unease" at work (Bigo 2002).

Indeed, the efforts of creating a Single European Market led to fears about the notion of frontiers. As Anderson and Bigo imply, until the late 20th

century, the frontiers are usually conceived as a barrier, a clear separation between an inside and an outside. “The state tried to homogenise the inside where neighbours are by definition fellow-countrymen, it created a friend/foe division where the enemy is normally to be found outside the territory” (Anderson & Bigo 2003, 8-9). However, the Europeanization process has created uncertainty about the notion of frontiers and as Bigo mentions it “has reinforced the de-linking between the locus of controls and the locus of state borders. This has destabilized the differentiation between friends and foes, insiders and outsiders” (Bigo 2005b, 50). For this reason, securitization of migration, says Bigo, is based on the conception of state as a body or a container for the polity. “It is anchored in the fears of politicians about losing their symbolic control over the territorial boundaries (2005b, 83). Bigo goes on stating that

> European leaders construct the category of immigrants as a political problem at the European scale, and in so doing, focusing on the outsiders inside, hope that they will avoid discussing the institution of frontiers for the identity of the EU. They refuse to deal with the uncertainty of where the frontiers run and what purpose they serve (Bigo 2005b, 60).

Since the 1980s, as Bigo mentions, “it was not the cost and benefits of migration that were important but the difficulties of integration of these new ‘migrants’ coming from the third World and the fact that they used their rights, such as the right to family reunion… From that discussion developed along the lines of identity and belonging, with a sub-text of invasion that different populist party promoted” (Bigo 2005b, 62). Huysmans notes that the political and social processes of linking migration to criminal and terrorist abuses of the internal market are related to a wider politicization project (2000, 751). As a result, “the European integration process is involved in the development of and the struggle against the representation of migration as a cultural danger” (Huysmans 2000, 763).

In conjunction of the abolition of internal borders, there was a blurring of the distinction between internal and external security after the Cold War ended. As Crelinsten mentions, during the Cold War, the world of terrorism and political violence was viewed through the bipolar East vs. West lens so the military threat was identified with the Soviet Union and the police threat with serious crime (1998, 396). In a similar vein, Bigo states that movements of people, which were an issue in the 1920s, did not seem to be problematic during the bipolar period (2002, 76). After the end of bipolarity, mentions Bigo, because of the crisis for the military world, the idea of the enemy continued to evolve meaning that "military organizations needed other enemies than the Soviet Union. At the same moment, some policemen invented at the EU level the notion of internal security so as to promote collaboration between police organizations and to include the surveillance of people crossing borders within the scope of policing against crime" (Bigo 2002, 77). After the Cold War, there was the "blurring of mandates between different control agencies that previously were quite distinct, such as customs agencies, border control, security intelligence, defence and policing" (Crelinsten 1998, 390). So, Bigo stresses that the new interests of the security professionals are not only in the foreigner but also in the immigrant and in this sense, "immigration also becomes a security problem when it is represented as such by some security professionals in their struggle to maintain their position" (Bigo 2002, 76).

After the end of Cold War, Lutterbeck discusses that, law enforcement agencies of EU countries have also been increasingly expanding their activities beyond the EU area, mainly in an effort to more effectively combat undocumented immigration from outside the EU. Thus, this process has resulted in the "deployment of an ever larger network of immigration liaison officers beyond the EU area with the aim of preventing these unwanted migratory flows towards the EU in the source and transit countries of migration" (2005, 236). Lutterbeck notes that immigration liaison officers are located at 'high risk' airports, "where they assist airline personnel in

detecting forged documents, or at the embassy of their country, where they are involved in a broad range of migration-related tasks, such as gathering intelligence on migratory trends or providing assistance in the area of border and immigration control" (Lutterbeck 2005, 237).

Bigo discusses that internal and external security are embedded in the figure of the 'enemy within', of the outsider inside, which is increasingly labeled with "the catchword 'immigrant', who is depending on the context and the political interests, a foreigner or a national citizen representing a minority. In this context, the outsiders becomes insiders and the lines of who needs to be controlled are blurred" (Bigo 2001, 112). To illustrate the issue, Bigo says that in France, the so called *'sans papiers'* (undocumented) have been created and reinforced a category of unauthorized persons who are not strictly illegal immigrants and who have been living in France for many years. This shows that the legal position of every person of foreign origin becomes a matter of permanent suspicion (2005a, 71). In a similar vein, Ceyhan and Tsoukala indicate that the criminalization of illegal immigrants has transformed undocumented migrants into 'deviants' who must be controlled. (Ceyhan and Tsoukala 2002, 28). This criminalization, as Ceyhan and Tsoukala mention, relies exclusively on police and/or prison but the authors rightly state that "any comparison of the criminal involvement of migrants with that of nationals is by definition problematic because not only are migrants usually young, male, unmarried and poor – each of which variable is itself a criminogenic factor – but also they are often discriminated against by the criminal justice system of their country of residence" (Ceyhan and Tsoukala 2002, 28). Moreover, the authors mention that police and prison statistics reflect police and judicial activities only for a given period and that police statistics deal exclusively with officially recorded criminality (Ceyhan and Tsoukala 2002, 28). "Migrants tend thus to be overrepresented because when they are involved in criminal activity it is usually crime of a highly visible kind. Many of them are in fact charged only with immigration

offenses that represent no real threat to internal security" (Ceyhan and Tsoukala 2002, 25-26).

As a conclusion, in the official discourse of the EU, it is stressed that there is a direct link between the free movement and security. The construction of this kind of link emerges firstly in Schengen Agreement of 1985 focusing on compensatory measures. Specifically, the Amsterdam Treaty of 1999 makes the link between free movement and security be institutionalized in the sense that security measures are not only compensatory measures, rather they are viewed as a precondition for the free movement in an area of freedom, security and justice. Especially for the ones who are economically disadvantaged, the right of freedom of movement is limited through security concerns.

The discussions of freedom of movement inevitably include migration-related issues. Due to this fact, immigration becomes a security concern for the EU authorities and it is explicitly pointed out together with security issues such as drug- trafficking, organized crime and of course terrorism. In the literature, governing of immigration as a security measure, identical with terrorism and other security issues is explained as a result of abolition of internal border checks between member states and blurring the lines between the internal and external security after the end of Cold War. This means that the link between free movement of persons in general and migration-related issues in particular and security is not direct or natural, rather it is invented in particular time, under specific conditions. It is a way of governing, a choice of dealing with issue of migration. To deal with immigration issues, surveillance databases become important and effective tools in the EU which is the concern of the next chapter.

CHAPTER IV

SURVEILLANCE AND SURVEILLANCE DATABASES OF THE EU

In God we trust, the rest we monitor
Enemy of the State

Surveillance is not a new phenomenon; rather it is as old as human history. In pre-modern times until the 18th century, surveillance included informal and unsystematic supervision. Watching and listening were means of surveillance. For this reason, surveillance was direct and based on face-to-face relations. Moreover, the census and other means of recording personal details were also crucial. However, it is with modernity that surveillance became formal and systematic so it gained its today's meaning. For this reason, in the thesis, surveillance will be examined starting from modern times. Indeed, as I try to emphasize, surveillance is one of the most important features of modernity.

In contemporary societies, surveillance is a critical tool for providing security. Since it is highly related to 'risk', it provides the categorization of individuals who are risky or not. For this reason, surveillance is an important criterion for defining who is free to move and who is not in the EU.

Indeed, the linkage between security and defense lies at the core of the redefinition of the West European security following the collapse of the Soviet Union. Anderson and Bigo explain that as the traditional attributes of sovereignty are eroded in Europe, defense of state interests is pursued through European and global institutions and networks rather than through warfare (2003, 17). As the authors observe, this erosion of sovereignty is also reflected by new systems of police, judicial and military co-operation

(Anderson and Bigo 2003, 17). “The establishment of the third pillar by the Treaty of Maastricht reshaped police co-operation and set in closer judicial co-operation. This has changed the way policing is defined and will modify the boundaries of criminals justice systems” (Anderson and Bigo 2003, 17). Moreover, Anderson and Apap state that integration of the tasks and functions of immigration services, customs and intelligence services and police services is supported by the gradual reshaping of security continuum under the pressure of the terrorist attacks of September 2001 and March 2004 (2002, 1). In other words, by the impacts of abolition of internal borders, the problem of European integration after the collapse of Communism including Eastern European countries, the re-conceptualization of immigrants as a threat to internal security and the terrorist attacks in 2001 and in 2004, all led to the exclusion of non-Europeans from the EU citizenship in general and freedom of movement in particular, and this situation coincides with the emergence of new surveillance institutions in the EU context. As I have mentioned before, in the new logic, the outsiders are also defined as persons, namely the non-Europeans in the EU who lack of the right of free movement. So, controlling their access to different set of rights and monitoring their movements are the main missions of these surveillance institutions. To be more explicit, in the post-Amsterdam era, in order to control the population within Europe and to provide information transmission between member states of the EU, databases such as SIS (Schengen Information System), EURODAC (European Dactylographic System) and TECS (The Europol Computer System) are created.

This chapter includes two sections. The first section will provide a theoretical framework for the second section which examines surveillance databases in the EU. Due to this fact, surveillance in modern times will be examined with a special focus on the Panopticon metaphor in the first sub-section of the theoretical part. After that, I will concentrate on contemporary surveillance which can be labeled as surveillance in post-modern era (see

Lyon 2005, 2007) Concepts such as ‘surveillance society’, ‘dataveillance’, ‘sorting’ and ‘risk’ will be discussed in this section.

It should be noted that there are both continuities and discontinuities between modern and post-modern periods of surveillance. Indeed, what basically changes in the meaning of surveillance is the techniques/means that are used during the surveillance process over time. For instance, starting from 18th century to 1970s, file-based surveillance was dominant. After 1970s, the main characteristic of surveillance becomes computer-based relied on databases. These issues will be clarified during the chapter.

In the second section, at the first sight, I would like to examine the new logics of surveillance techniques in general within the EU in the light of surveillance theories. Then I will focus on the new surveillants, namely SIS, EURODAC and TECS one by one.

4.1 Surveillance

As a word, ‘surveillance’ is rooted in the French verb *surveiller* which means ‘watch over’. As Lyon mentions, this kind of “watching over someone” does not simply emerge from curiosity, rather the main aim of surveillance is “the desire to influence, manipulate or control those whose personal details are recorded” (2005, 16). Due to this fact surveillance can be defined as “the observation, recording and categorization of information about people, processes and institutions” (Ball and Webster 2003, 1) with the aim of influencing or conducting those, whose data have been collected, stored and transmitted.

It is important to emphasize that surveillance has always been related with power. Indeed, as Lyon mentions, power is created and expressed by surveillance (2007, 23) because those who establish surveillance systems have access to the means of including the surveilled in their line of vision.

Lyon states that “it is they who keep records, hold types, mainly the databases, have the software to do the mining and the capacity to classify and categorize subjects” (2007, 23). Due to this fact, it can be said that surveillance is related to power relations.

4.1.1 Surveillance in Modern Times

Modernity came to scene with rationalization, bureaucracy, science and technology. The main invention of modernity was the creation of the nation-state together with the principles of democracy. This invention created a whole world of professionals. As a result, the techniques of surveillance changed. That is, face-to-face watching or listening in pre-modern times was accumulated in “a more rational footing within the burgeoning bureaucracies of modernity and would eventually be augmented by technological as well as scientific means” (Lyon 2007, 78). As Lyon mentions, identification, naming, counting, classifying and record-keeping are all significant for nation-states and their bureaucracies (Lyon 2007, 79).

Regarding modern surveillance theory, some early social scientists such as Marx, Durkheim and Weber mentioned indirectly surveillance issues. According to Marx, surveillance was an outcome of capitalist supervision. For Durkheim, surveillance was seen as the development of new kinds of solidarity. Lastly to Weber, surveillance was a part of the bureaucratic organization of nation-states based on a military-bureaucratic collecting and keeping information on individuals. However, as Lyon indicates, in surveillance literature, it was Giddens who conceptualized surveillance as a part of modernity along with capitalism and who claimed that surveillance could not be reduced to either capitalism, rather it should be seen in its own right (2007, 33).

To Giddens, surveillance is a crucial aspect of modern nation states. He notes that the authorities of nation-states need in-depth observation in order

to find out citizens that are in need of welfare assistance as a part of economic citizenship (1985, 309). For this reason, surveillance is a critical tool for the nation-state.

Moreover, Giddens mentions that "administrative power can only become established if the coding of information is actually applied in a direct way to the supervision of human activities" (1985, 47). So, to Giddens, surveillance includes direct supervision of social life together with the accumulation of coded information (1985, 13). In this sense, for the sake of controlling and managing its citizens, nation-states are eager to collect and store information from them through surveillance mechanisms such as censuses and identification documents. This kind of activity means that surveillance is an important tool for the state authorities (Giddens 1985, 47).

In a similar way, Dandeker points out that modern state depend on the knowledge of the files gathered from its citizens. Due to this fact, knowledge of the citizens are collected, documented and stored in bureaucratic nation-states (Dandeker 1990, 13).

The work of Michel Foucault, namely the metaphor of Panopticon became dominant in surveillance theory literature. Now, I will examine this metaphor.

4.1.2 The Panopticon

Foucault explained surveillance as a part of disciplinary society that begins from the 18th century onwards. As I had stated in the first chapter, discipline is a set of strategies, procedures and ways of behaving associated with certain institutional contexts. In Foucault's own words,

> 'Discipline' may be identified neither with an institution nor with an apparatus; it is a type of power, a modality for its exercise,

> comprising a whole set of instruments, techniques, procedures, levels of application, targets; it is a 'physics' or an 'anatomy' of power, a technology (Foucault 1979, 215).

Surveillance is an effective tool for the disciplinary power in order to designate economically, politically and socially productive and calculable individuals since through surveillance techniques, knowledge of the individual can be gathered, stored and documented. Moreover, a sense of self-observation is created by surveillance. Foucault uses the concept of panopticon to make this point clear. Indeed, the panopticon has become a central metaphor in the literature on surveillance. Foucault discusses "Panopticon" in "Discipline and Punish" (1979) and also in an interview entitled "The Eye of Power" (1980). The concept was originated from the Greek word *pan*, meaning all and *opticon,* representing the visual. Foucault borrowed the term from 18th philosopher Jeremy Bentham who described panopticon as an architectural device which represented the key idea of modern prison that was "all seeing". In general, panopticon represents a way of arranging people in such a way that "it is possible to see all of the inmates without the observer being seen and without any of the prisoners having access to one another (Mills 2003, 45).

As Foucault puts it:

> At the periphery, an annual building; at the centre, a tower; this tower is pierced with wide windows that open onto the inner side of the ring; the peripheric building is divided into cells… All that is needed, then, is to place a supervisor in a central tower and to shut up in each cell a madman, a patient, a patient, a condemned man, a worker or a schoolboy. By the effect of backlighting, one can observe from the tower… the small captive shadows in the cells of the periphery… Full lighting and the eye of a supervisor capture better than darkness, which ultimately protected. Visibility is a trap (1979, 200).

As McNay mentions, the key idea of Panopticon is constructing a repressive system based on a principle of permanent surveillance that ensures the functioning of power (1994, 93). As a result, the individual is forced to

internalize the disciplinary gaze within this new form of power relation. "The individual now plays both roles: the oppressor may well be absent, but the prisoner has internalized the behavioral code of the oppressor and will behave as though the prison guards were still watching" (Mills 2003, 46). Due to this fact, Rose argues that the aim of panopticism is not producing "terrorized slaves" in a prison-like society. Rather, the aim is to form "self-managing individuals through the process of power internalization" (1999, 242).

This kind of surveillance based on disciplinary gaze is very economic and effective for Foucault:

> …We are talking about two things here: the gaze and interiorisation. You have the system of surveillance, which on the contrary involves a little expense. There is no need for arms, physical violence, material constraints. Just a gaze. An inspecting gaze, a gaze which each individual under weight will end by interiorisation to the point that he is his own overseer, each individual thus exercising this surveillance over, and against, himself. A superb formula: power exercised continuously and for what turns out to be minimal cost (1974, 2).

In other words, since the individual does not know whether power observes him, s/he thinks that s/he is continuously under surveillance. Due to this fact, the individual becomes to be his/her own watcher/controller. In this way, disciplinary power guarantees the docility of the individual. The docility of the individual makes a continuous productivity, meaning that because of his/her docile position, the individual has to obey the power. In this sense, power gains a very efficient and effective resource of its reproduction.

To Foucault, panopticon is not only a method of observation. Rather, it is a laboratory, "a machine to carry out experiments, to alter behavior, to train and correct individuals" (1979, 203) within a variety of institutions such as prisons, schools, factories and hospitals. For this reason, Ajana mentions that "Foucault places the notion of disciplinary society under the umbrella of

panopticism by encapsulating different technologies and spaces of surveillance and discipline" (2005, 6). In other words, the metaphor of panopticon signifies the new disciplines of social control so that a new kind of society.

To put it in another way, this panoptical form was not only a characteristic feature of the modern prison, rather Foucault uses this form for implying a new kind of society. "In appearance", he says, panopticon "is merely the solution of a technical problem, but, through it, a new type of society emerges" (1979, 216). As Mathiesen explains, to Foucault, panopticon represents a fundamental movement from the situation where the many see the few to the situation where the few see the many (1997, 217).

To summarize, as Lyon mentions, within the metaphor of pan-opticon, Foucault saw surveillance occurring in enclosed sites such as prisons, schools, workplaces and hospitals where people are confined. Each sites have its panoptic principles as containing, shaping and including subjects within a system of automatic power. Moreover, Foucault's arguments indicate how self-discipline and self-observation are promoted through panoptic methods. The uncertainty about whether or not someone is being under surveillance creates the desire to consent to whatever is the norm for the institution in question (Lyon 2007, 59).

Although Panopticon provides a fruitful approach to analyze surveillance rationalities in modern times, in recent years, the metaphor is subject to some important criticisms. The main reason of these criticisms is concentrated on the changes in the political, economic and social context and in effect, the alterations in the aims and techniques of surveillance, especially starting from the 1970s. Some authors stress that panopticon metaphor is insufficient to grasp contemporary developments in surveillance technology and it only concentrates on transformations of institutions and logic of surveillance at the 18th and 19th centuries (Deleuze 1992; Haggerty and Ericson 2000). For

another thing, Panopticon pays little attention to the growth of mass media, a critique suggested by Thomas Mathiesen in his work "Synopticon" (1997). Last but not least, some authors, such as Didier Bigo, emphasize that the new rationality behind surveillance is not to discipline the individuals or to integrate them into society, rather, the new logic of surveillance is to categorize persons by risky or not so as to exclude some persons who are seen as a 'threat'. This kind of a change marks a shift from pan-opticon to ban-opticon (Bigo 2005b). The idea of ban-opticon will be discussed in more detail in the next chapter.

As a result, the present discussion in the social science literature focuses on the ways surveillance theory can go beyond the Panopticon. At this point, it is important to discuss about contemporary surveillance and its changing rationality together with changing dimensions that gave the way to it.

4.1.3 Contemporary Surveillance

Starting from the later part of the 20th century, there emerges crucial changes in the industrial relations. According to Bell, there are seven important changes. Firstly, the service sector gains importance. Secondly, there is a rise of professional and technical employment. Thirdly, human capital becomes significant. Fourthly, education becomes the basis of social mobility. Fifthly, intellectual technology and related to this, communication becomes important. Lastly, knowledge becomes the source of value (1999 xv-xvii). These shifts reflect the change in the rationality of capitalism. Related to these shifts, Lyon states that flexible capitalism referring to free mobility of capital becomes dominant in production, exchange and consumption (2007, 120) and global mobility is the fundamental feature of the flexible capitalism. So, what is at stake is globalization of capital so "capital restructuring encouraged by government policy led to new relationships between the economy, the state, society and culture" (Lyon 2005, 49). Since political and economic processes are globalized, surveillance is also

globalized. For this reason, global mobility generates large-scale surveillance.

In addition to this, the expansion of information communication technologies (ICTs) also led to large scale surveillance. With the extensive usage of ICTs, global data flows based on global collection and evaluation systems occur. At this point, a concept comes to the scene that is 'surveillance society'.

4.1.4 Surveillance Society

The rise of surveillance societies started after the first wave of computerization of organizations in the later part of the 20th century. As Lyon mentions, all societies that are dependent on communication and information technologies for administrative and control processes are surveillance societies (Lyon 2005, 1). Wood *et al.* state four main characteristics of the surveillance process in surveillance society. First, the desire behind surveillance is *purposeful*; meaning that "the watching has a point that can be justified, in terms of control, entitlement, or some other publicly agreed goal" (Wood *et al*. 2006, 3). Second, surveillance is a *routine* activity in the sense that it occurs as a 'normal' part of everyday life in all societies that depend on bureaucratic administration and some kinds of information technology (Lyon 2007, 14). Then, surveillance is the *systematic* attention to personal details since it is not occasional, random or spontaneous; rather it is "planned and carried out according to a schedule that is rational" (Wood *et al.* 2006, 3). Lastly, surveillance is *focused* which means that it directs its attention to get down to the details of certain individuals or groups.

In literature, Gary T. Marx was the first one to use the concept of computer-based "surveillance society" in 1985. Marx notes that a new surveillance arises depending on new technologies that transcend darkness; distance and physical barriers and transcend time through data storage, retrieval,

combination and communication (2002, 9). Moreover, Marx mentions that new surveillance techniques are less visible, capital rather labour-intensive, involve decentralized policing, involuntary and are more intensive and more extensive (2002, 9). He mentions that surveillance underwent certain changes for the discovery of personal information that were related to new technologies and created a complex network. This kind of a network, as Marx identifies, includes all kinds of monitoring such as video and audio surveillance, heat, light, motion, sound sensors, electronic tagging, drug testing, biometric access devices, DNA analysis, use of computer systems such as matching and profiling, data mining, mapping, network analysis etc. (2002, 9). For this reason, it can be claimed that information and communication technologies (ICTs) construct the infrastructure of contemporary surveillance by providing extensive monitoring.

Nevertheless, contemporary surveillance or what is called as surveillance society by some authors cannot be reduced to only the growth of the technological infrastructures. As I had mentioned at the beginning, surveillance is always related to power relations. Hence, governmentality perspective can be applied to contemporary surveillance together with the most important rationalities in which contemporary surveillance is related to, namely the risk and sorting.

4.1.5 Risk and Sorting

Indeed, the main characteristic of surveillance societies is its monitoring of everyday life. This monitoring enables to produce data flows in all kinds between various organizations such as national police forces, customs, immigration and visa departments. Through monitoring, it becomes easier to "categorize and classify words and activities in a computer-enabled sorting process" (Lyon 2005, 88). So, sorting which is the classification of groups into categories for the sake of facilitating management and control through differential treatment of those groups is crucial for the surveillance. This

means that “surveillance data are not gathered about everyone in the same way, or with the same intensity (Lyon 2007, 18). ICTs are used to identify the risk-posing individuals and their networks (Lewi and Hall 2004, 199). In other words, those involving surveillance data are increasingly related to risk-management.

As Lyon mentions, governments use new techniques of surveillance to automate the policing of borders, crossed by tourists, businesspersons and migrants (2005, 89). He states that customs, immigration, visa departments, consulates, private surveillance organizations and national police forces all share and store data and this creates new categories of relationship between such agencies (Lyon 2005, 97). The data, says Lyon, include wanted and disappeared persons, those refused entry permits, refugees, migrant workers and so on (Lyon 2005, 97). In this sense, database of the persons become an instrument of selection, separation and exclusion (Bauman 1998, 51).

As was mentioned in the second Chapter, controlling and managing the risky persons is one of the important features of neo-liberal governmentality. For this reason, surveillance becomes an important tool for neo-liberal art of governing in coping with persons considered as risk. Within the rationality of risk, surveillance now not only keeps records of past movements, it also aims to predict future flows. In this way, says Marx, the new surveillance transforms the presumption of innocence into guilt (1985). In a similar vein, Bogard points out that the data kept in computers turns everyone into a target. Since surveillance aims to anticipate future events so to prevent events before happening, surveillance authorities have a chance of comparing the profiles of the individuals with risk or unwanted categories that are established by prior records. In turn, when a person falls into these risk categories, then s/he becomes a target or a suspect that has the capacity of being a potential criminal (1996, 27).

Thus, risk rationality is very significant for understanding the contemporary surveillance rationality. In this sense, databases emerge as a key tool for categorizing the risk profiles of the individuals and deciding who is risky or not. For this reason, I would like to focus on databases by using the concept, dataveillance.

4.1.6 Dataveillance

The term dataveillance was introduced by Roger Clarke. According to Clarke, dataveillance is "the systematic use of personal data systems in the investigation or monitoring of the actions or communications of one or more persons" (1988, 499). In this sense, information gathering and processing it in the database technology such as profiling, matching or mining is the central concern of the contemporary surveillance (Clarke 1988, 500). Due to this fact, Deleuze mentions that in contemporary society, "individuals become dividuals" (1992, 5) meaning that they become codes, passwords and data.

According to Lyon, categorizing and distinguishing people through dataveillance strategies means 'social sorting' in the sense that it opens the way to differential treatment, facilitating the life for some groups while excluding the other (2003, 13). Hence, it can be said that the aim of dataveillance is categorizing and classifying individuals according to their level of being risky and excluding the risky ones from certain freedoms. This last point is explicit in the EU surveillance mechanisms, the databases which will be discussed in the next section.

4.2 The Logic of New Surveillants in the EU

SIS, EURODAC and TECS are databases which collect personal information, mostly from TCNs. In literature, certain authors believe that the main desire behind collecting information from TCNs is to identify their

country of origin and to facilitate the ways for sending them back to their country of origin (Bigo 2005; Broeders 2007; Carrera 2005; Guild 2005; Huysmans 2000; Mathiesen 2000; Munster 2005). Furthermore, these databases are effective tools for the EU authorities since they store the records of persons such as immigrants and asylum seekers that want to enter the EU territory. In turn, through these databases, authorities can categorize and sorts people from each other; they can label some persons as 'risky' or 'abnormal' so they can exclude these unwanted persons for the sake of maintaining freedom, security and justice.

In other words, as Bigo clearly points out, "there is a belief in technologies of 'morphing', of 'profiling', of computer data bases and their capacities to 'anticipate' who will be 'evil' and who is 'normal', who is 'allowed to be benefit from free movement' and who is 'excluded' or 'controlled' before they can use their freedom of movement" (2005a, 86). So, the databases set up to risk-profile individuals since these institutions aim not only protecting and surveilling borders but also the population itself and they aim at collecting data about the individuals, especially about people who are seen as threats to security and public order of the EU. For this reason, to control the population and their access to certain rights within Europe, different officers across Europe become surveillants and controllers. Here, surveillance is given a renewed importance through the discourses of 'control' technologies and the rhetoric of 'security'. In this sense, electronic technologies are seen to create new forms of social control.

4.2.1 New Surveillants: SIS, EURODAC and TECS

4.2.1.1 Schengen Information System (SIS) and Second Generation of SIS (SIS II)

The SIS is a joint information system that allows the competent authorities in the Member States, through an automatic query procedure, to obtain alerts

regarding persons and property.[37] In other words, it is a large database which includes information on millions of objects and individuals and is shared by different European states.

Legal Background and Purpose of the SIS

The construction of the SIS went back to the efforts of creation of a single market and making adaptations for the achievement of a single market so as to abolish the internal controls between the Member States of the European Community. Schengen Agreement of 1985 provided the abolition of internal controls between the signatory states and the creation of a single market. One of the conditions of the Schengen Agreement was that the abolition of the internal frontiers, so free movement of persons, should not endanger the security of the Member States. For this reason, Schengen Agreement was supplemented by the Schengen Convention of 1990 which "brought into the common borders of the EU various measures meant to compensate the apparent security deficit resulting from the abolition of internal border controls" (Carrera 2005a, 700). In the light of the Convention, the SIS was created as one of the compensatory measures. It has been operational since 1995 for the sake of controlling the entry of immigrants into the Schengen area.

The SIS was integrated as an element of the Schengen acquis within the framework of the EU on 1 May 1999. Since there is no agreement regarding its legal basis, the system temporarily rests on the provisions of the 3rd pillar by virtue of a protocol to the Amsterdam Treaty.

Title IV of the Schengen Convention is devoted to the SIS. In Article 93 of the Schengen Convention it was stated:

[37] COM(2001) 0720 final.

> The purpose of the Schengen Information System, under this Convention, is to maintain public order and safety, including State security, and to implement the provisions of this Convention concerning the movement of persons in the territory of the [Member States concerned] by means of information transmitted via this system.[38]

The stated purpose is indeed very wide and comprehensive since it includes both public order and state security. As Mathiesen mentions, there is no definition about what public order or state security means so everything may be included, "from acts of qualified terrorism through various forms of social unrest to political demonstrations deemed to be a threat to public order and/or State security by the governments concerned" (2000, 7). Although this is the case, the SIS seems a crucial element in the smooth running of the area of security, freedom and justice and it has often been described as the keystone for the abolishment of internal border control between the Schengen States. To illustrate, it is mentioned that the purpose of the SIS is "to improve police and judicial cooperation in criminal matters covered by Title VI of the EC Treaty and policy as regards visas, immigration and free movement of persons covered by Title IV of the EC Treaty".[39]

Operation of the SIS

The SIS is an interconnection of national files accumulating shared data, which is provided by the authorities of the Member States. In this sense, the system is based on national information gathered by the Member States. Member States supply the system through national networks called N-SIS which are connected to a central system called C-SIS. The C-SIS is established in Strasbourg and serves to guarantee that all the national systems are essentially identical. Therefore, the C-SIS has a database which ensures that national databases are identical by providing information on

[38] COM(2001) 0720 final.

[39] COM(2001) 0720 final.

line. Its role is not to store information, rather to serve as an intermediary in the exchange of information.

The system is supplemented by a network known as SIRENE (Supplementary Information Request at the National Entry), made up of national and local police authorities, customs and the judiciary. As Mathiesen mentions, SIRENE is aimed to facilitate bilateral and multilateral exchange, "mainly of supplementary information about persons and objects registered in the SIS, between the national police authorities in different Schengen countries (2000, 9). As a result, through the SIRENE system, police authorities in one country who have arrested a person who is registered in the SIS by another country, may require supplementary information, not stored in the SIS, from the latter country.

Broeders mentions that the SIS is a so-called hit/no hit system, meaning that, "a person is fed into the computer and produces a 'hit' if he or she is listed in the database. Even in the case of a hit, not all information is readily accessible. Rather, the computer 'replies' with a command, such as 'apprehend this person' or 'stop this vehicle'" (Broeders 2007, 79).

Information Recorded

Article 94 of the Convention contains a list of categories of data that can be stored in the SIS. The categories concern persons and objects.[40]
Data on persons include:

1) surname and forenames, any aliases possibly entered separately;
2) any specific objective physical characteristics not subject to change;
3) first letter of second forename;
4) date and place of birth;
5) sex;

[40] For objects, the Convention mentions that vehicles, firearms, identification papers, and stolen or lost banknotes may be listed in the SIS.

6) nationality;
7) whether the persons concerned are armed;
8) whether the persons concerned are violent;
9) reason of alert;
10) action to be taken.

Sensitive information, e.g. concerning racial origin, political, religious or other beliefs, information concerning a person's health and sexual activities may not be entered.

The purposes for which alerts may be entered are given in Articles 95 to 100. An alert for a person may be entered in the SIS for the following reasons:

1) arrest for the purpose of extradition (Article 95)
   in the case of aliens, refusal of entry to the Schengen area pursuant to a decision taken by the competent administrative or judicial authority subject to national laws, a decision based on the danger posed to national security and public order or a decision based on the fact that the alien concerned has contravened national provisions governing entry and residence (Article 96)
2) to determine the whereabouts of a missing person, of minors or of persons whose detention has been ordered by the competent authorities (Article 97)
3) arrest for the purpose of appearing in court, either as a suspect or a witness or at the request of the judicial authorities in connection with a criminal investigation or for the purpose of serving a custodial sentence (Article 98)
4) discreet surveillance and specific checks, conducted for the purpose of prosecution in connection with a criminal offence, averting a threat to public safety or national security (Article 99).

Critical Evaluation of Article 96 and Article 99

In the light of internal surveillance, the entries under Article 96 "aliens to be refused to entry" are the most important. Brouwer notes that about 90 % of all data on persons stored into the SIS concerns data on third country nationals to be refused entry (2005, 2). As is shown in the Table 1 below, the figures on the SIS since 1999 suggest that this is true. In 2004, the SIS held

about 12 million entries and the highest number is the entries based on Article 96.

Table 1 *Selected Entries and 'Hits' in the SIS, 1999-2004*

	1999	2000	2001	2002	2003	2004
Entries	8,687,950	9,697,252	9,856,732	10,541,120	12,274,875	11,746,847
Entries on Persons	795,044	855,765	788,927	832,312	874,032	883,511
Entries on Art. 96	703,688	764,747	701,414	732,764	775,868	785,631
Hits on Art. 96	5925	5469	6790	6156	5942	4873

Source: Broeders 2007, 80.

On the basis of Article 96, TCNs stored into SIS for the purposes of refusal of entry, Brouwer mentions that the entries can be divided into two categories. Firstly, these records based on public order or national security grounds may include TCNs who are convicted for an offence, which is penalized by a deprivation of liberty of at least one year or who are suspected of either having committed serious criminal offences. The first category also includes persons against whom there is a serious suspicion he or she will commit serious criminal offences on the territory of one of the Schengen States. Secondly, persons can be recorded into the SIS when they have not complied with national immigration law, and therefore have been subjected to measures of deportation, refusal of entry or removal (Brouwer 2005, 2). For this reason, Article 96 can be criticized in the sense that the criteria of the TCNs "to be refused to entry" are not limitative or transparent so that it can be applied very differently in the signatory states (Brouwer 2005; Edwards and Hebenton 1994). In a similar vein, Bigo and Guild imply that due to Article 96, an open-ended list based on national appreciations of risk is created. This list includes the names of individuals who have already

been in the territory of the Union for one reason or another is designated as 'undesirable' (2005, 238). The authors emphasize that "it is here that the question of divergent perceptions of what constitutes a risk and of what is security becomes central. What is perceived as a risk to security in one State is not inevitably identical to that in another" (Bigo and Guild 2005, 238).

Similarly, Article 99, the category dealing with reporting for the purpose of discreet surveillance is "both vague and arguably too wide" (Edwards and Hebenton 1994, 144) and as Mathiesen examines it opens for discreet surveillance of broad categories of people (2000, 7).

What is more, as is shown in Table 1, the hits on TCNs refused to entry are dropping since 2002. To Broeders, this situation can be explained due to the association of the SIS with the SIRENE system. "Annually, about 6000 irregular migrants produce a 'hit' in the SIS…and when they are inside a Member State, there may be an information change to make expulsion possible" (Broeders 2007, 80). Due to this reason, Ceyhan mentions that basically, the SIS's aim is to identify and exclude people who are considered to pose security risks within the Schengen territory (2005, 22). Indeed, says Ceyhan, the main concern is about "its target population which is composed of third country nationals… who are considered a 'security threat' to the EU and who receive closest scrutiny and surveillance (Ceyhan 2005, 22).

Access to Information

As is mentioned in Article 101 of the Schengen Convention, the data gathered by the SIS are accessible to those national authorities with jurisdiction for carrying out border surveillance and identity checks on national territory. In addition, visa services have access to the SIS but only with regard to alerts for TCNs barred from entering the national territory. However, as Brouwer mentions, after the European Council Decision in

2005,[41] Europol, Eurojust, authorities issuing residence permits and those charged with asylum matters may also access to the system (2005, 5).

Changing Purposes: A Road to the SIS II

In 2001, the Council stated that "the Schengen Information System…shall be replaced by a new system, the Schengen Information System II (SIS II), which shall allow for new Member States to be integrated into the system".[42] At that time, says Brouwer, Spain submitted a proposal for a Decision and a Regulation on new functionalities for SIS (2005, 5).

The initial reason for SIS II was the technical need to make SIS applicable for new Member States. As it was mentioned in the Council Regulation of 2004;

> The need to develop a new, second generation SIS, hereinafter referred to as "SIS II", with a view to the enlargement of the European Union and allowing for the introduction of new functions, while benefiting from the latest developments in the field of information technology, has been recognized.[43]

For this reason, establishing the SIS II is seen a prerequisite for the involvement of the new Member States in the area of freedom, security and justice without internal frontiers. From the beginning, however, says Brouwer, the development of SIS II has been used as well for political discussions on possible new requirements or functions of SIS (2005, 9). To illustrate, in 2003, the Council concluded the following:

[41] Council Decision 2005/211, OJ L 68/44, 25.03.2005 (cited in Brouwer 2005, 15).

[42] Council Regulation No 2424 / 2001 of 6 December 2001 on the development of second generation Schengen Information System (SIS II).

[43] Council Regulation (EC) No 871/2004 of 29 April 2004 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism.

> The SIS is a hit/no hit system allowing for information exchange with a view to policing the free movement of persons as well as maintaining public security, and in particular assessing national authorities in the fight against trans-national crime, in the context of the objective of the EU to maintain and develop the Union as an area of freedom, security and justice (cited in Brouwer 2005, 9).

This is a wider definition of the system than set out under Article 93 of the Schengen Convention, and it serves to indicate the context in which the SIS has come to be viewed since the Schengen *acquis* was incorporated into the legal and institutional framework of the EU. Indeed, the SIS II was considered to be a valuable instrument for fighting against terrorism.[44] So, in the name of maintaining an area of freedom, security and justice and fighting against terrorism, the Council decided to include the addition of new alerts, the storage of biometric data especially photographs and fingerprints,[45] and the possibility to grant new authorities access to SIS.[46] The planned date of deployment of SIS II was 2008 but as was mentioned in the Stockholm Programme, it was postponed to 2011 or 2013 due to the technical availability (2010, 45).

After the March 2004 bombings in Madrid, Boswell mentions that the Council considered the use of SIS II, "to be one of central planks of the counter-terrorism strategy" in the extraordinary meeting of 19 March 2004 (Boswell 2007, 602). As a result, Brouwer mentions that on 25 March 2004, in the Declaration on combating terrorism, the European Council invited the Commission to submit proposals for enhanced interoperability between SIS II, VIS, and EURODAC and to use this information for the fight and prevention of terrorism (2005, 10). In addition, Brouwer states that "the

[44] See the Council Regulation (EC) No 871/2004 of 29 April 2004 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism.

[45] COM(2004) 116, final, Brussels, 18 February.

[46] COM(2004) 429 final, Brussels, 16 June.

Regulation, adopted on 29 April 2004, provides for a legal basis for the information sharing by SIRENE offices as well as for the possibility to add extra information stored into SIS (whether a person has escaped), and gives visa authorities the possibility of access to information on stolen identity papers"[47] (2005, 5). Finally, Brouwer mentions that the EU Council adopted the Decision on new functions for SIS on 24 February 2005[48] (2005, 5). This Decision, says Brouwer, gives way to "the access for Europol and Eurojust to SIS, however limited to their judicial and police tasks and not including data of Article 96, nor 97 SC" (2005, 5). Moreover, Brouwer states that different from the access of Europol authorities to SIS, the Commission also announced to work on the "'development of links between SIS II and the Europol information system' before 2007" [49] (2005, 10).

In consequence, it can be claimed that the granting of access to the SIS by Europol marks how a common system for monitoring internal security is emerging. In addition, apart from its intended purpose set out under Article 93 of the Schengen Convention, SIS becomes to be viewed as an important database in the fight against terrorism. In this situation, Bigo states that the link between criminals' files and foreigners' files that SIS establishes "strengthens the suspicions against foreigners and focuses the attention to small crimes and violations by making it a top police and customs' priority" (2005, 87). Moreover, Carrera implies that the flexibility attached to very essence of these new security measures may become very dangerous for the safety of a European area of freedom (2005a, 720). Furthermore, "the broad enhancement of the SIS II functions may put into place a new European investigative and reporting tool that monitors the mobility of all, leading to an imposing security around mobility. By doing so, these instruments will become a real turning point in the full exercise of freedom of movement

[47] Regulation 871/2004 concerning some new functions of SIS, OJ L 162/29, 30.04.2004 (cited in Brouwer 2005, 15).

[48] Council Decision 2005/211, OJ L 68/44, 25.03.2005 (cited in Brouwer 2005, 15).

[49] COM (2005) 184, 10.05.2005 (cited in Brouwer 2005, 16) .

paradigm" (Carrera 2005a, 720). Carrera states that the data that SIS II store are very broad and sensitive. For this reason, at present, there is an absence of a framework providing a set of human rights. There is also a lack of transparency in the relevant decision-making procedure. Due to these facts, according to Carrera, "these gap may facilitate a situation in which SIS II becomes a tool focusing mainly on the surveillance of mobility and monitoring of social movements of the population as a whole" (Carrera 2005a, 720).

4.2.1.2 EURODAC *(Euro*pean *Dac*tylographic System)

EURODAC is a database that includes fingerprints of asylum seekers and illegal immigrants seeking access to one of the European Member States. As Aus mentions, it is the first biometric identification technology used by a supranational political entity (2003, 3).

Legal Background of EURODAC

The creation of EURODAC system is based on the Dublin Convention of 1990.[50] The aim of EURODAC is to facilitate the Dublin Regulation which determines the Member State responsible for examining an asylum application.[51] As was mentioned in the official website of the EU, the Dublin Regulation establishes "a series of criteria which, in general, allocate responsibility for examining an asylum application to the Member State that permitted the applicant to enter or reside. That Member State is then

[50] The Dublin Convention has been replaced by the Council Regulation 343/2003 of 18 February 2003.

[51] Article 1(1) of the Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.

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responsible for examining the application according to its national law and is obliged to take back its applicants who are irregularly in another Member State". [52]

After Treaty of Amsterdam entered into force in 1999, Regulation 2725/2000[53] was adopted by the European Council and as Aus mentions, EURODAC, as a biometric identification in digitalized form, began to operate on January 15 2003 (2003, 17). From that date, "fingerprint templates of asylum seekers and other third country nationals have officially been transmitted to the Central Unit" (Aus 2003, 17).

As I have mentioned above, originally, the purpose of EURODAC is to facilitate the determination of the responsible State, by controlling in which country an asylum seeker has forwarded his or her application for the first time, or in which country he or she stayed previously so that so-called "asylum-shopping" in the EU could be eliminated. For this reason, says Aus, the system is first directed at potential refugees in the meaning of the Geneva Refugee Convention, i.e. persecuted TCNs applying for political asylum in one of the Member States (2003, 19). Nevertheless, the Eurodac Regulation of 2000 shows that, the scope of EURODAC is significantly widened in the sense that all illegal immigrants[54] together with persons residing illegally within a Member State are also included in the scope of EURODAC. In consequence, as Aus notes, "beyond its relevance to the narrowly defined domain of Community asylum policy shaped by the Dublin Convention system, EURODAC also functions as a potentially deterring instrument of

[52] available at http://ec.europa.eu/home-affairs/policies/asylum/asylum_criteria_en.htm.

[53] Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention

[54] Chapter IV of the Council Regulation (EC) No 2725/ 2000 is dedicated to the topic of "aliens found illegally present in a Member State".

immigration control and for the maintenance of 'law and order' within the area of security, freedom and justice" (2003, 10).

Aus implies that it was the former German interior minister, Manfred Kanther, supported by his Secretary of State, Kurt Schelter, who pushed for the inclusion of irregular migrants in the EURODAC system (2003, 11). With a security driven logic, in 1998 Schelter states:

> Our practical experience has shown that many applicants for asylum cross external border yet do not lodge their application within the first Member State they have entered. Instead, they travel further to the receiving country of their personal choice. Once they arrive there, it cannot be proven any more which part of the external border they actually crossed. In contrast to the provisions of Dublin Convention and due to a lack of evidence concerning the responsibility of other Member States, the receiving country chosen by the applicant is thus responsible for considering asylum claim. For these reasons, Germany has demanded not only collecting the fingerprints of asylum seekers, but also those of aliens who have entered illegally (cited in Aus, 2003, 11).

As a result, says Broeders, Germany's demand for the collection of irregular migrants became successful and in 1999 the Schengen Executive Committee had concluded that "it could be necessary to take the fingerprints of every irregular migrant whose identity could not be established without doubt, and to store this information for the exchange with other member states" (Broeders, 2007, 82)

Operation of EURODAC

As is mentioned in Article 1 of the Council Regulation No. 2725/2000, EURODAC comprises of "a Central Unit within the European Commission with a computerized central database for the sake of comparing the fingerprints of asylum applicants" together with "a system for electronic data transmission between Member States and the database". The system operates by means of a participating State's taking on asylum applicant's fingerprints

and sending them automatically to the computerized central database for the purpose of comparing the fingerprint data of the applicants.

Like the SIS, EURODAC is a hit/no hit system. As Broeders mentions, the system defines a 'hit' as the existence of a match or matches established by the Central Unit by comparison between fingerprint data recorded in the databank and those transmitted by a Member State with regard to a person (2007, 82).[55]

Data Recorded

The data recorded in respect of an asylum applicant in the central database include:

1) Member State of origin, place and date of the application for asylum;
2) Fingerprint data;
3) Sex;
4) Reference number used by the Member State of origin;
5) Date on which the fingerprints were taken;
6) Date on which the data were transmitted to the Central Unit;
7) Date on which the data were entered in the central database;
8) Details in respect of the recipient(s) of the data transmitted and the date(s) of transmission(s).[56]

For this reason, Guild implies that the individual becomes "no more or less than his or her fingerprints for EURODAC" (2006, 66).

The EURODAC system becomes an important tool for the European authorities in fighting against irregular immigration. In the Article 8(1) of the Council Regulation No. 2725/2000, it is mentioned that

> Each Member State shall, in accordance with the safeguards laid down in the European Convention on Human Rights and in the United Nations Convention on the Rights of the Child, take the

[55] Article 8 (e) of the Eurodac Regulation of 2000 (cited in Broeders 2007, 82).

[56] Article 5 of the Council Regulation (EC) No 2725/2000, 15.12.2000.

> fingerprints of all fingers of every alien of at least 14 years of age who is apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State having come from a third country and who is turned back.

The data recorded in respect of a person apprehended in connection with the irregular crossing of an external border are:

1) Member State of origin, place and date of the apprehension;
2) Fingerprint data;
3) Sex;
4) Reference number used by the Member State of origin;
5) Date on which the fingerprints were taken;
6) Date on which the data were transmitted to the Central Unit.[57]

The first annual report of EURODAC was published on 5 May 2004.[58] According to the report, as one year of activities, from 15 January 2003 to 15 January 2004, 271.573 fingerprints were successfully transmitted to the central authority (2004, 10).

After the first annual report, a year later, the second report was published on 30 June 2005.[59] According to these reports, three different types of data on individuals over the age of 14 are kept in the Central Unit. Category 1 includes the fingerprints of asylum applicants who apply for asylum in one of the member states. The fingerprints of asylum seekers "are sent for comparison against fingerprints of other asylum applicants who have previously lodged their application in another Member State" (the first annual report of EURODAC, 2004, 6). Broeders states that these are the fingerprints that are necessary to eliminate cases of asylum shopping (2007, 83). Category 2 contains "data of *aliens apprehended in connection with the*

[57] Article 8(2) of the Council Regulation (EC) No 2725/2000, 15.12.2000.

[58] European Commission, SEC (2004) 557.

[59] European Commission, SEC (2005) 839.

irregular crossing of an external border and who were not turned back" (the second annual report of EURODAC 2005, 16, original emphasis). Last but not least, category 3 includes the fingerprints of "*aliens found illegally present in a Member State*" (the second annual report of EURODAC 2005, 16, original emphasis). The data on category 3 are not stored and are checked "against the data of asylum applicants stored in the Central database" (the second annual report of EURODAC 2005, 16). As Broeders mentions, it is specifically this category that indicates "the development of internal control on irregular migrants by means of EU surveillance systems such as EURODAC" (2007, 83).

4.2.1.3 European Police Office (Europol) and the Europol Computer System (TECS)

Europol is an intergovernmental organization which aims to facilitate exchange of information and intelligence between Member States. This activity is coordinated through an EU-wide network of liaison officers. Europol was established under the 3rd pillar of the 1993 Maastricht Treaty.[60] As Deflem mentions, on January 3, 1994, Europol started its limited operations in The Hague in the form of the European Drugs Unit (EDU) that was basically concentrated on the policing of international drug crime (2006, 341). Benyon notes that Europol started specifically "by limiting its activities to analyze information on drugs trafficking and those involved in these activities, and to facilitate the exchange of intelligence between EU police forces and customs" (1994, 61). On July 1995, says Deflem, a Europol Convention was formally constituted in Brussels, and on October

[60] Article K.1 of the Maastricht Treaty states that "For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest: (9) police co-operation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs co-operation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol)".

1998, the Convention came into force and finally, Europol started its operations on July 1999, when it replaced the EDU (2006, 341-342).

The Objectives and Operation of Europol

Based on the provisions of the Article 3 of the Europol Convention,[61] the objectives of Europol are as follows:

> 1) to facilitate the exchange of information between the Member States;
> 2) to obtain, collect and analyze information and intelligence;
> 3) to notify the competent authorities of the Member States without delay via the national units referred to in Article 4 of information concerning them and of any connections identified between criminal offences;
> 4) to aid investigations in the Member States by forwarding all relevant information to the national units;
> 5) to maintain a computerized system of collected information containing data in accordance with Articles 8, 10 and 11;

Europol consists of national units that are established by Member States. The national unit shall be the only liaison body between Europol and the competent national authorities (Article 4 of the Europol Convention 1995). Each national unit shall second at least one liaison officer to Europol. The liaison officers shall be instructed by their national units to represent the interests of the latter within Europol in accordance with the national law of the seconding Member State and in compliance with the provisions applicable to the administration of Europol (Article 4 of the Europol Convention 1995). In other words, these are liaison officers who represent their Member State within the Office. They ensure, within the Office, the connection between national authorities and Europol agents.

Due to Europol's objectives and operation, it can be said that firstly, the extension of police forces reaches beyond national borders, secondly, the

[61] Convention based on Article K.3 of the Treaty on European Union on the Establishment of a European Police Office – hereinafter referred as Europol Convention, 27.11.1995.

quality of police changes and lastly, there occurs a high cooperation among police forces between national, local and international levels. As Bigo mentions,

> Two main types of police now exist within the national police force; the first one employs staff who are little or not all qualified and whose job is to be visible and present locally. The second type employs few but highly qualified staff and in touch with other security agencies and social control institutions. This staff's two main characteristics are discretion and distance. The idea is to draw 'prospective' knowledge…a technical and human, operational police information service is thus the ambition of all these professionals who consider themselves more professional (2005a, 82).

Because the origin of the Europol is intergovernmental, Europol's control is carried out by the Member States. Europol's activity is subject to control at judicial level, by the national judicial authorities in the context of the exchange of information between the Office and Member States, and at political level, through the Management Board and the Council of Ministers. The Management Board includes a representative from each Member State. Article 28 of the Europol Convention provides that the Management Board is responsible for fixing rights and obligations of liaison officers to Europol, and it has taken part in the adoption of rules governing Europol's relations with third states and third bodies. Moreover, there is joint supervisory body which is an independent body to monitor Europol's activities to ensure that the rights of individuals are not violated by the storage, processing or utilization of the data in its possession. In addition, the joint supervisory body shall monitor the permissibility of the transmission of data originating from Europol (Article 24(1) of Europol Convention 1995). Regarding the joint supervisory body, it is also stated that the body "shall be composed of not more than two members or representatives (where appropriate assisted by alternates) of each of the national supervisory bodies guaranteed to be independent and having the necessary abilities, and appointed for five years by each Member State" (Article 24(1) of Europol Convention 1995). In

addition to the joint supervisory body, each Member State designates a national supervisory body, with the task of monitoring independently, "in accordance with its respective national law, the permissibility of the input, the retrieval and any communication to Europol of personal data by the Member State concerned and to examine whether this violates the rights of the data subject" (Article 23(1) of Europol Convention 1995). Due to this fact, it is stated that "the supervisory body shall have access at the national unit or at the liaison officers' premises to the data entered by the Member State in the information system and in the index system in accordance with the relevant national procedures" (Article 23(1)). Following this, it is mentioned that individuals have "the right to request the national supervisory body to ensure that the entry or communication of data concerning him to Europol in any form and the consultation of the data by the Member State concerned are lawful" (Article 23 (2)).

Regarding the control of activities of Europol, there are criticisms among certain authors. Boer mentions national parliaments of the EU Member States and the European Parliament have a mission to monitor and evaluate the activities of Europol (2002, 283). However, as Wagner point out, parliamentary and judicial control of Europol has been severely limited (2006, 1233). In line with this, Boer criticizes that during the negotiations of the Europol Convention, the governments of the Member States "kept both the European Parliament and national parliaments at bay" (2002, 283). For this reason, Loader states that marginal role played by both legislatures and the European Parliament in this domain causes Europol's activities to remain unjustifiable before the European Court of Justice (Loader 2002, 2).

Mandate of Europol

As I have said at the beginning, Europol was originally created with limited tasks, essentially concerned with gathering, exchange and analysis of information and intelligence on criminal cases. The Treaty of Amsterdam is

crucial in the sense that it extends Europol's mandate to specifically counter-terrorism.[62] In consequence, as Deflem mentions, after the Amsterdam Treaty came into force, Europol's specific areas of criminal investigation include "the illicit trafficking in drugs, vehicles and human beings, including child-pornography; forgery of money; money-laundering; and terrorism" (Deflem 2006, 342).

The aftermath of the events of the 11 September 2001 gave a new impetus and increased importance to Europol. As Monar mentions, this was reflected in an increase in Europol's budget for 2002 by 49.5% which was justified by additional tasks in the fight against terrorism, the build-up of its information system and the new Europol liaison officers at Interpol and the US (2006, 128)

Wagner mentions that on 28 November 2002, the Council agreed a protocol to the Europol convention which extended new prerogatives in accordance with the provisions of the Treaty of Amsterdam.[63] The protocol says Wagner, creates an opportunity for the Europol to request national authorities to conduct and coordinate its investigations together with allowing Europol "to participate in a support capacity in joint investigation teams" (Wagner 2006, 1232). In consequence, Europol's function has been widened to include joint investigative and operational actions. As Fijnaut

[62] Article K.1 of the Amsterdam Treaty states that "…the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters…". Article K.1 continues as follows: "that objective shall be achieved by preventing and combating crime …, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:
- closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol)…"

[63] Council act of 28 November 2002 drawing up a Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, *OJ* 2002 C 312/1 (cited in Wagner 2006, 1232).

notes, background of the protocol was the 1999 European Council in Tampere which emphasized that "there should be an immediate move towards establishing joint investigation teams for the fight against drug trafficking, trafficking in humans and terrorism" (2004, 246). In this respect, "once member states have all ratified the amendment, Europol officers may participate in joint investigation teams composed of police officers from the member states" (Wagner 2006, 1232). As a result of this process, Monar mentions that police organizations extended tasks in monitoring and analyzing terrorist threats (2006, 128).

In addition to the protocol of 28 November 2002, on 27 November 2003, the Council approved a second protocol.[64] As Peers observes, the main amendment concerns access to the Schengen Information System (2007, 2). According to Lodge, Europol's involvement with the SIS obscures the distinction between civil and criminal matters (2004, 265).

The Europol Computer System (TECS)

As is mentioned in Article 6(1) of Europol Convention of 1995, to perform its tasks, Europol maintains a computerized system of collected information consisting of the following components:

> 1) an information system with a restricted and precisely defined content which allows rapid reference to the information available to the Member States and Europol;
> 2) work files as referred to in Article 10 established for variable periods of time for the purposes of analysis and containing comprehensive information; and
> 3) an index system containing certain particulars from the analysis files referred to in point 2, in accordance with the arrangements laid down in Article 11.

[64] Council Act of 27 November 2003 drawing up, on the basis of Article 43(1) of the Convention on the Establishment of a European Police Office (Europol Convention), a Protocol amending that Convention, *OJ C 2,* 6.1.2004.

Article 6(2) of the Convention states that "the computerized system of collected information operated by Europol must under no circumstances be linked to other automated processing systems, expect for the systems of national units".

At this point, it is important to analyze the components of the computerized system of Europol in detail.

Information System

Information may be entered about persons who are suspected of having committed or of having taken part in criminal offences under Europol's competence, or persons about whom there are serious grounds, under national law, to believe will commit such offences (Articles 8.1.1 and 8.1.2). As Mathiesen mentions, "persons suspected of participation in a wide sense of word as well as…a broad category of possible future criminals and possible future offences… are very extensive and diffuse category" (2000, 19). The information system therefore unites convicts, suspects and not-yet-but-soon-to-be suspects (Busch 2006, 3).

What kinds of information may be included in the information system? In Article 8 (2) of the Europol Convention, personal data may include the following details:

> 1) surname, maiden name, given names and any alias or assumed name;
> 2) date and place of birth;
> 3) nationality;
> 4) sex; and
> 5) where necessary, other characteristics likely to assist in identification, including any specific objective physical characteristics not subject to change.

In addition, the information system also includes the following details:

1) criminal offences, alleged crimes and when and where they were committed;
2) means which were or may be used to commit the crimes;
3) departments handling the case and their filing references;
4) suspected membership of a criminal organization;
5) convictions, where they relate to criminal offences for which Europol is competent under Article 2 (Article 8 (3)).

Moreover, Article 8 (4) of Europol Convention states that "additional information held by Europol or national units concerning the groups or persons referred to in paragraph 1 may be communicated to any national unit or Europol should either so request. National units shall do so in compliance to their national law". In consequence, the information which may be included, says Mathiesen, "is continuously widened, ending with the catch-all additional information" (2000, 20).

Work files

Article 10 of Europol Convention mentions that "Europol may store, modify, and utilize work files data on the criminal offences for which it is competent, including data on related criminal offences". These are special, temporary work files and they function as a working instrument for analysis groups.

In addition to persons as referred to in Article 8(1); namely, the convicted persons, suspects and not-yet suspects, the work files also hold details on witnesses, potential witnesses, victims, potential victims, contacts and associates as well as persons who can provide information on the criminal offences under consideration (Article 10(1)). In other words, as Busch mentions, the work files "lays down that anyone who the police officers believe to be of any interest to them all, can be entered in the files" (2006, 3).

Article 10(2) of Europol Convention states that work files "shall be opened for the purposes of analysis defined as the assembly, processing or utilization

of data with the aim of helping a criminal investigation". The article 10(2) continues that each analysis project shall entail the establishment of an analysis group comprising analysts and other Europol officials and liaison officials and/or experts from the Member States (Article 10.2.1 & Article 10.2.2).

Wagner points out that analysis files themselves are created in the context of an analytical project intended to study a phenomenon or a particular criminal group. The data contained in the work files have been the object of assembly, processing, or use, with the objective of supporting a criminal investigation. The sensitivity of the information in these files explains the fact that access is limited to the analyst. Sensitive data such as ethnic origin, political or religious convictions, health and sexual preferences may be stored. Work files are designed to investigate the structures of organized crime, the results of which are then presented to the member states which in turn can initiate investigations (Wagner 2006, 1232).

As Busch mentions, in December 2004, Europol operated 19 work files altogether hold the data of 146,143 persons. "Around 10,000 were registered in the work file "Islamic terrorism", 22,500 were registered in a file on Turkish, and around 14,000 in a file on Latin American organizations involved in drugs trade" (Busch 2006, 3).

Index System

An index system is created by Europol for the data stored on the files referred to in Article 10 (1) (Article 11 (1)). The Director, Deputy Directors and duly empowered officials of Europol and liaison officers shall have the right to consult the index system (Article 11 (1)).

In consequence, it can be said that Europol professionals work with data-bases and files. As Wagner mentions, although Europol officers do not have

executive powers, “their data-related activities are designed to enhance the efficient use of executive powers by the national police” (Wagner 2006, 1232).

Based on the descriptive examination of Europol files, it can be claimed that the idea behind these databases is not to extend surveillance to all, but to refine it. To be more explicit, Bigo mentions that with Europol files, the profiling becomes much more pinpointed, meaning that; “on the one hand, people are believed to be potential risks would be recorded. Interpol databases include only criminals actually wanted by police. Europol files rather include wanted criminals, suspects, not yet subjected to judicial inquiry, possible witnesses and victims or persons suspected to do so.” (Bigo 2005a, 89-90). Due to this fact, Bigo claims that “since these files aim at anticipating the trajectories of networks, at tracing their path, at profiling each minority or diasporas and at defining those who need to be put under surveillance so that to avoid a heavy and generalized surveillance” (Bigo 2005a, 90) .

CHAPTER V

CONCLUSION

The right of free movement of persons is viewed as a fundamental right guaranteed to EU citizens by the Treaties of the European Union. This right came about with the signing of the Schengen Agreement in 1985 and the subsequent Schengen Convention in 1990, which initiated the abolition of border controls between participating countries. Before that date, generally, legislative measures to provide freedom of movement to workers of the Member States were at stake. Following the Schengen Agreement and Convention, 1993 Maastricht Treaty came into force by introducing European citizenship which was seen as a political achievement to allow for the evolution from the free movement of workers to free movement of persons. In addition, from the 1999 Amsterdam Treaty onwards, the right of freedom of movement is realized through an area of freedom, security and justice where the internal borders are abolished.

Lifting borders, for the EU Member States politicians, requires strengthened management of EU's external borders and regulation of entry and residence of non-EU nationals, including through a common immigration and asylum policy. For this reason, on the one hand, EU Member States have adopted measures for lifting of internal borders, elimination of controls and facilitation of travelling between Member States; on the other hand, they have opted for a more restrictive approach in their policies for immigrants for the sake of providing a 'secure space' in which free movement of persons can be best practiced.

From a governmentality perspective, this situation can be viewed as an outcome of neo-liberal governmental rationality at the first sight. Indeed, the relation between freedom and security is an uneasy one and there is an unresolved tension between these two notions. In turn, it can be claimed that this tension creates a constitutive paradox in the EU since for providing freedom such as the right of free movement of persons, security rationale comes to the scene in the sense that for providing the free movement of "self-regulating" and "self-governing" persons, the others who are seen as risk to the operation of market relations in general and to the free movement of persons in particular should be controlled and regulated. The "others" mostly include TCNs who lack of providing economic sufficiency and asylum seekers. For this reason, what is at stake is the securitization of freedom of movement. To manage the movement of "others", apparatuses of security, namely surveillance databases are used as effective tools in the EU. The basic aim of these databases is classifying and categorizing certain kinds of people so that the movement of these people can be prevented. Due to this fact, the database technology becomes a very effective tool for the EU since it enables continuous and automatic data sharing and data storing about information on certain kinds of people among the Member States. For this reason, with the help of surveillance mechanisms, a kind of exclusion mechanism prevails towards a majority of TCNs and asylum seekers and this exclusion mechanism becomes an indispensable part of EU migration policies. To put it in another way, as I had tried to illustrate throughout the study, because of the unresolved tension between free movement and security, the EU authorities produce certain laws, regulations, directives and policies with an aim of controlling and limiting the movements of certain kinds of persons on the one hand, and facilitating the movements of certain kind of persons on the other hand.

In consequence, in the thesis, first, the governmentality perspective has been analyzed. In order to draw a general framework of governmental power, the notion of government as the 'conduct of conduct' is examined in brief. After

that, I focus on two meanings of governmentality provided by Foucault and his followers: governmentality as an art of government and governmentality as a specific form of power emerged in the 18th century Western Europe. Grasping governmentality as an art of government is beneficial to link the governing activity and thought. In addition, governmentality as a specific form of power marks the period that a new way of governing emerges in the 18th century onwards which has its specific target as population, depends on apparatuses of security and is based on economy. In this respect, liberal and neo-liberal forms of governing come to the scene and these forms are analyzed through freedom and security nexus. Within this framework, freedom and security are complementary concepts to each other in liberal governmentality.

Secondly, the relation between free movement of persons and security discourse in the EU from a governmentality perspective is analyzed. Governmentality perspective emphasizes that power is diffused among various actors. In a similar way, in the EU governmentality, what we see is the diffusion of power relations among EU Member States and EU institutions such as EU Council, Commission and ECJ. These actors sometimes agree and sometimes disagree on enhancing the right of freedom of movement to certain groups. This also shows that the freedom of movement right is not something homogenous, meaning that different groups can enjoy this right in different ways. For one thing, the right of freedom of movement is a fundamental right of EU citizens. However, all EU citizens cannot enjoy this right in the same way. Specifically students, retired persons and economically inactive persons have difficulties in reaching the rights such as the right to work, reside in another Member State, and benefit from social assistances derived from the basic free movement right. This comes from the fact that the EU governmentality is mostly in effect of neo-liberal policies. The situation of TCNs is worse than the EU nationals. They are categorized in different groups and regulated by different legal instruments. In turn, the right of freedom of movement is applied to them very differently.

For instance, a TCN who is a spouse or minor child of an EU citizen is regulated according to Directive 2004/38/EC and has a certain set of rights that differs from the right of a long-term TCN resident who is regulated according to Directive 2003/109/EC. In addition, TCNs from countries which have special agreements with the EU may be subject to a different set of rights than TCNs who do not come from countries with such arrangements.

Within this scenario, the most unprivileged group among TCNs is the ones outside the EU territory and seeking ways to enter into this area. Indeed, in recent years, the Europeanization of migration policies have been widely discussed with a specific emphasis on security concerns. Regarding the security issue, the power actors are more or less in agreement in the sense that more freedom needs to be regulated with more security controls. The discourse on immigration becomes identical with the discourse on security, specifically terrorism. For some authors, this kind of understanding leads to securitization of migration and creates a 'security continuum' in an area called governmentality of unease.

After examining the relation between the right of free movement of persons and enhanced security measures through governmentality perspective, I aim to link these notions with the surveillance databases in the EU. For doing this, firstly, the concept of surveillance has been defined. Then meaning of surveillance, and the continuities and discontinuities of the term in modern and post modern times are focused on. With the emergence of modern states in the 18th century, surveillance becomes systematic, formal and in turn, an important tool of the modern states for the sake of prevailing their existences. Until the later part of the 20th century, surveillance theories are dominated by Foucault's metaphor of panopticon. Yet, due to the changes in political, social and economic processes and specifically globalization, this dominance of panopticon in grasping the surveillance becomes to be questioned. For this reason, the changing rationality of surveillance process

needs to be analyzed with a specific focus on concepts such as dataveillance, social sorting, risk and surveillance society.

After providing a theoretical framework on surveillance, I focus on surveillance databases in the EU, namely SIS, EURODAC and TECS. The analysis of surveillance databases reveals the fact that the security environment in the EU lead to the creation of techniques of risk-profiling and risk-testing which "allow for different degrees of intensity of checks depending on the risk criteria fulfilled by certain categories of persons and locations such as suburbs, border areas, immigrant neighborhoods etc." (Ceyhan 2005, 227). The techniques of risk-profiling and risk-testing are also valid for TCNs who succeed in entering the EU since there is always a possibility of controlling the status of them through the searches in the databases. For this reason, expulsion mechanism can be used on the grounds of public security. In this sense, the aim of the surveillance databases is not disciplining or correcting undesirable migration as in the metaphor of panopticon, rather, they are designed as a "factory of exclusion" (Engbersen 2001, 242). Put differently, the EU gathers information about the immigrants and asylum seekers with the aim to exclude them from its territorial and membership status together with from various spheres of social life such as education, employment and health. The focus of exclusion can be explained by the fact that TCNs "are perceived to be a threat to the (social) order" (Broeders 2007, 75). Due to this fact, the rationality of EU governing coincides with the term 'targeted governance' as Walters and Haahr summarizes,

> If early modern police dreamt of total surveillance, this was in the context of a largely localized world in which spaces of surveillance were more likely to be cities rather than nations. Total surveillance at a European level is neither politically nor technically feasible. Instead, Schengenland security employs 'modern control techniques' such as 'risk-profiling' and 'risk-testing'. These allow for different degrees of intensity checks

> depending on the criteria fulfilled by certain categories of persons and border checks (2005, 104).

This type of governmentality, to Bigo, can be labeled as 'banopticon' rather than 'panopticon'. Banopticon focuses on the power of exclusion provided by the surveillance databases. To Bigo, the 'ban' is linked with the management of unease in the EU developed through technologies by the professions of (in) security (Bigo 2005a, 86). So, "it is a belief in technologies of 'morphing', of 'profiling', of computer databases and their capacities to anticipate who will be 'evil' and who is 'normal', who is 'allowed to benefit from freedom of movement' and who is excluded or controlled before they can use their freedom of movement" (Bigo 2005a, 86). As was focused throughout this study, there is not a totalitarian discipline of whole population in the EU case. In other words, the logic of EU governmentality is not to discipline the whole population through normalization mechanisms as in the case of Panopticon. Rather, the idea is to categorize and sort people through surveillance mechanisms and to decide which categories of people are to be included or excluded. In turn, there is an increase in the development of security instruments as surveillance databases. These databases promote the "life" of the certain groups of people so they work as biopolitical power. However, by doing so, they exclude the so-called "others". As Foucault mentions, "freedom is nothing else but the correlative of the deployment of apparatuses of security" (2007, 48). The free movement of proper citizens requires the usage of security apparatuses, namely surveillance databases, through which the free movement of them will be secured. Through surveillance databases, certain kinds of practices such as data sharing, biometric identification, risk profiling, sorting can be provided. These practices categorize and sort certain people so that whose freedom of movement can be maximized and whose freedom of movement should be limited can be easily defined. As a last word, whole mentioned situation is well-illustrated in the recent Action Plan of the Stockholm Programme as follows:

Smart use of modern technologies in border management to complement existing tools as a part of a risk management process can also make Europe more accessible to bona fide travellers and stimulate innovation among EU industries, thus contributing to Europe's prosperity and growth, and ensure the feeling of security of Union's citizens. The coming into operation of SIS II and VIS systems will contribute to be a high priority. (Action Plan Implementing the Stockholm Programme 2010, 6).

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