OBSTACLES TO FREE MOVEMENT FOR "VISIBLE MINORITIES" IN THE EU: RACE DISCRIMINATION AND MIGRATION CONTROLS

Submitted for MPhil examination
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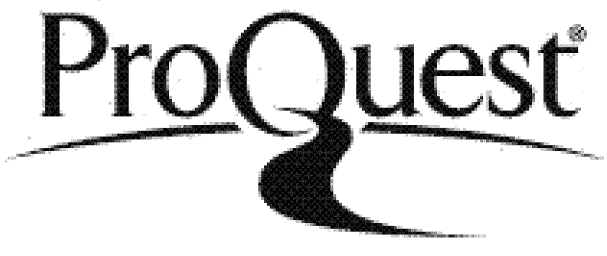

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ABSTRACT

Freedom of movement of people, one of the founding pillars of the European Community, has developed beyond the purely economic activity of the Treaty of Rome 1957 but it is still not easily accessible for all people working and residing within it. The right of free movement has been linked to nationality and the problems for *"visible minorities"* in the EU have been the subject of much controversy and discussion. The dismantling of internal borders has resulted in strengthening of external borders and a *"Fortress Europe"* mentality. The governments of the EU have been accused of inciting racial hatred by creating a climate in which race discrimination has thrived.

Laws on race discrimination presently differ throughout the EU. Discrimination in employment on grounds of race is effectively an obstacle to free movement for *"visible minorities"* as the individuals may be discouraged from moving to a country where they will receive little or no protection from race discrimination. As immigration laws are often used as a means of combating racism, immigration law will also be examined. EU immigration policy including asylum seekers and refugees, has evolved through semi-secret discussions and has been created in a climate of fear and hostility towards foreigners and visible minorities in particular. It has therefore tended to be prohibitive creating further obstacles to free movement.

The Treaty of Amsterdam 1997 enables *"appropriate action" to* combat discrimination based on racial or ethnic origin and also moved competence on asylum and immigration into the Community law arena. The Commission issued a package of proposals for combating discrimination to the social affairs Council in November 1999 and these will form the basis for further discussions. As the proposals require a unanimous vote, it is likely that some compromises will be reached before legislation is eventually enacted.

This paper examines the history of EU legal competence in the area of race and migration and how far freedom of movement for visible minorities, both EU and third country nationals, is hampered by the obstacles of racism and immigration, asylum and refugee policies. It will also explore what EU laws on race and migration should contain to fully realise freedom of movement for all, adopting a social justice model and focusing in particular on the UK's response to such issues.

This thesis argues that the lack of effective EU wide race discrimination laws and draconian national immigration laws are a breach of human rights, obstacles to free movement of people and contrary to the spirit of free movement of people enshrined in the Treaty of Rome.

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ABBREVIATIONS

All ER	All England Law Reports
CA	Court of Appeal (England and Wales)
CERD	Committee for the Elimination of all Forms of Racial Discrimination
CMLR	Common Market Law Reports
COREPER	Committee of Permanent Representatives
CRE	Commission for Racial Equality
EC	European Community
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECRI	European Commission Against Racism and Intolerance
EEA	European Economic Area
ELR	European Law Report
EOC	Equal Opportunities Commission (Britain)
EP	European Parliament
EU	European Union
HL	House of Lords
HMSO	Her Majesty's Stationery Office
ICERD	International Convention on the Elimination of all forms of Racial Discrimination
IGC	Intergovernmental Conference
ILO	International Labour Organisation
ILPA	Immigration Law Practitioners Association
JCWI	Joint Council for the Welfare of Immigrants
JHA	Justice and Home Affairs
LTR	Long term resident
NGO	Non-Governmental organisation
OJ	Official Journal of the European Communities
QMV	Qualified Majority Vote
SEA	Single European Act
SCORE	Standing Conference for Racial Equality
TCN	Third Country National
TEU	Treaty on European Union
TOA	Treaty of Amsterdam
UKREN	UK Race & Europe Network
UNHCR	United Nations High Commission for Refugees

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R v Immigration Appeal Tribunal, ex parte Antonissen, Case C-292/89 (1991) ECR I-745

Barber v Guardian Royal Exchange Assurance Group, Case C-262/88 (1990) ECR I-1889

Belgian State v Taghavi, Case C-243/91 (1992) ECR I-4401

Bernini v Minister van Onderwijs en Wetenschappen, Case C-3/90 (1992) ECR I-1071

Bleis v Ministere de l 'Education Nationale, Case C-4/91 (1991) ECR I-5627

Union Royal Belge des Societes de Football Association ASBL v Bosman, Case C-415/93 (1995) ECR I-4921

Brasserie de Peacher and Factortame, Joined Cases C-46/93 & C-48/93 ECRI-1029 (1996) 1 CMLR 889

Caisse d'Allocations Fasiliales v Meade, Case 238/83 (1984) ECR 2631

Carvel & Guardian Newspapers Ltd v Council, Case T-194/94 (1995) ECR II-2765

Castelli v ONPTS, Case 261/83 (1984) ECR 3199

Commission v Belgium, Case 149/79 (1980) ECR 3881

Commission v Belgium, Case C-321/87 (1989) ECR 997

Commission v Belgium, Case C326/90 (1992) ECR I-5517

Commission v Council, Case 45/86 (1987) ECR I-1493

Commission v France, Case 167/73 (1974) ECR 359

Commission v Greece, Case 305/87 (1989) ECR 1461

Commission v The Netherlands, Case C-68/89 (1991) ECR I-2637

Cowan v Le Tresor Public, Case 186/87 (1988) ECR 195

Criminal Proceedings Against Skanovi and Chryssanthakopoulos, Case C-193 (1996) ECR I-929

Cristini v SNCF, Case 32/75 (1975) ECR 1085

Office Natinal de l'Emploi v Deak, Case 94/84 (1985) ECR 1873

Defrenne v Sabena, Case 80/70 (1971) ECR 445

Dekker v Stichting Vormingscentrum Voor Jonge Volwassen Plus, Case 177/88 (1990)

Demirel v Stadt Schwabisch Smund, Case 12/86 (1987) ECR 3719

Di Leo v Land Berlin, Case C-308/89 (1990) ECR I-4815

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Dona v Mantero ,Case 13/76 (1976) ECR 1311

Dori v Recreb Sri, Case C-91/92 (1994) ECR I 3325

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Germany and others v EC Commission, Joined Cases 281, 283/85 and 287/85 (1987) ECR 3202

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Kazim Kus v Landeshauptstadt Wiesbaden, Case C-237/91 (1992) ECR I-6781 (1993) 2CMLR 887,

Kremzow v Austria (1997), Case C299/95

Land Nordrhein-Westfalen v Uecker & Jacquet, Cases C-64 and C-65/96 (1977) ECR I-371

Maria Martinez Sala v Freistaat Bayern, Case C-85/96 (1998) ECRI-2691

Marleasing SA v La Commercial Internacional de Alimentacion, Case C-106/89 (1990) ECRI-4135

*Marshall v Southampton Area Health Authority, C*ase 152/84 (1986) ECR 723

Marshall v Southampton and South West Hampshire Area Health Authority No. 2, Case C-271/91 (1993) ECR I-4367

Micheletti v Delgacion del Cobierno en Cantabria, Case C-369/90 (1992) ECR I-4329

Moser v Land Baden Wurttenberg, Case 180/83 (1984) ECR 2539

Mulder v Ministry of Agriculture and Fisheries, Case (1988) ECR 2321 (1989) 2CMLR

Nold v Commission, Case 4173 (1974) ECR 491

Nour El Yassini v Secretary of State for Home Departmen Case C-416/96 (1997) ECR I-1209

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Oyowe and Traore v Commission Case 100/88 (1989) ECR 4285

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Procureur de Roi v Royer, Case 48/75 (1976) ECR 497

R v Bouchereau, Case 30/77 (1977) 1999 (1977) 2 CMLR 800

R V Saunders, Case 175 78 (1979) ECR 1129

Raulin v Minister van Onderwijs en Wetenschappen, Case C-357 89 (1992) ECER I-1027

Razanatsimba, Case 65 77 (1978) ECR 2229

Netherlands v Reed, Case 59/85 (1986) ECR 1283 (1987) 2 CMLR 448, ,

Royal Scholten-Honig v IBAP (1978) ECR 2037

Royer Case 48/75 (1976) ECR 497

Rush Portuguesa Limitad v Office National d 'Immigration, Case C-113/89 (1990) ECRI-1417

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Skanavi and Chryssanthakopoulos Case C-193/94 (1996) ECR I-929, (1996) 2 CMLR 372

Society for the Protection of Unborn Children (Ireland) Ltd v Grogan Case C159/90 (1991) ECRI-4685

Sotgiu Case 152/73 (1974) ECR 153,

Stauder v City of Ulm Case*29/69(1970)CMLR112*

Stober and Pereira v Bundesanstalt fur Arbeit Joined Cases C-65/95 and C-111/95 (1997) ECR I-511

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UK v Council Case 84/94 (1996) ECRI-5755

UK v Commission C-106/96 (1998) ERI-2729

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Van Duyn v Home Office Case 41/74 (1975) 1 CMLR]

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Walgrave and Koch v Association Union Cycliste Internationale (Case 36/74) (1974) ECR 1405

Wisenbejk Case C-378/97, judgement 21 September 1999

Yousfi v Belgian State Case C-58/93 (1994) ECR I-1353

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East African Asians v UK (1981) 3EHRR76

Jessild v Denmark (1994) 19 EHRR 1

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Open Door and Dublin Well Woman case (1993) 12 EHRR 244

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Brind and Others v Secretary of State for the Home Department (1991) 1 All ER 720

Bulmer v Bollinger (1974) 2 All 1226

Khanum v IBC Vehicles (1998)

R v Home Secretary ex parte Flynn (1997) 3CMLR 888 (CA)

Re a Turkish Drugs Pedlar (Administrative Court of Appeal North Rhine Westphalia) (1993) 3 CMLR 276

Walendy v Germany 21 128/92 (1995) 80-A DR 94 and *Remer v Germany* 2506194 (1995) 82-ADR 117

Application of international Conventions, etc, to EU member states: extracted from the United Nations Human Rights International Instruments 1994

A	B Austria	c Belgium	D Denmark	E Finland	F France,	G Germany	H Greece	I Ireland	J Italy	K L'xbourg;	L N1ands	m Norway	N Portugal	0 Spain	p Sweden	Q UK
International Covenant on Economic Social an Cultural Rights (ICESCR)	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
International Covenant on Civil and Political Rights (ICCPR)	Xa	Xa	Xa	Xa	X	Xa		Xa	Xa	Xa	Xa	Xa	X	Xa	Xa	Xa
Optional Protocol to the ICCPR	X		X	X	X	X		X	X	X	X	X	X	X	X	
Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty	X	S	S	X		X		X	S	X	X	X	X	X	X	
International Convention on the Elimination of all forms of Racial Discrimination (ICERD)	X	X	Xb	X	Xb	X	X	S	Xb	X	Xb	Xb	X	X	Xb	X
International Convention on the Suppression and Punishment of the Crime ofApartheid (ICSPCA)						X*										
International Convention against Apartheid in Sports (ICAS)						X*										
Convention on the Prevention and Punishment of the Crime of Genocide	X	X	X	X	X	X	X	X	X	X	X			X	X	X
Convention on the Non-Applicability of Statutory Limitations to War Crimesand Crimes against Humanity						X*										
Convention on the Rights of the Child	X	X	X	X	X	X	X	X	X	S	8	X	X	X	X	X
Convention on the Elimination ofAll Forms of Discrimination against Women (CEAFDW)	X	X	X	X	X	X	X	X	X	X	X		X	X	X	X
Convention on the Political Rights of women	X	X	X	X	X	X	X	X	X	X	X	X		X	X	X
Convention on the Nationality of Married Women	X	S	X	X		X		X		X	X	X	S		X	
Convention on Consent to Marriage, minimum Age for Marriage and Registration of Marriages for punishment	X		X	X	S	X	S	S	S		X	X		X	X	X
Slavery Convention 1926	X	X	X	X	X	X	X	X	X		X	X	X	X	X	X
1953 Protocol amending the 1926 Convention	X	X	X	X	X	X	X	X	X		X	X		X	X	X
Slavery Convention of 1926 as amended	X	X	X	X	X	X	X	X	X		X	X		X	X	X
Supplementary Convention on Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Convention concerning the Traffic in persons and the Exploitation of the prostitution of others		X	S	X		X*			X	X		X	X	X		
Convention on the Reduction of statelessness	X		X		S	X		X			X	X			X	X
Convention relating to the Status of stateless persons		X	X	X	X	X	X	X	X	X	X	X			X	X
Convention relating to the Status of Refugees	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Protocol relating to the Status of Refugees	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X

See Explanatory Notes Overleaf Adapted from MacEwen, M., Tackling Racism In Europe, Berg, 1995

Explanatory Notes:

a, Declaration recognizing the competence of the Human Rights Committee under Article 41 of the International Covenant on Civil and Political Rights;

b, Declaration recognizing the competence of the Committee on the Elimination of Racial Discrimination under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination;

c, Declarations recognizing the competence of the Committee against Torture under Articles 21 and 22 of the Convention against Torture and Other Cruel, Inhuman or Predating Treatment or Punishment;

d, Declaration under article 21 only;

s, Signature not yet followed by ratification;

x, Ratification, accession, approval, notification or succession, acceptance or definitive signature;

*, Ratification, accession, approval, notification or succession, acceptance or definitive signature which have been given only by the former German Democratic Republic before the reunification.

Source: Human Rights International Instruments, Charts of Ratifications as at 30 June 1994, United Nations.

Chronology of principal measures on racism taken by EU institutions

5 April 1977: Joint Declaration on Fundamental Rights by the EP, Council and Commission (OJ No. C 103/1, 1977)

16 January 1986:EP resolution (1) on the rise of fascism and racism in Europe (OJ No. C 361142, 1986) EP resolution (II) on the rise of fascism and racism in Europe (OJ No. C 36/143, 1986)

11 June 1986: Joint Declaration (Evrigenis) against Racism and Xenophobia by the EP, Council and Commission (OJNo. C 176/62) and EP resolution on the Joint Declaration against racism and xenophobia (OJ No. C 176/63, 1986)

18 June 1987: EP Resolution on the growing number of crimes connected with fascism, racism and xenophobia in Community countries (OJ No. C 190/108, 1987)

9 February 1988: EP Resolution on. the revival of racism and fascism in Europe (01 No. C 68129, 1988)

8 June 1988: Commission Decision (88/384) on Setting up a prior communication and consultation procedure on Migration polices in Member countries (OJ No. L 183/35, 1988)

15 June 1988:EP written declaration on the fight against xenophobia and racism (OJ No. C 187/117, 1988)

29 June 1988: Proposal for Council Resolution on the flight against racism and xenophobia (COM (88) 318 final) and Commission communication to the Council on the fight against racism and xenophobia; OJ No. C214/32, 1988

23 November 1988: Economic and Social Committee opinion on the proposal for a Council Resolution on the fight against racism and xenophobia (OJ No. C 23/33)

1989 Community Charter on the Fundamental Social Rights of workers.

14 February 1989: EP Resolution on the Joint Declaration against racism and xenophobia and an action programme by the Council of Ministers (OJ No. C 69/40).
1
14 February 1989: EP resolution on the proposal from the Commission to the' Council on a resolution concerning the fight against racism and xenophobia (OJ No. C 69143, 1989)

3 October 1989: Council directive on co-ordination of law, regulation or administrative action concerning the pursuit of television broadcasting activities (OJ No L 298/23, 1989)

29 May 1990: Council resolution on the fight against racism and xenophobia (OJ No. C 15711, 1990)

14 June 1990: EP resolution on measures to combat racism and xenophobia (OJ No. C 175/178, 1990)

25/26 June 1990:Council Presidency Conclusions of Dublin Summit with Declaration on anti-Semitism, Racism and Xenophobia (Annex 111) (Bulletin of the EU, June 1990)

10 October 1990: EP resolution (1) on the report by the Committee of Inquiry into Racism and Xenophobia (OJ No. C284157, 1990) and EP resolution (II) on the report by the Committee of Inquiry into Racism and Xenophobia (OJ No. C 284157, 1990)

10 October 1991: EP resolution on racism and xenophobia (OJ No. C 280/146, 199 1)

9/10 December 1991:Council Presidency Conclusion of Maastricht Summit with Declaration on Racism and Xenophobia (Annex 3) (Bulletin of the EU, December 1991)

12 March 1992 EP resolution on support for demonstrations in favour of democracy and tolerance and against racism and xenophobia (OJ No. C 94/269, 1992)

30 October 1992: EP resolution on racism and xenophobia and anti-Semitism (OJ No. C 3 05/590, 1992)

11/12 December 1992: Council Presidency conclusions of Edinburgh summit

21 April 1993: EP resolution on the resurgence of racism and xenophobia in Europe and the danger of right wing extremist violence (OJ No. C 150/127, 1993)

21/22 June 1993:Council Presidency conclusions Copenhagen, paragraph 17 'Racism and Xenophobia'

24 June 1993:EP resolution on the rise of racism in Europe and criminal attacks on Turkish citizens in Germany (OJ No. C 194/204,1993)

2 December 1993: EP resolution on racism and xenophobia (OJ No. C 342119, 1993)

24/25 June 1994: Council Presidency conclusions Corfu, section 1 'Racism and Xenophobia'

9/10 December 1994:Council Presidency conclusions Essen, 'Promoting Tolerance and Understanding'

16 February 1995: EP resolution on racist murder in Austria (OJ No. C 561106, 1995)

16 March 1995: EP resolution on acts of racist violence in France and Italy (OJ No. C 89/158, 1995)

27 April 1995: EP resolution on racism, xenophobia and anti-Semitism (OJ No. C 126ns, 1995)

26/27 June 1995: Council Presidency conclusions Cannes, para. 5 on racism and xenophobia.

21 October 1995: Social Dialogue Summit (Florence) adopts Joint Declaration on the Prevention of Racial Discrimination and Xenophobia and Promotion of Equal Treatment at the Workplace.

10 October 1995: Council resolution on the fight against racism and xenophobia in the fields of employment and social affairs (OJ No. C 296113, 1995)

23 October 1995: Council resolution on the response of education systems to the problems of racism and xenophobia (OJNo. C 31211, 1995)

26 October 1995: EP resolution on racism, xenophobia and anti-Semitism (OJ No. C 3081140, 1995)

13 December 1995: Commission proposal to the Council for a decision designating 1997 as European Year against Racism (COM/95/0653. OJ No. C 89/7,1996)

15/16 December 1995: Council Presidency conclusions Madrid, section 6 'Racism and Xenophobia' and Annex 4 'Combating Racism and Xenophobia'.

24 April 1996: Opinion of the Economic and Social Committee on the Commission proposal (COM/95/0653) on racism, xenophobia and anti-Semitism and for designating 1997 as year against racism (OJ No. C 204123, 1996)

9 May 1996: EP resolution on the Commission proposal (CONV95/0653) on racism, xenophobia, and anti-Semitism (OJ No. C 152/57, 1996)

13 June 1996: Opinion of the Committee of the Regions on the Commission proposal (COM/95/0653) on racism, xenophobia and anti-Semitism and for designating 1997 as year against racism (OJ No. C 337163, 1996)

15 June 1996: Council Joint Action concerning action to combat racism and xenophobia (OJ No. L 185/5, 1996)

21/22 June 1996: Council Presidency conclusions Florence European Monitoring Centre approved in principle.

23 June 1996: Council resolution concerning the Year against Racism (OJ No. C 23711, 1996)

Table 2

27 September 1996: Commission proposal to the Council establishing a European Monitoring Centre for Racism and Xenophobia (COM/96/06 15; OJ No. C 78115, 1996)

30 January 1997: EP resolution on racism, xenophobia, and anti-Semitism and the Year against racism (OJ No. C 55/17, 1997)

20 February 1997: EP resolution on racism, xenophobia and the extreme right (OJ No. C 85/150, 1997) IGC Briefing No. 43 'The IGC and the Fight against Racism'

9 April 1997: Legislative resolution of the EP's' opinion on the Commission proposal (COM/96/0615) for a Monitoring Centre (OJ No. C 132194, 1997)

2 June 1997: Council regulation (No 1035/97) establishing the Monitoring Centre (OJ No. L 15111, 1997) and Council Decision determining the seat of the Monitoring Centre on Racism and Xenophobia (OJ No. 194/4, 1997)

12 June 1997: Committee of the Regions opinion on racism, xenophobia and anti-Semitism (CdR 80/97)

2 October 1997: Signing of the Treaty of Amsterdam, including Article 13 EC

24 November 1997: Council Declaration on the fight against racism, xenophobia and anti-Semitism in the youth field (03 No. C 368/1, 1997)

16 December 1997: Council declaration on respecting diversity and combating racism and xenophobia (OJ No. C 1 / 1, 1998)

25 March 1998: Commission Communication 'An Action Plan Against Racism' COM(98) 183 final.

4 May 1998: Commission proposal to the Council concerning the relation between the Community and the COE in the working of the Monitoring Centre (COM/98/0255; OJ No. C 171/10, 1998)

3/4 December 1998 Anti-discrimination The Way Forward, European Commission Conference, Vienna

3/4 June 1999 Draft EU Charter of Fundamental Rights

30 November 1999 Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Proposal for a Council Decision establishing a Community Action Programme to combat discrimination 2001-2006, Proposal for a Council Directive establishing a General Framework for Equal Treatment in Employment and Occupation

Adapted from Hervey, T., Putting Europe's house in order: racism, race discrimination and xenophobia after the Treaty of Amsterdam, in Twomey, P. & O'Keeffe, D. (eds.) *The Treaty of Amsterdam Hart, 1999 and Commission website http://europa.eu.int/comm/dg05/key_en.htm*

Table 3

Main Conventions, Resolutions, Recommendations, Decisions and Conclusions on Immigration Asylum in the EU

Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities and measures for its implementation (15.6.1990)

Resolution on manifestly unfounded applications for asylum (30.11.92)

Resolution on a harmonised approach to questions covering host third countries (30.11.92)

Conclusions on countries in which there is generally no serious risk of persecution (30.11.92)

Decision establishing the clearing house (CIREA) (30.11.92)

Decision setting up a Centre for Information, Discussion and Exchange on the Crossing of Borders and Immigration (CIREF) (30.11.92)

Recommendation regarding practices followed by Member States on expulsion (30.11.92)

Recommendation regarding transit for the purposes of expulsion (30.11.92)

Resolution on the harmonisation of national policies on family reunification (1.6.1993)

Recommendation concerning checks on and expulsion of third country-nationals residing or working without authorisation (1.6.93)

Resolution on certain common guidelines as regards the admission of particularly vulnerable persons from the former Yugoslavia (1.6.94)

Resolution on limitations on admission of third country nationals to the Member States for employment (20.6.94)

Decision on a Joint Action adopted by the Council on the basis of Article K (3(2) (b) of the TEU concerning travel facilities for school pupils from third countries resident in a Member State (30.11.94)

Resolution on the admission of third country nationals to the territory of the Member States of the EU for study purposes (30.11.94)

Resolution relating to the limitation on the admission of third country nationals to the territory of the Member States for the purposes of pursuing activities as self-employed persons (30.11.94)

Conclusions on the organisation and development of CIREFI (30.11.94)

Recommendation concerning the adoption of a standard travel document for the removal/expulsion of third country foreign nationals (30.11.94)

Recommendation concerning a specimen bilateral readmission agreement between a Member State of the EU and a third country (30.11.94)

Resolution on minimum guarantees for asylum procedures (20.6.95)

Resolution on burden sharing with regard to the admission and residence of displaced persons on a temporary basis (9.1995)

Recommendation on harmonising means of combating illegal immigration and illegal employment and improving the relevant means of control (12.95)

Recommendation on combating illegal employment of third country nationals, (9.96)

Resolution on integration of long term residents (3.96)

Draft Convention on the admission of third country nationals to the member states of the EU (7.97)

Resolution on Marriages of convenience (12.97)

Draft Convention on Eurodac for the comparison of fingerprints of applicants for asylum (17.11.98)

Resolution determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (12.3.99)

Commission proposal on Family Reunification (12.99)

Adapted from Guild, E. and Niessen, J. (1996) The Developing Immigration and Asylum Policies of the European Union, Kluwer

Table 4

Asylum applications 1995/96

	1995	1996	1995/96 change
EU	**274,000**	**226,000**	**-16.00%**
Belgium	11,409	12,412	9.00%
Denmark	5,104	5,893	15.00%
Germany	129,517	117,333	-9.00%
Greece		1,635	
Spain	5,678	4,730	-17.00%
France	20,415	17,153	-16.00%
Italy	1,752	681	-61.00%
Luxembourg		263	
Netherlands	29,258	22,857	0.00%
Austria	5,920	6,991	18.00%
Portugal		269	
Finland	849	711	-16.00%
Sweden	9,047	5,774	-36.00%
UK1	54,988	29,642	-46.00%
Norway	1,460	1,778	22.00%
Switzerland	17,021	17,936	5.00%
USA'	147,870	122,643	-17.00%
Canada	25,817	25,287	-2.00%
Australia'	7,556	9,770	29.00%

46,000 fewer asylum seekers in 1996. At 226,000 this was 16% down on 1995 and continued the downward trend that began in 1993. Numbers peaked at 696,000 in 1992

Source: Eurostat Quarterly Bulletin 1/98

Asylum Seekers 1997/98

Number of people applying for asylum in Europe in 1998 was the highest number recorded in the past five years

Applications lodged in Europe:	1997 - 288,000	1998 - 299,000 (19%)
Applications lodged in EU:	1997 - 252,000	
		1998 - 99,000 (-6%%)
Germany	1997 -104,700	1998 - 57,700 (39%)
UK	1997 - 41,500	1998 - 45,200 (31%)
The Netherlands	1997 - 34,400	1998 - 21.800 (1.9%)
France	1997 - 21,400	

Source: United Nations High Commission for Refugees, Geneva, January 1999

Table 5

Working Structure in the Fields of Justice and Home affairs

Prior to Amsterdam

COUNCIL JUSTICE/HOME AFFAIRS

CO REPER

K4 COMMITTEE
(Formerly: Group Of Coordinators
Prior to TEU)

STEERING GROUP Immigration Asylum (Formerly: Ad hoc Group on immigration) (prior to TEU)	STEERING GROUP Police/customs cooperation (Formerly: TREVI 1975 - CELAD (drugs) GAM (mutual assistance) (prior to TEU)	STEERING GROUP Judicial Cooperation in civil/criminal matters (Set up under European Political cooperation) (prior to TEU)
Working Parties	Working Parties	Working Parties

Asylum	Immigration Policy	Visas	External Frontiers	False Papers

Extradition	Criminal Law	Brussles Convention	Trans-mission of Acts	Driving bans

Terriorism	Police cooperation	Fight against organised crime	Europol	Drugs	Customs

Post Amsterdam

Transfer of asylum & immigration and judicial Co-op in civil matters to 1st pillar issues still dealt with by Council JHA

K4 Committee, now Article 36 committee but a new steering group will handle "first pillar", issues previously dealt with by K4

Schengen working groups will cease to exist and will be absorbed by corresponding working groups of Council

Adapted from Guild,E, The Developing Immigration and Asylum Policies of the EU, Kluwer, 1996

OBSTACLES TO FREE MOVEMENT FOR "VISIBLE MINORITIES" IN THE EU: RACE DISCRIMINATION AND MIGRATION CONTROLS

INTRODUCTION

1.1 Framework for analysis

Free movement of people, one of the founding pillars of the European Economic Community has continued to play a central role in the European Union (EU)[1]. Discrimination on grounds of race is effectively an obstacle to free movement for *"visible minorities"*[2] as individuals may be discouraged from moving to a country where they will receive little or no protection from race discrimination. This thesis will critically examine EU policy on free movement and race discrimination to ascertain whether *"visible minorities"* within the EU have equal access to such basic rights.

Presently there is no EU wide legislation to prevent race discrimination, but following the Treaty of Amsterdam 1997 the Commission presented a package of proposals including a framework Directive for equal treatment in employment and a specific race Directive at the November 1999 Social Affairs Council. Prospects for some form of EU wide legislation on race are becoming increasingly likely[3]. Prior to Amsterdam Member States continually resisted the calls to introduce race

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1 The Treaty on European Union 1993 established the European Union

2 This term has been adopted to describe non-whites, Forbes and Mead, *Measure for Measure,* Department of Employment, 1992

3 The European Parliament's opinion is awaited in accordance with the consultation procedure required for legislation introduced under Article 13 EC. The prospects for success of the Commission's proposals are examined in Chapters 8 and 9

legislation, as it was argued that it was not within the competence of the EU, despite many commentators presenting an argument for a legal base[4].

Migration flows and rules on immigration will also be examined as a significant influx of migrants can exacerbate racism, particularly in times of high unemployment, and immigration laws are often used as a means of combating racism. Historically, the European Community resisted competence in the area of immigration, as Member States jealously guarded their sovereignty in this area. However, Member States engaged in a series of conventions, meetings and agreements largely conducted in semi-secret outside the legal framework of the Community and EU. This resulted in much criticism from human rights groups and again commentators put forward arguments for Community legislation [5]. Competence in the area of migration was formally granted at Amsterdam.

The thesis will challenge the EU's notion of *"people"*, which is presently defined in terms of nationality. It assumes Dworkin's perspective on equality, that of *"treatment as an equal"*[6] and adopts the social cohesion and social justice model towards social policy, which argues that social policy law is necessary for reasons of fairness and distributive justice[7]. This is not from an ideological or utopian viewpoint but from a human rights and social inclusion perspective. As distinctions

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4 See for example Guild , E. *EC Law and the Means to Combat Racism and Xenophobia in* Dashwood, A. & O'Leary, S., (eds) *The Principle of Equal Treatment in EC Law, Sweet & Maxwell*

5 See for example, O'Keeffe, D. *The Free Movement of Persons and the Single Market* (1992) 17 ELRev 3-19

6 Dworkin, R., *Taking Rights Seriously, Duckworth, 1997, p.227*

7 See Hervey, T., *European Social Law and Policy,* Longmans , 1998, for an account of the of the different models

between race, ethnicity, culture and religion are blurred in the eyes of the discriminator[8] this thesis will not delve too far into these differences, save to highlight the case for enacting explicit religious discrimination laws[9]. It will focus on employment as this promotes self-worth and social status and is a means of integration into society. Discrimination in employment can deprive individuals of their livelihood and can result in dire social consequences. Social security provisions are generally excluded for the scope of the thesis as are the restrictions on the use of diplomas and qualifications.

The role of the four main institutions, the European Parliament, Commission, European Court of Justice and Council will be examined alongside the role of a number of Member States. Particular attention is given to the role of the UK Government in shaping the direction of the European Union's policy on race and migration. Race discrimination and immigration laws in France, Germany and the Netherlands will also be examined as these four countries have the largest visible populations.

1.2 The People Working and Residing Within the Member States

Despite the fact that the principle of free movement [10] applies to *"workers"* under

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8 Miles, R., *Racism*, Routledge, 1989, see Chapter 1

9 See for example, the work of the UK's Commission for Racial Equality, Second Review of the Race Relations Act, 1992, which highlighted the need to introduce specific laws to protect religious groups

10 The principle of free movement has extended beyond the purely economic activity identified in the Treaty of Rome 1957 and has been extended to the economically inactive as highlighted in Part Two

Article 39EC (former Article 48EC), the EU classifies workers rights according to their status as nationals or residents of the EU rather than workers per se.

Member States Nationals[11] have, in principle, the same rights as nationals of the EU State in question, regardless of colour. However, as Sivandandan[12] argues racism may very well effectively undermine any rights as they are often all based on nationality not race. A black UK citizen may be refused employment in another Member State because of her/his colour and, in the absence of EU race discrimination laws, would therefore seek protection from the Member States laws.

Residents of EU States who have rights to work and reside there indefinitely, and may have even been born and lived in that State all their lives , are generally not entitled to the same rights as EU citizens as they are citizens of a non-EU State (third country nationals). They will not be entitled to free movement, or be able to rely on EU rights such as non-discrimination on grounds of nationality. Third country nationals who require permits to stay in EU States, therefore subject to frequent renewals, are the most vulnerable. Third country nationals may however acquire rights via other means.[13]

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11 Each State is empowered under international law to determine its own definition, as detailed in Chapters 3 and 7. Member States nationals also qualify for rights granted in accordance with Citizenshup of the Union under Article 17EC (former Article 8 EC).

12 Sivanandan, A., The New Racism, New Statesman and Society, 4 November 1988

13 Third country nationals have a number of free movement rights stemming from their rights as family members of Community workers and Agreements such as the EEA with Norway and Iceland. More limited rights are granted under Association Agreements with countries such as Turkey, as detailed in Chapter 4. Third Country nationals may also be allowed entry if they are working for an undertaking established in one of the member states, *Rush Portugesa Ldc*, Case C 113/89 and *Van der Elst* , see case law in Chapter 6

Although free movement rights are no longer tied to the economic status of *"worker"* the rights attached to EU Citizenship are dictated by the possession of nationality of the Member States. It has been estimated that 12 million people in the EU are legally resident third country nationals[14]. These people presently comprise a legally disadvantaged group.

1.3 Part One: The Context: Racism and Immigration in the EU

Part One will examine the issues of race discrimination and migration within the context of the EU. The increase in racist antagonism and violence towards minority groups is well documented and is discussed in ***Chapter 1***. The causes of racial discrimination are complex but it can be exacerbated by allowing inequality to thrive. Increased support for far right political groups, such as the Front National in France, demonstrates the rise of organised right wing groups. The increase in nationalism and its tendency to marginalise minority groups has intensified hatred towards *"foreigners"*. This has been particularly directed at *"visible minorities"* i.e. non whites and largely focused on immigrant groups.

Although there have been a number of international provisions and some Member States have enacted laws to overcome race discrimination their application across the EU is somewhat patchy as discussed in ***Chapter 2***. National approaches to tackling discrimination vary. Much of the anti-discrimination law in the EU Member States is complaints based and concentrates on preventing discrimination against

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[14] Eurostat surveys 1995-11 and 1996-2 estimate 11.6 m residents in 1993 who did not possess citizenship of any of the 15 Member States. Statewatch estimates that around 12.5 m third country nationals were present in the EU in 1997, Vol 7 No. 6, November/December 1997 p. 20-21

individuals rather than seeking to eradicate social disadvantage. The use of the law as an instrument for social change is controversial and the law alone will not eradicate discrimination but the law can certainly assist in shaping acceptable behaviour and promoting racial and cultural diversity. As the EU has historically denied competence in this area it has not influenced Member State laws, this is in sharp contrast to the area of sex discrimination.

An overview of selected Member States immigration laws is contained in ***Chapter 3***. The increase in movement of people with falling borders, national conflicts, economic change and globalised trading is a fact of life and millions of people are now involved in some sort of migration. Admission of economic migrants, who seek residence in another country to improve their life prospects, is now tightly controlled with some Member States claiming to be countries of *"zero immigration"*. A growing number of refugees and asylum seekers entered the EU during the 1980s and in the absence of co-ordinated EU policy, Member States tightened laws on asylum. Recent changes in Member States nationality and immigration laws have resulted in a *"Fortress Europe"* mentality and Member States have been accused of inciting racial hatred by *"falsely characterising refugees as illegal immigrants, criminals, scroungers and terrorists"*[15].

1.4 Part Two: Free movement provisions and the impact of EU policy on race discrimination and migration controls, with particular reference to employment issues and the UK's response

[15] Statewatch Volume, 5 No.1, January-February 1995, Extracts from the Basso Tribunal on Rights of Asylum in Europe

Part Two will examine the EU's free movement provisions and the impact of EU policy on race discrimination and migration controls, with particular reference to employment issues and the UK, from 1957-1997. ***Chapter 4*** will examine policy prior to the Treaty on European Union and ***Chapter 5*** will look at changes following the TEU up to 1997 and the Treaty of Amsterdam

Historically the member states attitude to politically sensitive issues such as race discrimination and migration has been to either put them on a back burner or to question whether the EC/EU had the competence to enact measures. Despite growing evidence of discrimination and disadvantage, continued pressure from civil liberties and human rights groups[16] and a number of commentators presenting a case for EU competence, the EU continually denied it had the powers to enact either EU wide race discrimination or migration laws until the Treaty of Amsterdam.

The Treaty on European Union created *"three pillars"*. The first pillar is the existing Treaties *"the law"*. The second and third pillars, foreign and security policy and justice and home affairs, respectively, contained a broad framework operating outside the usual legislative process. The second and third pillars allowed for *"co-operation"* rather than a set of binding Community rules[17]. Somewhat controversially, the second and third pillar measures were not subject to the usual EU legislative process including the European Parliament and the European Court of Justice which resulted

16 for example, the UK's Commission for Racial Equality, the Standing Conference for Racial Equality, the Joint Council for Welfare of Immigrants, Human Rights Watch

17 Although they are binding in international law the problems associated with enforcing inter national law often hampers its effectiveness as detailed in Chapter 2

in calls to redress the "*democratic deficit*".[18]

The Treaties and secondary legislation e.g. Directives and Regulations, emanating from the Treaties make up the *"hard law"*. The absence of EU wide protection against race discrimination is likely to result in the exploitation of workers in countries with little or no protection from race discrimination. Employers in countries granting limited rights could have an unfair competitive advantage thereby distorting competition. The EU has power to legislate in areas where the labour market position would appear to be in conflict with the principles of an internal market and could lead to social dumping.[19] Protection against race discrimination has traditionally been left largely to EU *"soft law"* such as Resolutions and Declarations[20].

Progressive moves towards a frontier free Europe has inevitably led to tightening of external borders which impacted on immigration policy. Disagreements amongst Member States, most notably the UK, Ireland and Denmark, as to haw far the EU should intervene in this area resulted in some measures being created in the third pillar. The TEU granted limited competence in the field of immigration, under former Article 100 (c) EC, relating to visas. The move toward some form of harmonisation of immigration and asylum laws with the EU has increased at a steady

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18 See for example Justice Report , *The Democratic Deficit: Democratic accountability and the EU,* 1996

19 This argument led to the inclusion of former Article 119 in the TOR which deals with equal pay as the French were worried that France would be at a competitive disadvantage as its laws on equal pay were much stronger than other EU countries.

20 See Table 2 for a list of measures

pace and the range of measures adopted has been described by Huysman as resulting in the *"quilting"* of immigration policy. Discussions within the EU has led to the *"Europeanisation"* of both Member States policies and the boundaries of Europe[21].

A number of immigration measures were adopted outside the legislative framework prior to and after the TEU. This resulted in semi-secret intergovernmental agreements and groups such as Schengen and Trevi negotiating the policing of borders and immigration issues. The Schengen Agreement which eventually came into force in March 1995 has been described as a *"model for development of immigration policy"* [22]. Resolutions which attempted to harmonise immigration were agreed but the harmonisation programme resulted in a levelling down as the hostility of Member States to many of the provisions resulted in compromises. The level of derogation resulted in a complex set of responses and a plethora of different laws. Rights of integration for third country nationals already admitted to EU States were negotiated and agreed by the Council in 1995 and 1996 within the framework of the third pillar. However, two restrictive Recommendations providing for checks on illegal immigrants and employees were also agreed during the period.

The Intergovernmental Conference 1996-97 resulted in a number of proposals being put forward by each of the EU institutions, Member States and other interested parties. Only three member States, The Netherlands, Finland and Greece, called specifically for Treaty amendments on racism with the UK's former Conservative Government openly opposed to an amendment. The Commission and Parliament

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21 See Huysmans, J., as cited in Chalmers D. & Szyzszcak, E., *European Union Law Volume 2*, Ashgate Publishing, p. 117

both supported a Treaty amendment. As regards third country nationals and migration policies, the Commission, Parliament and majority of Member States were in favour of adopting an EU wide immigration policy, but the UK, Ireland and Denmark continued to express reservations as they were not prepared to lose sovereignty in this area.

Chapter 6 examines the role of the European Court of Justice (ECJ) and its success and failure in the areas connected with this thesis. The ECJ has played a significant role in interpreting and establishing general principles of law but the Court's input has been limited somewhat by the lack of Treaty competence and its exclusion from the Justice and Home Affairs pillar. Nonetheless the Court has demonstrated some willingness to protect the fundamental rights of individuals whose rights have been violated by Member States. Although the Court has certainly clarified and extended a number of areas relevant to this thesis the Court has tread carefully on occasion, perhaps due to what some Member States have perceived as *"excessive activism"*. Some commentators argue, however, that the Court has not been liberal enough and has prioritised market ideology over social rights and has recently *"lost sight"* of the objectives of the sex equality law[23]. In recent years individuals within Member States have turned to the European Court of Human Rights for protection against discrimination[24] as the ECJ has not recognised their legal arguments.

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22 O'Keeffe, D., op cit at note 5

23 See, for example, Hepple, B., *The Principle of Equal Treatment in Article 119 EC and the Possibilities for Reform*, and Ellis, E., *The Principle of Equality of Opportunity Irrespective of Sex: Some reflections on the present state of European Community Law and Its Future Development in* Dashwood, A. & O'Leary,S. (eds.) op cit at Note 14

24 See, for example, *Lustig Prean & another v UK, Smith & another v UK*, European Court of Human Rights 31417/96,32377/96,33985/96 & 33986/96 which provided protection for lesbians and gays whereas when the ECJ was asked to consider rights connected with sexual orientation in *Grant v South West Trains* Case C-249/93 (1998) ECRI-621 the ECJ

Chapter 7 examines the impact and relevance of Citizenship and nationality and the links to free movement rights. Acquisition of nationality/citizenship, including naturalisation rights, is determined by individual States and a variety of criteria are used throughout the EU. The rights and duties of citizens are somewhat contentious. Whether they rest on the possession of political rights or wider social rights has been the subject of debate both within the EU and beyond and there has been a trend towards a wide definition. Citizenship can create a level of superiority and inequality between citizens and *"mere"* residents. Third country nationals legally resident in the EU contribute to the EU in the same way as EU citizens in respect of taxes and national insurance, for example, but do not generally have rights on a par.[25] The development of EU Citizenship has fuelled debates regarding race and migration. The impact of Citizenship of the EU, including threats and opportunities, is examined. EU Citizenship has not yet fully lived up to its anticipated *"dynamic"* but there is growing support to extend citizenship rights to all legal EU residents.

1.5 Part Three: Alleviating the barriers of race discrimination and restrictive immigration control: Future EU policy on free movement, race discrimination and migration control

Part Three examines future EU policy on free movement, race discrimination and migration controls. ***Chapter 8*** focuses on the impact of the Treaty of Amsterdam. The Treaty introduced a broad non-discrimination clause in Article 13 which allows the Council, acting unanimously after consulting the European Parliament, to *"take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion*

failed to provide protection. This may have been attributable to the ECJ's reluctance at the time to interfere in the area as the impact of Article 13EC had not been fully realised, see further comment in Chapter 6.4.2

[25] refer to note 10 for an indication of rights granted to some third country nationals

or belief, disability, age or sexual orientation" and moves competence on asylum and immigration from the third pillar into the EC Treaty. The prospects for the introduction of race discrimination legislation have been analysed by a number of commentators, with some remaining cautious about its potential and others more optimistic[26].

Amsterdam has resulted in fragmentation and movements between the EU pillar and is likely to result in difficulty in establishing the correct legal base for future migration proposals. The EU is still lacking a comprehensive human rights policy. Increased powers granted to the European Parliament and Court are likely to result in greater democratic involvement although the limited timescale for adoption of immigration and asylum proposals at the Tampere Council meeting in October 1999 has not fully adopted the spirit of openness, accountability and democracy.

Chapter 9 examines future EU policy on race discrimination and migration. It examines ways of alleviating the barriers of race discrimination and restrictive immigration controls to ensure free movement of all legally resident in the EU. The Commission's package of proposals to combat discrimination and *"The New Starting Line"* proposals, are examined.

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[26] Allen, R., QC, *Article 13 and the search for equality in Europe: an overview in Anti-discrimination: The Way Forward, report of a European Conference*, Vienna December 1998, Bell, *The New Article 13 EC Treaty: A sound Basis for European Anti-Discrimination Law?*, 6 MJ 3 (1999), Waddington, L., *Testing the Limits of EC Treaty Article on Non-Discrimination (1999) 28*, ILJ 133-151 , Hervey, *Putting Europe's house in order: racism, race discrimination and xenophobia after the Treaty of Amsterdam*, in Twomey, P. & O'Keeffe, D. (eds) *The Treaty of Amsterdam*, , Hart, 1999

Since Amsterdam a number of position papers on migration have been put forward. The Austrian paper in 1998 which suggested replacing Fortress Europe with a system of *"Concentric Circles"* was critically received and disowned by the majority of Member States. Despite this, the German Presidency put forward a paper in January 1999 selecting 48 of the 116 Austrian proposals to be actioned immediately. The paper from the Finnish Presidency published in June 1999, and discussed at Tampere in October 1999, is a great improvement but some commentators are still expressing cause for concern. The case for a Constitution, Bill of Rights, Manifesto, Charter, Convention and Directive for third country nationals has been articulated in a number of quarters and is examined in this Chapter together with recent European Court of Human Rights judgments granting rights to non-nationals. The recent proposal for a Charter of Fundamental Rights will no doubt add to the debate as highlighted in this Chapter.

1.6 Conclusion

The thesis concludes that increasing racism and draconian immigration laws are a barrier to free movement for *"visible minorities"* and that EU wide race discrimination and immigration laws respecting international and human rights standards are long overdue. The contribution of migrants should be recognised and the increase in asylum seekers put into the context of a fall in the population of the EU and the requirement to respond to the needs of those caught up in growing civil unrest.

The EU's complex hierarchy of workers should be dismantled and distinctions between EU nationals and long term residents removed as they legitimise discriminatory behaviour and restrict mobility, thereby hampering the competitiveness of the EU and undermining social stability. The people of Europe need a clear set of rights within a comprehensive human rights framework. The EU's proposed Charter of Fundamental Rights is a useful starting point. The status of the Charter has caused some debate as there have been calls for the Charter to be legally binding[27]. No doubt the Charter will make fundamental rights more visible and will in future be used by the European Court of Justice in interpreting fundamental rights, however, incorporation into the Treaties will send a stronger message. The Union is a key actor in world affairs[28] and its policies have the potential to influence the prospects of millions of people. Its commitment to wiping out discriminatory racist practices must be demonstrated for all to see.

1.7 Methodology and Acknowledgements

This thesis has been compiled from primary data, including European Parliamentary and EU Commission reports, and secondary data detailed in the attached bibliography. Statistical data from Eurostat and the United Nations Commission for Refugees and Eurobarometer studies has been referred to where appropriate. Information from organisations and pressure groups such as Statewatch, Human Rights Watch, the Starting Line Group and the European Commission Against Racism and Intolerance has proved particularly valuable.

27 Agence Europe No 7619, 20 & 21 December 1999

28 Presently the EU comprises nearly 7% of the world's population and almost as many people as USA and Japan combined. Impending enlargement is set to increase its territory

I have managed to complete this thesis thanks to the patience, support and guidance of Professor Erika Szyszczak. Special thanks also goes to my ever supportive family. I will always be grateful.

The law is stated as at December 1999, with some amendments at proof reading stage in January 2000.

PART ONE: THE CONTEXT: RACISM AND IMMIGRATION IN THE EU

CHAPTER 1

THE RISE OF RACISM AND XENOPHOBIA IN THE EU

1.1 The ideology of Racism

Discrimination on the grounds of race or ethnicity[1] has been progressively well documented as detailed throughout this Chapter. A survey carried out in the EU in Spring 1997[2] reported that nearly one third of European citizens described themselves as *"quite racist"*[3] or *"very racist"*. The ideology of racism results in the victims being relegated to a lower place in society in terms of education, welfare, housing and employment and consequently suffering economic disadvantage. The rise of

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1 Banton, M., *Ethnic and Racial Consciousness*, London 1997, p.30-46, examines the works of other writers and claims that the word 'race' is less than five hundred years old and that it is only within the last two centuries that physical differences have been conceptualised as racial. Theories of 'scientific racism' were put forward in the 1850s and Europeans claimed to be racially superior to African and other 'backward' people. In the mid nineteenth century beliefs that whites were permanently superior to blacks were nurtured. Charles Darwin argued that species were not fixed but subject to change and argued that groups in Europe called races should be called 'ethnic groups'. Huxley and Haddon saw ethnic group as a synonym for race. This paper will assume this synonym.

2 Eurobarometer *No. 47.1 "Racism and Xenophobia in Europe"*, 1997. See Gearty, C. *The Internal and External 'Other' in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe* in Alston, P. (ed.) *The EU and Human Rights*, Oxford University Press, 1999, p.. 322 for a discussion of the Eurobarometer findings

3 Banton, M., p 41, op cit at Note 1, reports that the word "racism" entered the European languages in the 1930s "to identify the doctrine that race determines culture, the underlying concept being that of race as type" and that some types were perceived as being superior that others and that "in the late 1960s "racism" was given a second, extended meaning as designating the use of beliefs and attitudes to subordinate and control a category of people defined in racial terms. The word was then increasingly used to express a moral

nationalism[4] and its tendency to marginalise minority groups has exacerbated hatred towards minorities.

The causes of racial discrimination are complex. The United Nations General Assembly unanimously adopted the International Convention on the Elimination of All Forms Of Racial Discrimination in 1965 which *"resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations"*. Banton claims that *"underlying the issue were two contrasting conceptions of the nature and causes of racial discrimination: one saw it as resembling a crime, the other as resembling a sickness"*[5]. Banton further comments that many of the delegates to the General Assembly identified it as a '*social sickness*, the Russians thought it was caused by capitalism, the newly independent states of Africa believed it was caused by colonialism and European states accepted that it was caused or exacerbated by the propagation of doctrines of racial inequality. Responses to curbing such propaganda, including the legal control of right wing groups is therefore relevant to this thesis.

Recent changes in Europe including the reunification of Germany, the break up of Yugoslavia and the collapse of the USSR, have had an enormous impact on society and the movement of people. Unemployment has increased across Europe and has contributed in fuelling racist attitudes and xenophobia as demonstrated in the 1997

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judgement"

4 Nationalism encourages pride in the nation state emphasising uniformity rather than diversity

Eurobarometer study[6]. Although migration from one country to another has been operating for centuries, and emigrants from the Caribbean, Asia and Africa were actively encouraged by a number of European countries after the second world war, primary immigration slowed down drastically in the 1970s and 1980s, although secondary immigration in the form of family reunification continued. The forced migration of refugees and asylum seekers on the scale witnessed in recent years across Europe is unprecedented, as discussed in Chapter 3, and has no doubt increased racial and ethnic tensions.

Racism has been particularly directed towards *"visible minorities"* i.e. non-whites and in Western Europe and the EU has largely focused on so called *"immigrant"* groups. More recently divisions along ethnic lines have emerged. The phenomenon of *"ethnic cleansing"* has surfaced in Eastern Europe[7] and conflicts between inter-ethnic groups, centring on old disputes over territory, erupted in discrimination and violence in ex-Yugoslavia. The ethnic partition of Boznia and Herzegovnia was rather controversially sanctioned by the EU in 1992[8]. Apartheid may have fallen apart in South Africa but it would appear that it is thriving in some parts of Eastern Europe.

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5 Banton , M., p. 41, op cit at Note 1

6 Op cit at Note 2.

7 Eastern European countries are lining up to enter the EU during the next phase of enlargement and the EU has recently sent a clear message, via the Amsterdam Treaty as outlined in Chapter 8, to countries seeking entry that human rights issues will be taken seriously when considering membership

8 A Statement of Principles for the New Constitutional Settlement of Bosnia and Herzegovina

In today's global marketplace, ethnic, religious and cultural diversity is a common feature. However, some countries are finding this diversity difficult to manage. Increased hatred and discrimination has been directed towards particular ethnic and religious groups such as Romanies from the Czech Republic and Slovakia[9]. Discrimination against Muslims, and the rise of *"Islamophobia"*, has provoked an enormous debate about the distinctions between race, ethnicity and religion. Traditionally, race and religion was identified as different issues but these have now been brought into sharp perspective[10].

A Runnymede Trust consultative paper in 1997 claimed that Britain is in danger of becoming a nation of Muslim haters and called for changes in attitudes from the media, politicians and other public figures to combat discrimination and violence against the *"million or more British muslims"*[11]. Whether muslims are discriminated against because of their colour, race, nationality, religion or culture is a moot point. Extreme right wing groups frequently justify their attacks on *"foreigners"* by emphasising the threat of their different cultures rather that any differences in colour. Where ethnicity,

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was issued at an EC-sponsored conference in Lisbon on 18 March 1992

9 *The Guardian* 14 March 1998 *"East European Romanies flee rising levels of racist violence"*

10 See, for example, Poulter, S., *Ethnicity, Law and Human Rights, The English Experience*, Oxford Clarendon Press, 1998

11 *"Islamophobia – Its Features and Dangers"*, Runnymede Trust 1997. Presently muslims are not protected from discrimination by the British Race Relations Act 1976, although recent case law (*Khanum v IBC Vehicles* 1998) has enhanced the protection of Muslims. The Human Rights Act 1998 is likely to have an impact on religious freedom, as discussed in Chapter 2.3.1. The Commission for Racial Equality and the Muslim lawyers association has criticised the lack of protection in this area and has condemned such omissions as a violation of International Conventions, http://www.muslim-lawyers.net

culture or religion is the discriminatory factor then the law has to respond to accommodate this difference and protect those being discriminated against.

The divisions between race, ethnicity, culture and religion are blurred in the eyes of the discriminator and in this thesis for, as Miles[12] acknowledged, many researchers now blur the distinctions to expand the concept of racism to include all form of exclusionary doctrine or practice. Hargreaves and Leaman[13] argue that the definition is *".....unhelpful, since it encourages a confusion between racial and cultural factors of precisely the kind that extreme right-wingers thrive on"*. As this thesis concentrates on legal frameworks and mechanisms it cannot delve too far into exclusionary ideologies and practices in contemporary Europe. The rise in religious discrimination is an issue that deserves particular attention though.

Scenes witnessed in Eastern Europe in the 1990s in ex-Yugoslavia mirrored those of Nazi Germany during the second world war and have increased calls to protect human rights[14]. History is repeating itself. Similar pleas to protect human rights were voiced following the second world war and the Nazi holocaust and a number of responses were witnessed in the latter half of the Twentieth century. The United Nations was

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12 Miles, R., *Racism*, Routledge, 1989

13 Hargreaves, A. and Leaman, J., *Racism in Contemporary Europe: An Overview*, p.15, in Hargreaves and Leaman (eds.), *Racism, Ethnicity and Politics in Contemporary Europe*, Edward Elgar Publishing, 1995

14 See, for example, the work carried out by Human Rights Watch, an organisation which carries out regular, systematic investigations of human rights abuses across the globe human rights law www/hrw.org.

formed in 1945 and regional groups such as the Council of Europe[15] and the European Economic Community were established in the 1950s with a view to promoting co-operation and peace between States. A number of measures including the United Nations Charter and Declaration of Human Rights (1948), The Council Of Europe's European Convention on Human Rights and Fundamental Freedoms (1950) and the International Convention for the Elimination of All Forms of Racial Discrimination (1965) were enacted. However, International and national definitions of human rights and the legal status and enforcement of these rights have proved difficult in practice as detailed in Chapter 2. Despite the International and Regional declarations, racist antagonism and violence in Europe towards minority groups has increased as detailed in this chapter.

1.1 Evidence of Increase in Racism and Xenophobia in the 1980s and early 1990s

Two Reports were commissioned by the European Parliament between 1985 and 1990 and the Parliament has been involved in an annual debate on racism and xenophobia since 1990. A Committee of Inquiry into the rise of racism and fascism was established in 1984. The Inquiry concluded that racism and fascism was increasing[16].

In 1986 a Declaration Against Racism and Xenophobia was signed on behalf of the

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15 The Council of Europe was the first political institution to be set up with a view to overcoming the conflicts in Europe and gaining respect for all human beings regardless of their differences. It presently comprises some 40 States

16 The Evrigenis Report, *Rise of Racism and Facism*, 1985. See Chapters 4 and 5 of this thesis for a more detailed analysis of this and other EU reports

European Parliament, the Council, the Representatives of the Member States meeting with the Council and the Commission. It recognised *"the existence and growth of xenophobic attitudes, movements and acts of violence in the Community which are often directed against immigrants"* and conveyed *"their resolve to protect the individuality and dignity of every member of society and to reject any form of segregation of foreigners"*.

A more comprehensive *Report on racism and xenophobia* was carried out in 1990 by Glenn Ford MEP[17]. Although a number of changes had occurred since the first report the Ford Committee found that only a few of the Evrigenis recommendation had been carried out and claimed that the failure of Member States to implement the recommendations had resulted in a rise of racism and xenophobia. The Ford Report highlighted the increase in organised racism and right wing extremism and found that the majority of the 12 member States which made up the European Community at that time had growing extreme right groups. There was evidence of cross-European collaboration which heightened the situation. Social changes and conditions such as the rise in unemployment and increase in asylum seekers and refugees contributed to the growth as it encourages scapegoating of *"foreigners"*.

Another disconcerting feature was the number of right wing groups securing votes in elections. Although votes for right wing extremists tend to fluctuate and can be purely protest votes against the present government there is some evidence of an increase in racist attitudes. In France the resurgence of far right groups such as the Front National

17 *The Second Report of the Committee of Inquiry into Racism and Xenophobia*, The Ford Report 1990

led by John Marie Le Pen took place in the early 1980s. In the first round of the French Presidential elections in April 1988 14.4% of votes were recorded. In June 1989 European Parliament Elections the Front National won 10 seats, secured more than 2 million votes and increased its percentage to 11.3%. In Italy, which has had a fairly continuous level of support for extreme right wing parties, The Movemiento Sociale Italians did however experience a decrease in the 1989 European elections from 6.5% to 5.5%. The Ford Report also provides an overview of the 'inter-community' relations in member states to demonstrate the growing tide of racist behaviour and violence. Although Germany, France and the UK are included in the countries demonstrating most aggression towards *"foreigners"*, some of the other member states also displayed overt racist behaviour. In Belgium, for example, a number of police vans displayed stickers of extreme right groups. A study in Denmark[18] concluded that foreigners were being denied equal opportunities and that this violated international conventions signed and ratified by Denmark. In some Danish job centres employers were asked whether they wanted to employ a foreigner and allowed to refuse work to foreigners.

The rise in violent attacks against foreigners in Germany, including arson attacks, such as the one in November 1992 when two Turkish women and a young girl were killed, is documented in a report by Claude Roth[19]. The German government, led by Helmut Kohl, faced criticism due to its inaction to stem the violence. There was also some reluctance by the police and Public Prosecutors to admit that racism was a motive. The

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[18] Wilkie, M. *"Racial Discrimination in Denmark"*, Danish Centre for Human Rights, Copenhagen 1990

negative attitudes towards foreigners in Germany was fuelled by the break-up of the GDR together with an increase in asylum seekers and refugees entering Germany in the late 1980s and 1990s. A 1989 West German opinion poll highlighted that 75% felt there were too many foreigners, 69% agreed that asylum seekers were unfairly exploiting the social welfare system and 93% favoured reducing the number of 'economic refugees'.

An increasing number of racially motivated murders and attacks occurring in France during the late 1980s were highlighted in the Ford Report. In addition, a Runnymede Trust Report[20] identified 31% of respondents agreeing with the views of Le Pen on immigration and 18% favouring him for the post of Immigration Minister. In 1988 the Prime Minster decided to set up an inter-ministerial unit on racist violence and put forward proposals to tighten existing legislation. The Front National led by Le Pen capitalised on defending Christianity against Islam and incidents such as that surrounding the wearing of the Islamic headscarf, where three girls of North African origin were banned from school in the Autumn of 1989, aroused cultural, racist and xenophobic tendencies. France seem reluctant to accept cultural diversity as a positive feature. A number of announcements by public figures in the 1990s such as the one made by Mitterrand that the *'threshold of tolerance'* of immigration had been reached only served to fuel far-right supporters.

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19 Working Document by C. Roth (PE139.279)

20 Runnymede Trust Report, *Racial Discrimination and the law in EEC Countries,* for the Social affairs Commission of the European Economic Community, unpublished, 1986. See French Section on immigration by Jacqueline Costa-Lascoux

The UK reported an increase in racial violence year after year and race relations in the UK have been hampered by some sensationalist newspaper reporting of issues relating to race[21]. There has been some difference of opinion about the actual number of racist incidents due to the difficulties in reporting. The Ford Report referred to *"7,000 known cases of racism a year but a Policy Studies Institute survey suggested that the real total could be ten times higher as many victims do not report their cases, one reason being lack of confidence in the police"*[22] This led to a debate via the letters page of the Guardian in 1991 as to who possessed the correct statistics on racial violence and accusations that the Ford report was 'scaremongering'. The problems surrounding accurate statistics on racially motivated incidents are widely acknowledged throughout the Member States.

The growing trend of racist attitudes and beliefs was also demonstrated in Eurobarometer Studies and opinion polls in a number of Member States. A special Eurobarometer study on racism and xenophobia was carried out in October and November 1988 and officially presented to the European Parliament in November 1989[23]. The Community comprised twelve member States at the time. Fairly low approval of openly racist groups and high approval of anti-racist groups were discovered in five countries: Greece, Spain, the Netherlands, Italy and Luxembourg. Higher rates of approval for racist movements were found in the seven other member states in Belgium, France, Germany, the UK, Denmark, Ireland and Portugal.

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21 See for example *"Different Worlds"* the Runnymede Trust (1986), *"Living in Terror"*, Commission for Racial Equality (1987)

22 Ford, p.68, op cit at Note 17

23 Eurobarometer 1989 *"Racism, Xenophobia and Intolerance"*, special issue, November 1989

Hargreaves and Leaman[24] commented that the findings suggest a *"rough correlation"* between racist sentiments and the size of the visible population but argued that it would be a mistake to conclude that the presence of visible minorities causes racism. The Netherlands, for example, demonstrates a high level of commitment to policies of tolerance and mutual respect between different ethnic groups, yet has a relatively high number of ethnic minorities in the EU and one of the lowest levels of racism. Alternatively, the relatively high levels of support for racist movements found in Ireland, suggests that racism may thrive even in countries like Ireland, where visible minorities are relatively small in number. The Eurobarometer survey did present some optimism. Although one European in three believed that there were too many people of another nationality or race in his or her country *"a considerable minority of those questioned"* viewed the presence of immigrants in their country negatively.

In response to the rise in racism and xenophobia a number of projects were commissioned. The Committee of Experts on Community Relations commissioned a project in 1987 reporting in 1991[25]. The report called for comprehensive legislation to *"ensure equality of opportunity and to combat discrimination"*. On 29th May *1990* the Council and representatives of the Governments of EU Member States put forward a *Resolution on the fight against racism and xenophobia.* Following the recommendation that the Commission should make a comparative assessment of the

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24 Hargreaves, A. and Leaman, J., op cit at note 13, p. 12

25 *Community and ethnic relations in Europe*, MG-CR (91) 1 final, Council of Europe, Strasbourg 1991

legal instruments in Member States to combat all form of discrimination, racism and xenophobia and incitement to hatred and racial violence, twelve national reports were commissioned and the International Institute of Human Rights in Strasbourg compiled a *Report for the Commission in 1992*[26] which concluded that there was a wide variety of legal measures and recommended that each Member State should review their existing legislation to establish gaps and consider the introduction of comprehensive anti-racism and anti-discrimination legislation. The Report commented that *"the dearth of jurisprudence is a matter for some concern"* as there were few reports of prosecutions, convictions or civil remedies despite evidence of an increase in racist attacks. The lack of jurisprudence was attributed to high costs, burden of proof, lack of support for complainants, overburdened legal systems and lack of familiarity on the part of victims of the remedies available. In particular the *"role of associations"* was vital in tackling the issues.

1.2 Further Evidence of the Increase in Racism and Xenophobia and Support for Far Right Parties in the 1990s

Further Eurobarometer studies in the 1990s revealed a growing intolerance towards people from other nations and different races. Eurobarometer No. 39 carried out in 1993 reported that a majority, 52%, felt that there *"are too many people living the country who are not nationals of Member States"*, 34% felt that there were *"a lot but not too many"* and 9% believed that there were *"not many"*. *"Race"* was declared as the most disturbing factor in eight out of the twelve member states (Belgium, Germany, France,

[26] Commission Document V/6332/93-EN *'Legal Instruments to Combat Racism and Xenophobia'*

Ireland, the UK, Spain, Italy and Portugal), ahead of nationality and religion, and an increase from the six countries who had originally identified race as the most disturbing feature in the 1988 survey.

A Eurobarometer study in Spring 1997[27], reported that nearly one third of European citizens described themselves as *"quite racist"* or *"very racist"*. According to the survey Belgium was identified as the country with the strongest racist feeling (55%) followed by France 48%, Denmark (43%) and Austria (42%). The UK was seventh in line. A major factor in the causes of racism was identified as the fear of unemployment and job insecurity and a significant correlation was found between the degree of racist feelings and being unemployed.

Reports in the 1990s on the increasing rise of racism and xenophobia include Oakley, Piccoli and Idem[28]. Oakley analysed the roots of racism in Europe and reported that racism had intensified over the previous decade. In 1993 a summit meeting of European heads of State sponsored by the Council of Europe made a declaration appealing to all States to introduce or improve legislation to combat racism, xenophobia, anti-Semitism and intolerance and this eventually led to the establishment of the European Commission against Racism and Intolerance (ECRI). The ECRI

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27 Op cit at Note 2

28 Oakley, R., *Racial violence and harassment in Europe* MG-CR (91) 3 rev 2, Council of Europe, Strasbourg 1992. Piccoli, C. Committee on Civil Liberties and Internal Affairs: *Report on Right-Wing Extremism and the Rise of Racism and Xenophobia*, European Parliament 1993, and Idem, G., *Tackling racist and xenophobic violence in Europe: review and practical guidance*, European Committee of Migration, Council of Europe, 1996

commissioned a survey of the national legislation of all of the Council of Europe's members and suggested tightening Article 14 of the ECHR to provide for direct protection against race discrimination, as well as discrimination on grounds of sex and culture.

Evidence of increasing racism and support for far right parties across Europe continues to be reported by a number of organisations . The Netherlands recorded an increase in racist attacks in 1994 by the Centrale Recherche Informatiedienst, the national criminal intelligence services and a report on racist incidents throughout Spain in 1995 highlighted an increase in recorded xenophobic attacks by around 65%. Support for far right parties increased in a number of countries. In the Netherlands in 1994 electoral gains by the far right were recorded in local elections and it is reported that opinion polls in May revealed that half of the Dutch population felt the problem of ethnic minorities was *"their most serious concern"*, ahead of unemployment, social security and crime[29]. Austria also witnessed the new Nazi Freedom party gaining almost 28% of the vote in the Austrian European election in October 1996, an improvement on the 22% it gained in the 1995 general election. A more disturbing result was the popularity of the extreme right Freedom Party in the 1999 elections which resulted in the Party being involved in a coalition government, a prospect which caused huge international condemnation.

[29] See European Commission Report *"The Member States of the EU and Immigration in 1994: Less tolerance and tighter control policies"*, 1997

A marked increase in support for the far right also surfaced in the municipal and national elections in Belgium in 1995 where the far right parties managed to consolidate their vote in their national elections with the Vlaams Bloc getting 7.8% of the national vote (up from 6.6 % in 1991). A study of right wing extremism in Germany sponsored by the interior ministry in Brandenburg concluded that increases in violence was rooted in *"hatred of foreigners and intolerance of anything different".* [30] The German CID reported an increase in the number of extreme right activists at 47,000 the first increase since 1993. It also reported an increase of 14% in radical right offences in 1997, some 5,173.

The French fascist party, the Front National (FN) led by Le Penn gained control of its fourth municipality in Vitrolles in 1997. It also obtained 15% of the vote in the French parliamentary election in 1997, winning one seat in the town of Toulon where they already run the council. The 15% vote in the first round was the Front National's highest ever result in a parliamentary election and established it as the second largest party of the right with votes being secured nationally beyond its traditional vote in the South.[31] The influence of the Front National in the four towns it controls, Vitrolles, Toulon, Orange and Marignane, has already been witnessed. In Vitrolles the Front National Mayor announced in 1997 that she would offer white French families 5000FF to have a child in the area. Orange, Marignane and Toulon have all been involved in cases in which local libraries have removed books deemed unsuitable by the Front

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30 *The Guardian* 21 January 1998, *"Neo Nazis rule the East"*

National, for example books relating to African culture [32]. The National Front's leader, Jean-Marie Le Pen was fined £30,000 in December 1997 for anti semetic remarks relating to the Holocaust. It is somewhat disturbing that many of these cases occurred in the year designated European Year against Racism[33].

The increased power of the Front National was recognised in a number of quarters including the Gaullist former prime Minister Edouard Balladur who lobbied for a meeting with the Front National leader to discuss the adoption of Front National doctrine. Somewhat surprisingly however, just when the Front National was really beginning to influence changes in cultural, sporting and educational programmes, including a call to exclude immigrants from French national sporting teams, the tables turned and the 1998 French World Cup victory had a dramatic affect. President Chirac for example warned the right wing to discontinue its support for the Front National policy on racial discrimination and publicly acknowledged the French *"tricolour and multi-colour"* victory in the World Cup [34]

Public opinion forced the Front National to reconsider its call for a ban on players of foreign extraction and even the rightwing French newspaper Figaro acknowledged the contribution of "foreigners" although somewhat typically credited the French

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31 See Institute of Race Relations, Bulletin 24 August 1997

32 Runnymede Bulletin, Vol 8 No 3 & 4 May-August 1998

33 1997 was designated the European Year Against Racism by the EU, refer to Chapter 8 for comments on the significance of this

34 *The Guardian* 15 July 1998 *"Chirac uses World Cup win to kick at racists"*

immigration policies and claimed that immigrants had *"progressively become French though the alchemy of integration"*. The French former interior minister Charles Pasqua (who was responsible for introducing tough immigration laws between 1993-1997, detailed in chapter 3) appeared to be doing a U-turn when he claimed in a Le Monde interview that the football championship proved that integration had 90 per cent succeeded and that new settlements should be encouraged[35]. The continued use of the term integration somewhat puzzling as French immigration policy is presently shaped by *"assimilation"* policies rather than integration, as detailed in Chapter 3. It remains to be seen whether the positive feelings towards immigrants will have any long term effect on French policy. The Socialist government elected in 1997 has had some impact on immigration laws as detailed in Chapter 3. Internal leadership battles in the Front National in 1999 could well undermine the impact and popularity of the party.

An increase in the activities of the far right were also witnessed in the UK. In the 1992 general election the BNP had a small percentage of the vote (0.4%). However, in a local council by-election on the Isle of Dogs in September 1993 the party secured 34%. Four extreme right parties stood 84 candidates in the May 1997 UK general elections. Only four got above 5% of the vote, therefore retaining their deposit. Somewhat controversially, the British National Party received a free television broadcast and publicity as they had over 50 candidates standing.[36] The broadcast was run by all

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35 *The Guardian*, 17 July 1998, *"Pasqua warms to France's migrants"*

Channels apart from Channel 4 , who argued that it incited racial hatred and was offensive. The broadcast featured John Tyndall the leader of the BNP standing in front of the white cliffs of Dover stating *"We must stop immigration and help immigrants to return home"* and depicted black people walking together against a backdrop of a mosque while Tyndall commented *"The floodgates have been opened. Is this what our war heroes fought for?"*.

The screening of the broadcast was all the more controversial due to the fact that the BBC cut scenes depicting a foetus in a Prolife Alliance broadcast going out during the same election campaign. It seems that viewers should be protected from images of a foetus, as this might upset and offend, but do not need to shielded from images which conjure up racial prejudice or hatred. Therein lies the rub. UK legislation would only ban the BNP broadcast if it could be proved that inciting racial hatred is likely to result. This has always been difficult to prove in practice. On a more positive note however, in contrast with other Member States far right parties[37], the British far right parties have not been very successful in gaining seats.

Controversy has also surrounded the lack of protection for religious groups. A consultative paper entitled *"Islamophobia: its features and dangers"*[38] caused much

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[36] The UK's Representation of the People Act allows a five minute television broadcast and free postal distribution of 2 million leaflets by the Royal Mail for parties fielding 50 candidates.

[37] See Statewatch Vol 7 No. 3 May/June 1997, p.7

[38] Runnymede Trust, 1997

debate in British newspapers when it concluded that Britain is in danger of becoming a nation of Muslim haters and called for changes in attitudes from the media, politicians and other public figures to combat discrimination and violence recommending that religious discrimination should be unlawful. The UK's Commission for Racial Equality also suggested incorporating protection on religious grounds.

A vigorous emotive debate, capable of stirring up religious hatred, followed the Trust's paper. Prominent individuals in the media, including Peregrine Worsthorne [39] and Polly Toynbee [40], declared themselves as "*Islamophobes*". Condemnation of what was perceived as the increase in extreme fundamentalists, cultural differences, the fatwa against Salman Rushdie and the inferior status of women ranked most highly amongst those declaring themselves Islamophobes. Worsthorne expressed his condemnation as follows *"When Nazis erupted in a Christian country, the other Christian countries combined to smother that evil. The other Muslim countries have done very little to smother either Saddam or the Iranian Ayatollah and still less to put down terrorism".*

The threat of the Islamic culture was at the forefront of the debate. Trevor Phillips writing in the Independent in October 1997 argued *"The problem with European liberals is their intolerance. They will oppose, to the death, any kind of bigotry but their own. Their capacity to know what is best for others is unlimited, riding roughshod over the fact that people may not choose the values of most West Europeans"*[41].

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39 *Sunday Telegraph*, 1st March 1997, *" I believe in Islamophobia"*

40 *The Independent* 23rd October 1997, *" I am an Islamophobe"*

41 The Independendent, 25th October 1997, *"Islamophobia"*

The latest threat to race relations is the increase in racist and xenophobic Internet sites. It is reported that there are at least 20 British-based and 500 US websites propagating racial hatred[42]. Legal attempts to control the abuse of the internet are being considered in a number of countries. As the potential reach of the internet is enormous efforts to control the abuse of web based materials are currently being tackled across the globe. This involves the co-operation of internet service providers and organisations such as the UK's internet watch foundation

In 1997 the EU established a European Monitoring Centre for Racism and Xenophobia, in a Council Regulation of 2 June [43]. The Centre aims to provide the Community and Members States with objective, reliable and comparable data at European level on the phenomena and manifestations of racism, xenophobia and anti-Semitism analysing their causes, consequences and effects and examining examples of good practice in dealing with them. Islamophobia is not explicitly referred to but religious and cultural differences will likely emerge from the anti-Semitism analysis. The previous UK Conservative government had vetoed earlier attempts to set up the Centre as it feared the EU would have too much influence over national policies, however, the government eventually backed down in April 1997 giving the go-ahead for the initiative. The Centre will work closely with the European Commission against Racism and Intolerance, established in 1995, which is the main Council of Europe expert body dealing with racial discrimination.

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42 *The Guardian*, 26th January 2000, *"Watchdog moves to curb racist websites"*

1.3 Summary

The rise in racism and xenophobia is evidenced by the increase in racist attacks and sentiments through to the rising popularity of extremist groups. The decision within the EU to establish a European Monitoring Centre for Racism and Xenophobia is proof in itself of the perceived increase and threat of racism and xenophobia. This threat has been heightened recently by the growth of the internet, the latest mass media vehicle for spreading racist material.

Discriminatory racist behaviour is a breach of fundamental human rights and undermines democratic societies. States must assume responsibility to protect individuals within their borders. Although the EU presently lacks a comprehensive human rights policy[44] there has been some recognition in the EU that protection from race discrimination is a human rights issue [45]. Condemnation of cultural differences and the perceived threat to national identities will result in exacerbating racist ideology. Indeed, European States accepted that racism is caused or exacerbated by the propagation of doctrines of racial inequality[46].

The role of the law in shaping, controlling and punishing racist behaviour is examined

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43 See COM (97) 201 final and COM (96) 615 final

44 Alston, P., and Weiler, J.H.H., *An Ever Closer Union in Need of a Human Rights Policy* (1999) 9 EJIL 4, p.658

45 See, for example, Hervey, T., *Putting Europe's house in order: race discrimination and xenophobia after the Treaty of Amsterdam*, in Twomey, P. & O'Keeffe, D. (eds) *The Treaty of Amsterdam*, Hart, 1999

in this thesis. Despite the overwhelming evidence of increased antagonism towards minority groups the EC/EU continually resisted attempts to acknowledge competence in the area of race discrimination, as detailed in Part Two, until the introduction of the Article 13 EC general equality clause in the Treaty of Amsterdam in 1997. The prospects for successful introduction of EU race legislation is examined in Chapters 8 and 9. Member States existing legislation aimed at combating racial discrimination and prejudice is examined in Chapter 2.

[46] Banton, M., p 41, op cit at Note 1

CHAPTER 2

INTERNATIONAL AND NATIONAL LEGAL MEASURES ON RACIAL DISCRIMINATION IN THE EU, WITH PARTICULAR REFERENCE TO EMPLOYMENT DISCRIMINATION IN THE UK, FRANCE, GERMANY AND THE NETHERLANDS

2.1 Theoretical Perspectives and Approaches to Anti-Discrimination[1] and Equality Measures

As detailed in Chapter 1, the ideology of prejudice and discrimination results in the victims being relegated to a lower place in society in terms of education, welfare, housing and employment and consequently suffering economic disadvantage. It has been argued that the subordination of *"visible minorities"* is an essential feature of the white majority's identity in some countries with racism an inevitable and permanent feature[2]. Racism results in a waste of valuable knowledge and skills, creates a social underclass and often leads to social unrest on the part of the individuals experiencing discrimination. Violence and hatred towards individuals and groups who are identified as *"different"* is another feature, as detailed in Chapter 1, and the rule of law and social order is threatened. Discrimination is an infringement of fundamental human rights and is institutionalised, as recognised in the concept of indirect discrimination, detailed below. A system which encourages equality of opportunity and attempts to balance

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1 As this thesis is concerned with freedom of movement issues it deliberately focuses on discrimination against "workers". As work is one of the best means of integration for minority communities, legislation surrounding employment is particularly pertinent

2 Ward, C.V., (1997) *"On Difference and Equality"*, Legal Theory Vol 3, No 1, Cambridge University Press, commenting on the work of Bell, D. *Racial Realism* (1992), 24 CONN L. Rev 363, who argues that African Americans should abandon the quest for racial equality and

the inequalities inherent in society is required therefore.

The notion of equality permeates the writing of a good number of legal theorists A legal system should ensure that everyone in society benefits from fair systems which do not discriminate, however, progressive legal theorists have argued that treating everyone equally, or the same, eliminates important differences and therefore is a violation of liberal equality properly conceived[3]. Dworkin [4] argues that everyone is entitled to *"treatment as an equal"* rather than "*equal treatment*" which suggests that everyone should be entitled to equal shares and assumes an equal starting point. Treatment as an equal does not mean that all treatment has to be identical, as difference and diversity should be valued.

Governments' approach to tackling discrimination varies and is often informed by immigration policies which fall into two broad categories based on assimilation or integration[5]. A European Commission Report in 1992[6] highlighted that Member States laws and policies concerning racism and xenophobia tend to reflect one of three different approaches, namely, (1) assimilationist, or individualistic, such as that adopted in France which opposes the recognition of minority groups, but uses individual rights as a means of combating racism, (2) pluralistic, recognising the principle of

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focus on bettering their situation in society

3 Ward, *ibid,*

4 Dworkin, R., Taking Rights Seriously, Duckworth, London 1978, p.227

5 See Chapter 3 for a discussion of immigration policies in EU Member States and 4 & 5 for EU developments

6 Commission of the European Communities *Legal Instruments to Combat Racism and Xenophobia,* 1992, p.16, V/6332/93

equality and equal protection including protection of linguistic minorities, such as Italy and Belgium or (3) rejectionist (denial that a policy is needed). Some countries have a mixed approach of individualistic and pluralistic, such as The Netherlands and Denmark.

The values that States employ when framing laws to prevent discrimination are also informed by issues of public policy, including the economic and political climate of the day, the views of society at any given time, culture and what governments believe that their electorate will tolerate[7]. Whatever form the laws take, any rights and freedoms bestowed must be recognised and capable of enforcement by the courts if they are to be realised. The complaints based anti discrimination approach which concentrates on redressing discrimination against individuals rather than seeking to eradicate social disadvantage tends to predominate in most European countries. It has been suggested that anti or *"non-discrimination"* approaches are negative while an *"equality"* approach is more wide-ranging and positive as it adopts forward looking strategies such as affirmative action and the use of quotas, has a more purposeful and quicker impact and has resulted in changing the climate [8].

International and regional measures which impact on anti-discrimination and equality laws in the EU are examined below and will be referred to throughout Part Two and Three of this thesis which examines the EU's measures on race discrimination. An overview of race discrimination laws in the UK, France, Germany and the Netherlands

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7 For a discussion of the history of race relation laws see for example Bindman, G., and Lester, A., *Race and Law*, Penguin, 1972 and Greenberg, J., *Race Relations and American Law*, Columbia University Press, New York, 1959

8 Lustgarten, L. and Edwards, J., *Racial Inequality and the limits of law*, in Braham et al

is also provided as these four countries have the largest visible minority populations[9]

2.2 International Anti-Discrimination Measures

The right not to be discriminated on the grounds of race (and religion and culture) is internationally recognised. Despite recognition of the need to protect human rights following the second world war, problems have surrounded the incorporation and enforcement of international agreements as States are reluctant in practice to lose their sovereignty and extend the rule of law to include all forms of discrimination. States may contribute to and sign a particular provision but not necessarily observe or adopt mechanisms to access remedies. The effect of international provisions is therefore variable as States may do no more that provide a commitment to respect the rights contained therein.

Ireland and Denmark, which have written constitutions, do not expressly implement all international obligations and there has been no real effort to incorporate international obligations into national law to implement the conventions. Some countries, Greece for example, incorporate international conventions into domestic law to enable the Greek courts to enforce the Convention. Alternatively, in the UK domestic statute law is interpreted to conform with treaty obligation unless there is a conflict. If there is a conflict between national and international law the national law will take precedence.[10]

(eds.), *Racism and Antiracism*, 1992, p. 281 .

9 Forbes, I. and Mead, G., *Measure for Measure: A Comparative analysis of Measures to Combat Racial Discrimination in Member Countries of the EC*, UK Employment Department, 1992 reported visible minorities as: Netherlands 4.9%, the UK 4.7%, France 4% and Germany 2.6%

10 See *Brind and Others v Secretary of State for the Home Department* (1991) 1All ER 720 where

If a State introduces legislation to implement a Convention the position is relatively straightforward as individuals are aware of the provisions and can seek remedies within the national legal system. However, the situation can be complex if a State has introduced legislation which does not fully cover the provision of the Convention. If a private individual employer is accused of discrimination it is important to look to the national legislation to see whether there is an obligation on all employers. As the State is under an obligation to introduce measures to prevent all employers from discriminating, an individual within a member State which has not introduced adequate national legislation could institute proceedings against the State. This is a difficult, tedious process though and some States have not agreed to provisions whereby individuals can access remedies.

The significance of States introducing specific national legislation should not be underestimated as it allows easy access by national lawyers and individuals. As some lawyers advising individuals in the employment field for example will not be aware of the international or regional conventions, national legislation is a positive move. Additionally, judges may be reluctant to place too much reliance upon Conventions which is another argument for introducing specific national legislation.

The impact of international provisions on the EU is complicated by the ruling that the EU cannot accede to Conventions such as the ECHR[11]. This in effect means that the

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the House of Lords upheld the Home Secretary's directive prohibiting the direct broadcasting of the statements of named organisation in Northern Ireland which was in breach of Article 10 of the European Human Rights Convention

11 Opinion 2/94 (1996) ECR I-1579 ruled that "as Community law now stands, the Community has no competence to accede to the European Convention". Some Member States had argued that

relationship between the Council of Europe, the European Community, European Union and Member States of the EU will continue to be messy and result in a variety of measures in EU Member States. However, general principles of law such as those found in international law and member states legal systems have been incorporated on a case by case basis into EU law by judgments of the ECJ, as discussed in Chapter 6.

There are a number of international legal obligations which are relevant to individual EU Member States (See *Table 1* for an overview of which international obligations have been signed by each Member State). International obligations drawn up following the second world war reflected the *"victims"* of the period, namely, Jews, Gypsies and Poles, and have been criticised by human rights groups for not addressing contemporary human rights issues, such as cultural diversity and ethnic minorities. For example the UN Charter and Declaration made no mention of minorities. Thornberry[12], in his observation of trends in international and European standards of minority rights, asserts that measures which favour the *"flourishing"* of the identity of minorities are forward looking and should not be regarded as discriminatory.

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the Community had the competence to accede to the ECHR due to the recognition of the protection of fundamental rights via the general principle of law interpreted by the ECJ. However the ECJ held that there are no express or implied power in this area in the EC Treaty which meant that former Article 235 had to be considered. The ECJ acknowledged that accession to the ECHR would necessitate the integration of two separate systems for the protection of human rights, Strasbourg and Luxembourg and declared that such changes "would be of constitutional significance and would therefore as such go beyond the scope of Article 235" and needed a Treaty amendment. As Member States are obliged to comply with EU law, incorporating the ECHR into the law of the EU would give greater force to the ECHR.

12 Thornberry, P., *International and European Standards on Minority Rights*, p. 20 in *Minority Right in Europe*, Edited by Mial, H., Pinter Publishers Limited 1994. Thornberry examines international measures to protect minority rights, including the UN Declaration on the Human Rights of Individuals who are not nationals of the country in which they live, European Convention for Protection of Minorities, European Charter for Regional or Minority Languages, which all seek to protect minority identity in culture, religion and language and have been described as a right to resist integration into the host country

A comparative assessment of international legal instruments highlights that there is little jurisprudence regarding international human rights organs applying the international treaties. For example a 1992 Commission report highlighted that only one case against an EU Member had been brought before the UN Committee on Elimination of All Forms of Racial Discrimination. This concerned an action against The Netherlands where a finding that the applicant had been wrongfully denied her right to work was made and the Dutch government agreed to provide compensation[13]. Given the levels of racial discrimination occurring this is surprising but reflects reluctance on the part of many individuals to use international provisions.

2.2.1 The United Nations Charter and Declaration of Human Rights 1948

All EU Member States are signatories. The Charter and Declaration are not formal instruments of international law and do not have mechanisms to enforce the provisions. They provide a framework and guidelines within which to assess the human rights provisions of its members. Article 2 (7) of the Charter confirms that the UN will not intervene where issues are primarily within member states jurisdiction. The Charter does not define human rights but the Declaration refers to human rights as civil, political, economic, social and cultural rights.

Attempts by the Commission of Human Rights to draft a binding treaty to provide legal force to the Declaration resulted in disputes as to the priority of the rights which culminated in two separate covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which

13 Commission Report, op cit at note 6, p 30

were not signed until the 1970s[14], refer to 2.2.4 below. The Charter makes reference to race (and religion) in Article 1 and, similarly, Article 1 of the Universal Declaration of Human rights refer to equality and to everyone being entitled to the rights set forth in the Declaration *"Without distinction of any kind such as race, colour, sex language, religion, political or other opinions, national or social origin, property, birth or other states"*

2.2.2 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The ICERD was adopted on 21 December 1965 by the General Assembly of the united Nations and was given force on 4 January 1969. It has been ratified by the majority of Member States, the exception being Ireland.

Article 1 (1) defines racial discrimination to include

> "...any distinction, exclusion restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life"

but Article 1(2) states that it does not apply to *"distinctions.....between citizens and non-citizens"* which effectively sanctions different treatment of third country nationals. Whether the definition embraces indirect discrimination is unclear as a race neutral requirement which disproportionately disadvantages members of a particular racial group is not a distinction *"based on race"*, although it is argued that many international lawyers believe that indirect discrimination is covered.[15]

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[14] MacEwen, M., *Tackling Racism in Europe: An examination of Anti Discrimination Law in Practice*, Berg Publishers Limited, 1995

[15] See the discussion for example in Forbes, I. and Mead, G., op cit at Note 9 p7.

Article 2 lays down a general obligation on States to

> "Prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, groups or organisation.....(and introduce penalties for) dissemination of ideas based on racial superiority or hatred"

Article 2(1) (a) seems to apply only to public authorities but Article 2(1) (d) refers to "*racial discrimination by any persons, group or organisation*", thereby including private as well as public employers. *Article 2 (2)* bestows a general duty to take steps to ensure the development and protection of certain racial groups, which implies that some positive action must take place.

Article 4 is concerned with propaganda and organisations which incite racial hatred or discrimination and requires States to

> "Condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin or which attempt to justify or promote racial hatred and discrimination in any form."

Member States interpretation of this Article varies, some merely condemn such groups while others, notably Germany and the Netherlands, reserve their right to ban them as discussed below.

Article 5 indicates the rights expressly protected which include political and civil rights, including equality before the law, freedom of movement and an undertaking to guarantee the right

> *"to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment to equal pay for equal work, to just and favourable remuneration"*

Article 6 refers to remedies and provides an obligation to ensure "*everyone within their jurisdiction has effective protection and remedies....*" Article 7 imposes an obligation to

"educate against prejudices and to promote inter-racial understanding."

The effectiveness of the CERD is questionable. The Committee has had difficulty meeting regularly to deal with the increasing workload created by ethnic conflicts throughout the world and also had to deal with financial difficulties caused by some members failing to contribute. Individuals have limited rights of access depending on the agreement with individual States and as the Committee has received very few complaints, only one complaint between 1969 and 1992, this demonstrates that the individual right of access is clearly not working. Sanctions for non-compliance and remedies are also ineffective although procedures adopted in recent years to appoint a rapporteur to focus on some of the reports appear to have improved its capacity to question members. It largely relies on shaming governments and using moral pressure to force them to comply, which is not particularly effective.

2.2.3 International Labour Organisation Convention 111

The Discrimination (Employment and Occupation) Convention (Number 111) was introduced in 1958 and has been ratified by the majority of EU Member States (exceptions being Ireland, UK and Luxembourg). Discrimination includes race (and religion) and Article 1(1) defines discrimination as

> "...any distinction, exclusion or preference made on the basis of race, colour, sex, religion..... which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation "

Article 3 includes an obligation to *"....enact such legislation as may be calculated to secure the acceptance and observance of this policy"*

Similarly to the CERD it is not clear whether the ILO 111 applies to indirect discrimination but there is some opinion that it does[16]. The ILO require States to promote equality of opportunity and equality of treatment and expects affirmative action programmes to be established for the purpose of providing preferential treatment in education and training for disadvantaged racial minorities to enable them to compete equally in society. It has been argued that the main weakness of the Convention is the lack of a requirement to provide supervisory mechanisms and it is largely unenforceable.[17] Some signatories, for example Belgium and Denmark, do not provide legal provisions to outlaw racial discrimination in recruitment as required by the Convention.

2.2.4 International Covenant on Civil and Political Rights (1966)

Two provisions adopted by the UN, the Covenant on Civil and Political Rights and Covenant on Economic, Social and Cultural Rights were both adopted in 1966 and both came into effect in 1976. The Covenant on Civil and Political Rights strengthened the civil and political rights set out in the Universal Declaration, including the rights to life, liberty and security, privacy, peaceful assembly, a fair trial and equality before the law, the rights of members of ethnic, religious and linguistic minorities, freedom from inhumane treatment, freedom of thought, conscience, religion, expression and association and the right to self determination. Rights of minorities, reflecting growing concerns at the time, were additions to the Declaration of Human Rights.

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16 See *Equality in Employment and Occupation* (1988) ILO p23

17 MacEwen, M. , op Cit at Note 14, p.56

Article 27 of the International Covenant on Civil and political Rights states:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in common with the other members of their group, to enjoy their own culture, to progress and practise their own religion, or to use their own language."

Thornberry[18] argues that interpretation of Article 27 implies a supportive rather than passive role. The Covenant permits individual complaints but no requirement to incorporate the Covenant into domestic law was made which has resulted in problems of enforcement.

2.3 Regional Anti-Discrimination Measures - The European Convention of Human Rights (ECHR)

At European Regional level the Council of Europe (which has 40 members) oversees the European Convention on Human Rights and Fundamental Freedoms enacted in 1950. The Convention has been referred to as the *"most effective"* international instrument in the field of fundamental rights[19]

The European Commission against Racism and Intolerance (ECRI) set up in 1995 is the main Council of Europe expert body on racial discrimination and is part of the Human Rights Directorate which monitors and revises the ECHR.[20]. All the EU Member States are signatories, although their response to the Convention differs depending on their legal systems. The ECHR is the only human rights convention referred to in the Treaty

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18 Thornberry, P., op cit at Note 12, p.15

19 Evrigenis, D. (1985) *Committee of Inquiry into the Rise of Fascism and Racism in Europe,* European Parliament p77. See also MacEwen , M., op cit at Note 14, p.61

20 See ECRI website for further details,www.ecri.coe.fr

on European Union (TEU)[21] and is part of international law operating under the jurisdiction of the European Court of Human Rights based in Strasbourg. The Convention extends to a wide category of people and includes Non-EU citizens as witnessed in recent cases before the Court detailed in Chapter 6 and Chapter 9.4.

The Convention includes race (and religion). Exceptionally at that period in time, the ECHR did include protection for minorities as Article 14 refers to

> "....the enjoyment of the rights and freedom set forth in this Convention...without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"

However, Article 14 is limited in that it is applicable only within the context of the Convention and cannot be generally applied[22]. The European Court of Justice have not cited Article 14 in connection with race discrimination in any of it judgements thus far as the ECHR does not outlaw race discrimination as a general principle.

The ECHR it is not explicitly relevant to this thesis, as it does not give a right of access to employment and therefore does not provide a right to protection from discrimination in employment. However, successful litigants have secured protection under the ECHR by relying on their right to privacy and right to family life. The Convention has been criticised as being outdated and in urgent need of amendment by a number of civil rights groups but the European Court for Human Rights has recently recognised a

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21 Article 6.2 TEU (former Article F2 TEU) "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms... and as they result from the constitutional traditions common to the member states, as general principles of Community law"

22 Kruger, N. and Strasser, J., *Combating racial discrimination: the European Convention on the Protection of Human Rights and Fundamental Freedoms* in Cator and Niessen, *The Use of International Conventions* p.19-25

number of rights not recognised by the ECJ, such as sexual orientation and rights of non nationals. [23] The European Commission against Racism and Intolerance has urged the Council to strengthen Article 14 and a draft Protocol is currently being developed.

2.4 EU and Member States measures on race discrimination

Presently there is no EU wide protection from race discrimination although there have been numerous resolutions and declarations *(see Table 2)*. Changes introduced at Amsterdam are likely to have an impact on EU policy in this area as detailed in Chapters 8 and 9.

2.4.1 The UK

Due to its links to the Commonwealth, not surprisingly the UK has one of the largest numbers of ethnic minority people in the EU. The 1991 census, the first collating ethnic origin data, recorded 3 million (6%) visible ethnic minorities. The largest ethnic minority groups are of Indian, Caribbean, Pakistani, Bangladeshi and African origin. There is a concentration of ethnic minorities in urban areas such as London and Birmingham and unemployment rates are disproportionately higher for many ethnic minority groups. It is worth recognising that a large number of the so called ethnic minority population were born in the UK and may be of a particular ethnic origin but are British in culture and upbringing.

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[23] For example, *Lustig-Prean & anor v UK; Smith & anor v UK*, ECHR, 31417/96, 32377/96, 33985/96 & 33986/96, decision of 17th September 1999. For a discussion of this case see Chapter 6 and 9.

International Obligations

The UK has ratified a number of international conventions (see *Table 1*) including the ECHR, ICERD and the Covenant on Civil and Political Rights, with reservations, but it did not sign the ILO 111, apparently due to technical difficulties between UK law and the Convention. Courts in England, Wales or Scotland will not recognise international obligations unless they are expressly incorporated into domestic legislation. The UK is not one of the EU Member States which allows individual petitions under the CERD and has been criticised for this. Although the UK was commended by the CERD in 1996 on a range of issues, including a commitment to enact race relations law for Northern Ireland, *"serious concern"* was expressed regarding the high number of racist attacks and incidents, the non-incorporation of the ICERD into domestic legislation and anti- Muslim sentiments. The UK asylum and immigration legislation was criticised together with the Government's failure to ban the British National Party in accordance with Article 4 of ICERD.

As regards the ECHR, although the UK was the first country to agree to abide by Strasbourg judgments in 1951, the UK has been found in breach of the ECHR more times than any other EU Member State. Its restrictive immigration and nationality laws have been criticised by the Court[24]. The Human Rights Act 1998 incorporates the ECHR provision and comes into force in October 2000, following a training programme for judicial personnel. It introduces a rights based approach guaranteeing

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[24] See for example *East African Asians v UK* 1981 , detailed in Chapter 3, where the European Council for Human Rights condemned the UK for violating Article 3 and 14 of the ECHR and the Guardian 25th October 1997, *UK's 50th Breach of Convention*

the 12 basic rights[25] enshrined in the ECHR and could enable quicker and cheaper access to UK courts rather than the long tedious process through Strasbourg which averages 5 years. The Act is likely to have a huge impact on the UK although criticism surrounds the fact that the rights are not absolute, as the government could argue that interference with the right is in pursuit of a legitimate aim. The Government decided not to introduce a human rights commission, due to its impact on the CRE and EOC. The absence of a human rights commission could weaken the effectiveness of the legislation.

Constitutional provisions

The UK is exceptional in the EU in that it does not have a written constitution or bill or rights, although a body of constitutional law has been established and the Human Rights Act 1998 will have an impact in the future.

Legislation

Legislation relating to race applies to Great Britain (England, Wales and Scotland) but not Northern Ireland. Britain has the oldest and most comprehensive legislation, pre-dating its ratification of the ICERD. This is acknowledged by the European Commission Against Racism and Intolerance.. British law has been subject to wide ranging criticism however[26]. The Race Relations Act 1976 replaced the previous

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25 Right to life, freedom from torture or inhuman and degrading treatment, slavery, arbitrary arrest and detention, right to a fair trial, freedom from retrospective penalties, right to privacy and family life, freedom of religion, expression and association, right to marry and found a family and freedom from discrimination, but not the right to employment, and incorporates three rights added later: to education, peaceful enjoyment of property and free elections.

26 See, for example, Lustgarten, L. & Edwards, J., op cit at Note 8, p.270-289 and Hepple B., *Have 25 years of the Race Relations Law in Britain been a Failure*, in Hepple, B. &

legislation of 1965 and 1968. The 1965 Act criminalised racial incitement but proved problematic as intention and effect had to be proved. The 1976 Act imposes civil liability, protection from direct and indirect discrimination and victimisation in both the public and private sectors, including employment matters. It allows for race to be taken into account at the point of selection if being of a particular race is a *"genuine occupational requirement"*. It also includes the principle of vicarious liability of employers for employees actions and allows positive action in education and training where there is evidence of under-representation.

Presently, the burden of proof is largely on the complainant, however, in recognition of the difficulties this presents the burden often shifts to the employer to demonstrate that there was no discrimination. In cases of indirect discrimination the complainant must demonstrate that there is a requirement or condition which is such that the proportion of his/her racial group who can comply with it is considerably smaller than the proportion of another racial group, and that he/she, to their detriment, cannot comply with it. A Directive on Burden of Proof in cases of discrimination based on sex is due to be implemented in 2001 which states that the burden of proof in sex discrimination cases should be shared. The UK Government and the EU Commission is of the view that the Directive simply confirms ECJ decisions in the area rather than grant any new rights although some commentators disagree[27].

A code of Practice which provides guidelines for employers was issued in 1984 by the

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Szyszczak, E. (eds.), *Discrimination: Limits of the Law*, Mansell 1995, p.20-31

[27] Council Directive 97/80/EC, 15 December 1997, Croner's Europe Bulletin No. 65, July

CRE which oversees the legislation. The Code has a statutory basis and can be used as evidence in an industrial tribunal, where employment cases are heard. Accessing the law can be difficult, as legal aid is not available for legal representation and the statutory body, Commission for Racial Equality (CRE), has only a limited budget to assist applicants. Trade Unions provide some assistance to members.

The Public Order Act 1986 imposed a maximum two years imprisonment and/or a fine when tried on indictment and six months on summary trial if intent or likely effect of racial hatred is proved. Criticism has been levelled at lenient sentences imposed.[28]. Between 1987 and 1995 fifteen prosecutions had been started, which was in fact fewer than the equivalent provision in French law, a system renowned for its small number of prosecutions and reluctance to litigate[29]. There is no distinct offence of racial violence although the Crime and Disorder Act 1998 attempts to ensure that tougher sentences are passed if the crime has a racial motive. There are problems with definitions, however, as highlighted by Jepson.[30]

A major conference organised by the Centre for Research in Ethnic Relations, the Runnymede Trust and the Commission for Racial Equality in 1996[31] identified a number of areas for reform including stronger sanctions, inclusion of religious

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1998

28 *The Guardian* 13 March 1997 *"Combat 18 three jailed on race hate charges:Anti-Fascist campaigners hit out at far too lenient sentences"*

29 Banton, M. , *Ethnic and Racial Consciousness,* Longman, 1997, p.138

30 Jepson, P. , *The definition of a racial incident, New Law Journal* 11 December 1998 p.1838

31 See *Reviewing the 1976 Act,* The Runnymede Bulletin September 1996

discrimination, shifting the burden of proof and indirect discrimination. In his keynote speech at the 1996 conference Anthony Lester QC, who was involved in drafting the 1976 legislation, acknowledged some of the weaknesses of the law and argued that the technical drafting of the legislation *"has cramped the potential reach of the crucially important concept of indirect discrimination through a strict textual interpretation"* and that positive monitoring, similar to the powers given to the Fair Employment Commission in Northern Ireland, should be granted.

Responsibility for implementation and monitoring of the legislation

The Commission for Racial Equality (CRE) is responsible for promoting equal opportunities, reporting on and making recommendation for change to legislation to the Home office. The CRE publishes an annual report and has carried out three reviews identifying weaknesses in the legislation. Its 1998 Review[32] calls for a positive right not to be discriminated against, increased powers for the CRE, ethnic monitoring , new definition of indirect discrimination and greater use of positive action. Successive UK Governments have not readily accepted the need for change, however.[33]

The CRE can assist individuals and carry out formal investigations in the name of the Commission, but its influence has weakened over the years due to budget cuts. In 1998[34] the CRE received 1,657 applications for assistance, a similar number to the

32 *Reform of the Race Relations Act 1976*, Commission for Racial Equality, April 1998

33 See, for example, a report from the Better Regulation Task Force, *Review of anti-discrimination legislation*, May 1999 which rejected need for reform of the Race Relations Act 1976 and influenced the Government's subsequent response calling on the CRE and EOC to work closer together to make the existing legislation work

34 *Annual Report of the Commission for Racial Equality, January to December 1998*

previous year, although complaints relating to employment dropped by 6%. The number of applicants who received full legal representation fell by 15% compared to the previous year although the number receiving limited representation trebled. The CRE successfully represented 29 applicants and helped settle 87, with 103cases being settled early by Commission officers. The average tribunal award for CRE supported cases fell by 10 %. However the average 1997 award had increased by 62% over 1996 due largely to the lifting of the ceiling on compensation levels in tribunals in 1994 to fall in line with sex discrimination compensation following the ECJ ruling in the *Marshall v Southampton and West Hampshire Area Health Authority* case as detailed in Chapter 6. The level of awards in 1998 demonstrate that the courts are prepared to order large settlements[35] This may influence the response of some employers and encourage them to adopt non-discriminatory policies. The CRE has suffered criticism[36] over the years and a former Commissioner, Blondel Cluff, recently accused the CRE of having *"lost the plot"* and claimed it was "a source of racial division rather than harmony"[37].

2.4.2 France, Germany and the Netherlands

France, like the UK, has a colonial history which has resulted in a large number of citizens and residents from its ex-colonies. The major countries of origin include

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35 Equal Opportunities Review No. 86 July/August 1999, Compensation Awards 1998 – A Record Year

36 See, for example, Hepple, B, *Have Twenty Years of the Race Relations Act in Britain Been a Failure* and Cousey, M., *The Effectiveness of Strategic Enforcement of the Race Relations Act,* in Hepple, B. and Szyszczak, E. (eds.), op cit at Note 26

37 See, The Voice, 4th January 1999, "CRE must move on" and Mears, M., *The Commission for Racial Equality: a happy ship?,* New Law Journal, 15th January, 1999, p.62

Algeria, Morocco, Asia, Tunisia and Turkey. Its visible minority population increased from around 3.7% in 1982 to an estimated 4% in the 1990s. Ethnic groups concentrate around urban areas particularly Paris, Lyon and Marseilles. Employment figures demonstrate systematic disadvantage in patterns of employment for ethnic minorities showing unemployment levels of 8.7% in total population and 14% amongst ethnic minorities.[38] France does not particularly welcome racial diversity as borne out be cases such as that involving the banning of Islamic headscarves in school as discussed in Chapter 1.

Germany's ethnic minorities fall into five principal categories, namely, those from established communities, guest workers, dependants of guest workers, refugees and asylum seekers and *"ethnic Germans"*. The last category comprises individuals who have been allowed to repatriate to Germany, regardless of their nationality, due to their language and cultural links with Germany. *"German"* settlers in this group are recognised as German citizens and not aliens. In 1968 5.2% of the workforce within the previous Federal Republic of Germany was non-German increasing rapidly to around 10.3% in 1971. By March 1991 the number of non-German workers was approximately 8%. Visible minorities are concentrated in large cities such as Berlin. The unemployment rate for non-Germans is considerably higher than for German nationals and evidence of discrimination in employment has been documented[39].

The Netherlands colonial links resulted in a tradition of immigration by ethnic

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38 Forbes, I. and Mead, G., op cit at Note 9, p. 34

39 See for example Layton-Henry, Z., and Wilpert, C., *Discrimination, Racism and Citizenship:*

minorities. Immigrants from Surinam, Turkey, Morroco and the Mollaccas have settled and approximately 5% are from ethnic minorities. Generally the government has reacted favourably to different groups of settlers by promoting multi-culturalism. Approximately 50% of ethnic minority groups reside in the four largest cities, Amsterdam, The Hague, Rotterdam and Utrecht, where they form around 15-2% of the population. The unemployment rate amongst ethnic minorities is three times greater than that of the majority. MacEwen observed that a report to the Minister of Justice in February 1988 concluded that ethnic minorities had absorbed racial discrimination instead of using the legal means available to combat it.[40]

International Obligations

Approaches to international obligations vary but, similar to the UK, the evidence demonstrates that international conventions are not fully complied with and individuals are reluctant to take complaints forward under international measures.

According to French law if an international convention has been ratified by Parliament it supersedes national law therefore, theoretically, where conflicts occur conventions should be directly applied. However, the CERD reports that the authorities have not given an opinion on the direct application in domestic law of the various articles of the Convention[41]. France ratified the CERD in 1966 and has ratified the ECHR. The ILO 111 was ratified in 1981. However it has not introduced legislation which covers all

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Inclusion and Exclusion in Britain and Germany, The Anglo-German Foundation, London 1994

40 MacEwen, M., op cit at Note 14, p. 133

41 Ibid p.36

aspects of these obligations, for example, there is no positive action programme and indirect discrimination is not recognised. France does recognise the rights of individuals to petition the CERD though (only 3 other countries Denmark, Italy and the Netherlands also recognise this). As regards the ECHR a European Commission report in 1992 stated that there have been no European Court of Human Rights decisions under article 14 of the ECHR against France.[42]

Germany is a signatory to 24 of the 25 international measures on human rights, including ratification of the CERD, ECHR and ILO111. According to its constitution international provisions are incorporated into national law without the need for further enactment but if there is a conflict between international conventions and the German constitution the constitution prevails, although the German courts attempt to interpret national provision to accord with international requirements. The constitutional position is that the CERD places obligations on state authorities only. Germany's report to the CERD in 1993 claimed that it had fulfilled obligations under Article 4 by punishing the dissemination of racist ideas and incitement to racial hatred. German governments have maintained that the ICERD does not require comment on treatment of foreigners because Article 1 (2) states that it does not apply to distinctions between citizens and non-citizens. Individual complaints to the European Commission on Human Rights against Germany numbered 4,915 by 1988 but only 16 of these were heard by the European Court of Human Rights, none involving racism or racial discrimination under Article 14[43].

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42 Commission Report op cit at Note 6, p31

43 Commission report op cit at Note 6, p.31

The Netherlands has ratified CERD and ILO 111, UN Covenant on Civil and Political Rights and the ECHR, the Council of Europe Convention on the Legal Status of Migrant Workers and the EU's Social Charter. International obligations have direct effect according to Dutch law and do not require domestic legislation but the nature of application of Conventions has in practice been controversial. Forbes and Mead report, however, that the Dutch lawyers were becoming increasingly aware of the importance of Conventions to test the validity of national legislation[44] For example the International Covenant on Civil and Political Rights was used to claim unemployment benefit for women.

Constitution

Unlike the UK all three countries have a written constitution. Redress for race discrimination is not readily available under the Constitution though and litigants tend to use the legislation. The 1958 French Constitution states in Article 2 that *"France is a republic, indivisible, secular, democratic and social and it shall ensure the equality of all citizens before the law without distinction of origin, race or religion. It shall respect all beliefs"*. The Constitutional Council has ruled that the rights are granted to all residents and not merely French citizens[45] and non-citizens are eligible to participate in local elections. As the Constitution is based on equality for all it refuses to positively recognise minority rights. It may also be restricted in the public interest.

The German Constitution outlaws race (and religious) discrimination as well as

[44] Forbes, I. and Mead, G., op cit at Note 9, p.56

[45] C.C.89.269 D.C.

discrimination on the grounds of sex, birth, language, national or social origin or political persuasion. It applies to the legislature, executive and judiciary and is intended to protect individuals against the State, thereby excluding private employers. Generally it is considered that the provision include indirect as well as direct discrimination.

Article 1 of the Dutch Constitution states that all persons shall be treated equally in like circumstances and does not permit discrimination of the grounds of religion, belief, political opinion, race or sex. It does not allow individuals to challenge other individuals but they can challenge the State

Legislation

Civil and criminal remedies are employed in France, Germany and Netherlands[46]. French legislation adopted in 1972 implemented ICERD obligations and covers public and private employers. Amendments to strengthen the law were made in 1991 and 1994 following increases in racial violence and opinion polls highlighting widespread racism. A new Criminal Code introduced higher penalties, up to two years imprisonment and/or fine up to £30,000, and convictions for certain offences may now result in that person being barred from public office and prevent him from standing in elections. The defence of *"legitimate motive"* was removed. High profile cases have included prosecutions against National Front leaders, including Le Pen in December 1997 who was fined £30,000 and Bridget Bardot.

Despite one or two high profile cases, there is very little evidence that the legislation is

[46] See ECRI website at www.ecri.coe

effective. Difficulties occur in enforcing the law due to narrow procedural rules, the high standard of proof and problems associated with obtaining evidence and persuading people to testify. The conviction rate in employment related cases is low, three convictions in 1992, one in 1993, two in 1994 and 1995 and 10 in 1996[47].

Civil actions can also be taken in relation to employment related matters. The Code du Travail and Code d'emploi contain the relevant provisions. Reports have suggested that many people are afraid to use the legal system to complain.[48] Complainants are also dissuaded due to the financial deposits they have to lodge with the courts. MacEwen is critical of existing legislation and argues that there is *"no evidence that the government has introduced positive action programmes"* and there is no obligation to encourage equal opportunity initiatives[49], for example, it is unlawful to monitor performance by reference to race.

In 1999 the French Government and social partners issued a joint declaration in relation to racial discrimination in the workplace and proposed new legislative measures. Although the social partners are of the opinion that existing legal measures are effective new proposals to strengthen the legislation were put forward. These include a new procedure permitting a workplace union representative to instigate procedures on behalf of employees, an amendment to the burden of proof allowing the judge to

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47 European Industrial Relations Review, No. 309, *France: Combating racial discrimination at the workplace*, 1999, p.30

48 See for example the Council of Europe Report (MG CR (90) 5) December 1989 which noted the very small number of convictions for discrimination in France

49 MacEwen, M., op cit at Note 14, p.127

remove it from the plaintiff, a right of disclosure or "whistleblowing" allowing employee representatives to bring evidence of discrimination in the workplace and stronger power for the French labour inspectors to monitor instances of racial discrimination. It is likely that the French Government has been influenced somewhat by increased powers bestowed on the EU under Article 13 EC introduced by the Treaty of Amsterdam and knowledge of the impending Commission proposals to combat discrimination, which were eventually released in December 1999 as detailed in Chapter 9. While the new French legislative measures are to be welcomed they fall short of the Commission's 1999 proposals for a Directive on race. For example, as detailed below, there is no "*independent body*" to promote the principle of equal treatment. Although the Commission's proposals allow some flexibility, Article 12 of the race proposal states that Member States *"shall provide"* for independent bodies to promote the principle of equal treatment between persons of different racial or ethnic origin.

The German Works Constitution Act 1972, amended in 1989, lays down that every Works Council, which includes private employers, must not discriminate in employment and recruitment. This is enforced by the civil law. Professor Heilbronner of the University of Konstant opines that indirect discrimination is included, but there is no case law to support this.[50] Article 85 of the Act allows Works Council to hear grievances and order the employer to provide a remedy. Employers disagreeing with the remedy may appeal to the Conciliation Committee. The burden of proof shifts to the employer if complainants provide evidence that they have better qualifications for

[50] MacEwen, M., op cit at Note 14, p.152

the job. The evidence may be either direct or indirect for example producing statistical evidence demonstrating a tendency to appoint a smaller proportion of minority applicants than majority ones.[51] Access to the law is assisted by the trade unions as approximately 43% of workers belong to unions. Although damages may be claimed under the civil code, there is a reluctance to bring civil actions due the costs involved.

Germany has a criminal code to penalise those damaging property and injuring people but there is no specific legislation relating to racial discrimination. The German Criminal Code was amended in 1960 to penalise incitement to racial hatred and in 1994 criminal liability was extended for neo nazi and racist attacks. Statistics on the number of convictions for racist incidents are difficult to gauge as data on motive is not systematically collected. The perceived lenient prosecution of offenders has caused outcry on occasion such as in May 1992 when a judge accepted drunkeness as a mitigating factor resulting in. two out of three skinheads convicted for an arson attack receiving suspended sentences and one receiving three and a half years imprisonment German law allows the authorities to ban racist organisations but there is reluctance to use this. A couple of organisations were banned in the 1950s, one a national socialist group and the other a communist group, and the Association Act of 1964 resulted in bans on five right-wing extremist organisation in the 1980s. German legislation does not permit positive discrimination on grounds of race (Article 3(3) of the Federal Constitution states that no one must be disadvantaged of favoured because of his race) although it allows positive provisions relating to sex discrimination.[52]

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51 Forbes, I. and Mead, G., op cit at Note 9, p. 42

52 This has been questioned in the ECJ however, see case law detailed in Chapter 6

Despite attempts to introduce anti racist legislation in 1990 and 1997, evidence of increasing racism and the rise of far right groups in Germany, as detailed in Chapter 1, German governments have not recognised the need to further tighten existing legislation. This has met with some recent criticism from Human Rights Watch particularly in relation to enforcement provisions[53].

In the Netherlands, non-discrimination is outlawed in the criminal code, which was revised in 1992, covering direct and indirect discrimination, civil codes and labour laws. There is also provision to apply to the Dutch ombudsman. Article 137 of the criminal code includes racial insult, incitement to hatred, discrimination and violence on racial grounds. Publicising or disseminating racist material is also an offence with penalties including fines and imprisonment up to one year. Persistent offenders may be disqualified from their connected occupation. Article 429 prohibits discrimination in employment, both direct and indirect, and outlaws taking part in or supporting activities which are aimed at discriminating against people on racial grounds, carrying penalties of up to two months. The law also empowers the court to dissolve racist organisations following an application by the Public Prosecutor, although this provision has not been used.

The Dutch civil code allows compensation to be paid to victims, but amounts paid have been very small. Legislation introduced in 1994 includes the Equal Treatment Act which uses the civil law to combat racial discrimination and prohibits direct and

[53] See website www.hrw.org

indirect discrimination and the Act on Improvement of Equal Participation of Ethnic Minorities in Labour Organisations. The latter seeks to encourage employers to recruit more ethnic minority employees on a quota basis relevant to the percentage of ethnic minorities in the region in question. The Act carries penalties for failure to comply but only a small number of employers have been reported as complying with the legislation.[54] Although the Dutch laws appear to be fairly extensive MacEwen opines that in practice the legislation has proved difficult to implement and the sanctions imposed have been light.[55]

Responsibility for implementing and monitoring legislation

France and Germany do not have national bodies equivalent to the UK's CRE and there is no obligation to publish annual reports or to assist in monitoring the legislation, although the recent proposals from the French Government allows for Labour Inspectors to monitor the workplace. Associations whose purpose is to fight racism, such as the League against Racism and Anti-Semitism, are allowed to initiate proceedings under the French criminal legislation and actions have been taken against newspapers and authors of racist pamphlets. Trade Unions representative powers to pursue employment related issues in France are in the process of being strengthened. Germany has a Federal Commissioner for the Integration of Foreign Workers who provides guidance and assistance for victims of discrimination. There are also a number of local authority bodies.

54 See ECRI website, op cit at Note 45

55 MacEwen, op cit at Note 14, p. 138

The Dutch Landelijk Bureau Racismebestrijding (LBR), bureau against racism was founded in 1985 by a number of ethnic minority organisations and the Netherlands Jurist Committee for Human Rights. Although funded by the Department of Justice it is not a statutory body and is independent. Through a network of regional offices it acts in an advisory capacity and provides guidance to individuals and groups. It has provided comment on government policy also. The Bureau has issued codes of practice on employment and housing but these do not have any legal effect, they are codes of honour. In 1995 an Equal Treatment Commission was established with powers to investigate, mediate and initiate court proceedings. As the Commission is relatively new it is too early to comment on its effectiveness. Early reports demonstrate that so far it has dealt with more complaints relating to gender than race [56].

2. 5 Summary

Presently the fifteen member states have different mechanisms for dealing with race discrimination ranging from constitutional provisions and no specific anti-racist laws to specific legislation[57]. The variety of measures to combat racial discrimination in employment have been severely criticised in a number of quarters[58].

Much of the anti-discrimination law in the EU Member States is complaints based and

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56 MacEwen, M., *Anti Discrimination Law Enforcement: A Comparative Perspective*, Ashgate, 1997, p.152

57 Employment protection legislation is particularly limited in Luxembourg, Belgium and Denmark as detailed in Forbes, I. and Mead, G., op cit at Note 9 and ECRI website op cit at Note 45

58 See, for example, Forbes, I. and Mead, G, ibid and Justice Report *The Union Divided, Race Discrimination and third country nationals in the EU,* 1997

concentrates on preventing discrimination against individuals rather than seeking to eradicate social disadvantage. The use of the law as an instrument for social change is a controversial one [59] as the law does not have mystical powers and is not a panacea. Legislating to change beliefs and attitudes is particularly problematic and public policies in employment, education and housing, for example, also have a role to play. Neverthless the rule of law and legislation can assist in promoting and encouraging equal opportunities and provide some redress for victims of discrimination. Arguably, it also has a role to play in establishing and shaping acceptable behaviour in Society. Evidence of increasing racism and discrimination, as detailed in Chapter 1, and low participation rates in employment suggests that the measures enacted throughout the EU thus far have not been particularly effective.

Reports have highlighted the different approaches and varying levels of sophistication of Member States' race discrimination policies. Access to the law is more difficult in some countries than others as the remedies and penalties involved are vastly different. The *"dearth of jurisprudence"* has been identified as a matter of concern but is said to be due to overburdened legal systems, prohibitive costs, difficulty in securing evidence, lack of support from police and public prosecutors and general unfamiliarity with the legal remedies available[60].

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[59] See, for example, Lustgarten , L. and Edwards, J. op cit at Note 8, p. 271, Hepple, B., op cit at Note 26, p. 19.

[60] Commission Report, op cit at Note 6 , p.75

One of the first major studies to examine legislative measures in the Member States[61] grouped the countries together according to measures that have been enacted and concluded that Britain and the Netherlands have moved toward the multi-cultural approach and are at the forefront. France and Germany are included in the second group just ahead of Spain and Italy, with the remainder of the countries in the Community at that time being grouped lower down. Few systems allow positive discrimination or encourage positive action despite encouragement from the ICERD.

Evidence on the effectiveness or otherwise of legislation is difficult to measure, not least because of poor monitoring systems and lack of statistical data. The evidence of racial and ethnic tensions in Europe is mounting, however, and the issue of race equality (and related forms of discrimination on grounds of difference such as culture and religion directed at ethnic minorities) needs to be tackled across the EU to remove inequalities and facilitate free movement of people in the increasingly global marketplace. Due to the relatively slow pace of change, there is growing awareness of the need for some form of positive action, as detailed in Chapter 9.

Prior to the Amsterdam Treaty, the EC/EU continually resisted attempts to introduce an EU wide policy, as detailed in Part Two. Despite the fact that the UK is widely acknowledged as having the best race relations laws in the EU this did not prompt the previous UK Conservative Government to seek to protect its domestic legislation, which is in sharp contrast to the French Government's vigorous efforts to protect its equal pay

61 Forbes, I., and Mead, G., op cit at Note 9, p.74

laws when the Treaty of Rome was initially negotiated[62]. This demonstrated the determination to retain sovereignty in this area. Although the present UK Government appear to be more supportive of EU wide legislation and competence in the area of race discrimination was granted at Amsterdam, controversy surrounds the interpretation of the non-discrimination clause contained in Article 13[63]. The EU Commission recently issued proposals for a framework directive and directive on race which will form the basis for future discussions in the EU. These are detailed in Part Three, Chapter 9, "The Way Forward".

As free movement is potentially hampered by restrictive controls, and immigration measures are often used as a means of combating racism, an examination of immigration flow in the EU and immigration law in selected member states follows in chapter 3 before moving on to the substantive EU issues raised in Part Two.

[62] Former Article119 was inserted as the French government did not want its equal pay laws undermined by the other member States

[63] See discussion in Chapters 8 and 9.

CHAPTER 3

RECENT IMMIGRATION FLOWS IN THE EU AND IMMIGRATION LAWS IN SELECTED MEMBER STATES: THE UK, FRANCE, GERMANY AND THE NETHERLANDS

3.1 Immigration flow in the EU and approaches to immigration law

The rules on immigration, refugees and asylum are relevant to this thesis as they are connected with equality of opportunity for minority groups and they impact on freedom of movement of people[1]. Acquisition of nationality[2] is also worthy of examination within this context as the granting of nationality will legally remove the individual from the category of "*immigrant*" and grant a number of rights. The EU facilitates free movement of nationals of Member States, in particular those granted EU Citizenship.[3]

The increase in movement of people with falling borders, national conflicts, economic change and globalized trading is a fact of life and millions of people are now involved in

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1 The right of free movement in the EU is connected to nationality i.e. nationals of EU States (third country national may have rights as a family member of a Community worker or under agreements such as the EEA), and acquisition of EU nationality and citizenship grants a number of important rights as discussed in chapters 7 and 8. Distinctions between citizenship and nationality are also examined in chapter 7

2 Ways of acquiring nationality of a given States vary. In some States it may be as simple as being born in that State (Jus soli) whilst in others a more stringent test is applied (Jus Sanguinis) determined by the principle of descent i.e. the nationality of the parent(s). States do not rely solely on one principle but tend to emphasise one more that the other. Other ways of acquiring nationality include marrying a national or naturalisation.

some sort of migration, both economic and forced. Increasing importance is attached to moving freely across borders without unnecessary and unwarranted restrictions.

The majority of countries in Europe experienced increasing numbers of immigrants from different races and cultures following the second world war. A Commission Report[4] on racism and xenophobia, commenting on immigration to Member States highlights that although there was fairly steady immigration after 1954, the percentage in 1982 was almost identical to that of 60 or even 150 years ago, around 6.8% of the population. Immigration stabilized in 1975 and slowed down somewhat with the biggest change occurring in the origins of immigrants. Conflicts, upheavals and economic depression outside the European Community in the 1980s and 1990s resulted in a huge movement of people and increases in the numbers seeking refuge. The number of requests for political asylum in Members States tripled between 1987 and 1991 reaching a peak at 696,000 in 1992 due largely to the war in ex-Yugoslavia (see *Table 4).*

Tighter immigration policies proliferated as countries attempted to tighten their borders to non-nationals to prevent an influx capable of abusing state benefit systems. As detailed in Chapter 1, some countries stirred up visions of hordes of immigrants coming to enjoy the benefits of the welfare state and taking the jobs of nationals. The potential

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3 See Chapter 7 and 8 for discussion of the issues connected with citizenship

4 Commission of the European Communities Report *Legal Instruments to Combat Racism and Xenophobia,* 1992, V/6332193-EN, p. 15

to cause a racist backlash against ethnic minorities and visible minorities in particular, when unemployment increased across the Community and Union was enormous.

Approaches to immigration vary. Assimilation strategies emphasis the culture of the host country and expect migrants to adapt accordingly whereas integration strategies recognise diversity and attempt to assist migrants to integrate into society. Some countries consider themselves to be immigration societies adopting a "*positive*" welcoming stance towards migrants recognising the contribution they make. Immigrants entitlement to claim the full rights of citizenship has proved controversial, as detailed below and in Chapter 7, and the concept of *"Denizenship"*, whereby "*foreigners*" are granted limited rights and residence has been mooted in some quarters[5].

Presently there is no comprehensive EU policy on immigration and Member States laws are contained in a variety of sources, including constitutional provisions. Historically the EU has had difficulty accepting any formal competence in the field of immigration but Member States engaged in a series of conventions, meetings and agreements, such as Schengen and the Dublin Convention[6], largely conducted in semi-secrecy outside the legal framework of the EU and although each Member State has its own immigration

5 See, for example, Peers, S., *Fortress Europe: The Development of EU Immigration Law* (1998) 35 CMLRev 1271

6 Schengen is concerned with border controls and the Dublin Convention determines the State responsible for examining asylum applications as detailed in Chapters 4 , 5 and 8

and nationality laws there have been attempts to harmonise these[7] (*see Table 3).* The consequences of this are detailed in this Chapter. The developing EU immigration policy is detailed in Chapters 4 and 5. The Treaty of Amsterdam 1997 granted competence in the area of migration and the implications for future EU policy is examined in Chapters 8 and 9.

Despite the fact that a 1995 Commission report on immigration in the EU highlighted an overall decrease in migration and asylum seekers across the Member States[8] and a 1998 Eurostat survey (*Table 4*) confirmed that the downward trend was continuing with a 16% decrease in asylum applications, asylum seekers still appeared to be one of the main subjects of concern. The decrease in applications had no visible effect on Member States policies. Some countries witnessed a decrease in legal immigration including Italy, Spain, Finland, France the Netherlands, Germany and the UK, whilst Denmark, Ireland, Belgium, Austria and Luxembourg experienced an overall increase. Figures for Greece are less reliable and have to be viewed with caution due to the scale of illegal immigration. According to a 1996 study by the Piracus Trade Union Confederation the number of foreigners living in the country was in excess of 600,000

7 For example, resolutions on family reunion June 1993, admission for employment June 1994, integration of existing legal residents March 1996, self employed and students December 1994 marriages of convenience December 1997. In addition, Recommendations on checking illegal immigrants and employees were agreed in 1995 and September 1996. These are detailed in Chapter 5

8 European Commission Report, T*he Member States of the EU and Immigration in 1994: Less Tolerance and Tighter Control Policies*, RIMET, 1995, p.9

with only 5% possessing a valid work permit [9]. The downward trend was reversed in 1997/8 due to the crisis in Bosnia and Kosova. In 1998 366,000 applications from asylum seekers were recorded across Europe compared to 288,000 in 1997 (an increase of 27%) and 260,000 applications in 1996. The survey noted, however, that although the EU still receives the majority of asylum seekers across Europe the EU's share fell from 88% in 1997 to 82% in 1998, perhaps reflecting the tighter controls across the EU[10].

The increase in refugee and asylum seekers has resulted in strains being placed on Member States but it has to be put in perspective. Many of the applicants are fleeing from civil wars and regimes practising genocide. The increases also have to be in the context of the falling population across the EU[11].

3.2 International provision on immigration, refugees and asylum controls

All Member States are party to a number of international treaties and Conventions containing provisions relating to immigration *(Table 1)*. Of particular relevance is the UN Convention of 1951 relating to the Status of Refugees, 1967 Protocol, International Covenant on Civil and Political Rights 1966, and the European Convention of Human Rights. Each of the treaties and conventions contain provisions relating to fair

9 Due to the increasing number of illegal immigrants, Greece attempted to legalise the status of its illegal migrants in 1997 by granting temporary work permits prior to issuing renewable two year residence permits. This was reported as causing disagreement amongst EU governments as it was claimed that it was encouraging illegal immigrants to flee to Greece and that these immigrants could eventually move to other EU countries, *The Guardian*, 6th January 1998, *"EU Passport free regime buckles"*

10 UNHCR Statistics, *"Asylum Seekers in 1998"*, Geneva , January 1999. See website www.unhcr.ch/statist

procedures and appeal rights. The Convention relating to the Status of Refugees 1951 and Protocol 1967 include that the *"expulsion of refugees shall be only in pursuance of a decision reached in accordance with due process of law"* (Article 32) and *"no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"* (Article 33).

The difficulties associated with enforcing international treaties, as detailed in Chapter 2, have resulted in international measures being undermined and enforcement virtually impossible. EU Member States have been accused of violating international conventions[12]. However, some Member States are unrepentant claiming that some of the international provisions are *"out of date"* and in need of reform[13]

The agreement to harmonise EU immigration laws has led to a number of changes to domestic laws. Member States immigration policies have tended to influence each other. The next section examines the impact of these changes on the UK and also provides an overview of the impact on selected Member States, namely France, Germany and the Netherlands. EU policy developments are examined in part Two.

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11 Agence Europe 7629, 8 January 2000, reports on the Eurostat figures which reveal that births are falling and shows that "natural growth account for around one quarter of the total increase in the population and confirm the importance of international migration, with is responsible for the remaining three quarters"

12 See for example, *Institute of Race Relations, Europe on Trial*, Indictment laid before the Basso Tribunal on the Right of Asylum in Europe, Berlin 8-12 December 1994 and Report commissioned by the EU Commission in 1998 which reported as having to be sanitised before publication as it criticised the "inhumane and degrading treatment of detainees", *The Guardian*, 9th October 1998, *"Europe's human rights rhetoric at odds with reality"*

13 See, for example, the Austrian Presidency *Strategy paper on migration and asylum policy*, 1.6.98

3.3 British Immigration, Asylum and Refugee Laws

3.3.1 Country profile, including acquisition of nationality

The UK has the second largest percentage *"visible minority"* population in the EU according to the Forbes and Mead survey[14]. This is not surprising given the UK's colonial background . A Eurostat report in 1993 highlighted that the UK had the third highest number of Non-EU citizens (11%), after Germany and France. The number of asylum seekers sharply decreased from 44,800 in 1991 to 24,600 in 1992 and although numbers increased again in 1993, the UK witnessed one of the highest percentage decreases in asylum seekers from 54,988 in 1995 to 29,642 in 1996, a decrease of 46%. The latest UNCHR figures, which highlight an increase in asylum seekers across Europe in 1997/98, identify the UK as receiving the third largest number of asylum seekers, behind Germany and The Netherlands. According to the UNCHR figures the UK received 58,000 applications in 1988 compared to 41,500 in 1997 (see *Table 4)*. Although the figures released by the Home Office, which claim to be more accurate, record 46,000 in 1998 this is still an increase on the previous year Recent Home Office figures have highlighted an increase in monthly asylum applications from 3,500 in 1998 to 6,000 in 1999[15] and the yearly figures released in January 2000 show a marked increase of 55% on the previous year[16]

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14 Forbes, I. & Mead, G., *Measure for Measure: A Comparative Analysis of Measures to Combat Racial Discrimination in the Member Countries of the European Community*, UK Department of Employment, 1992

15 *The Guardian* 24th August 1999, *"Asylum shambles rooted in Tory cuts"*

16 *The Guardian*, 26th January 2000, *"Asylum seekers up 55% as backlog grows"*

The UK labour market has traditionally relied on gaps being filled by immigrants from former colonies, such as India and the West Indies. A number of these immigrants have been granted or have applied for British nationality. Nationality laws changed in 1948 when new categories had to be introduced to accommodate the independent commonwealth states. Primary nationality was determined by individual countries if it was a self-governing state e.g. Canada, India, Australia allowing the status of British subjects or commonwealth citizens. Self-governing Commonwealth States could grant their own citizenships. According to Nicol[17], the intention was to grant political rights to each other's citizens. However, as the UK Representation of the People Act 1949 limited the vote to residents and Irish citizens, few citizens of Commonwealth countries (apart from Britain) were entitled to vote in British elections.

British citizenship is acquired in four ways; birth (or adoption), descent, registration or naturalisation and is based on the principle of jus soli. The British Nationality Act 1981 abolished the category of citizen of the UK and Colonies and people connected with a colony became British Dependent Territories' citizens with others British overseas citizens. Since 1st January 1983 children born in the UK acquire British citizenship if one parent, at least, is a British citizen or *"settled"* in accordance with the Act[18]. The 1981 Act permits a British woman to transfer citizenship to a child born outside the UK whether she is married or not but a British father cannot transmit citizenship to an

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17 Nicol. A., *Nationality and Immigration in the UK*, in Blackburn, R. (ed.), *Rights of Citizenship*, Mansell, 1993

18 "*Settled*" is defined as lawfully resident without a time restriction on his/her stay

illegitimate child. Citizenship is not automatically acquired by a second generation born abroad but can be available by registration.

As regards naturalisation, two types exist under Schedule 1 of the 1981 Act. The first is for spouses of British citizens and the second for all others. This second category lays down a number of requirements including a five year residence period, good character, sufficient knowledge of either English, Welsh or Scottish Gaelic and intention to make their principal home in the UK or Crown service or continue in the service of an international organisation or company established in the UK. Naturalisation is issued on discretion and there is no right of appeal against refusal. Although the Act states that this discretion must be exercised without regard to the race, colour or religion of the applicant as the process is conducted in secret and there is no right of appeal or need to give reasons for refusal a refusal would be difficult to challenge on these grounds. Such decisions could be vulnerable to judicial review though[19]. Dual citizenship is allowed under the 1981 Act.

3.3.2 British Immigration Policy and Practice

In the 1960s immigration legislation became more restrictive with rising unemployment and racial tensions emerging. The Commonwealth Immigrants Acts of 1962 and 1968 restricted the right to enter Britain as witnessed when Britain refused entry to large numbers of East African Asians in 1968. This was condemned by the European Commission of Human Rights as violating the guarantee in Articles 3 and 14 and in

[19] See Anisminic (1969) 1 All ER 208

contravention of the Fourth Protocol, which the UK refused to sign, that *"No one shall be deprived of the right to enter the territory of the State of which he is a national".* A number of East African Asians claimed that the UK's actions amounted to degrading treatment, contrary to Article 3 ECHR and the Commonwealth Immigrants Acts 1968 and had been motivated by racism, contrary to Article 14 ECHR. Although the case was held to be admissible it was held up for years. The British government did not repeal the 1968 Act but instead increased its quota of vouchers for East Africa and admitted liability in respect of the individuals complaints[20]. The case did not proceed to the court and the decision by the Commission was not formally published. The Immigration Act of 1971 categorised certain Commonwealth citizens who 'belonged' to Britain. Nicol commented .... *the debate was infused with racism and it was no coincidence that the belongers were in the main white and those excluded principally black"*[21]. It has been argued that the legislation of the 60s and 70s resulted in aggravating the race relations situation in the UK. [22]

The UK's *"Primary purpose"* marriage rule was introduced in 1983. Its aim was to deny citizenship to people taking part in a marriage purely to secure rights of entry or settlement in the UK. The rules were severely criticised by a number of groups including the Joint Council for the Welfare of Immigrants and Justice as being *"grossly*

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20 *East African Asians Case* (1981) 3EHRR76

21 Nicol, op. cit at note 17.

22 Dummet, A and Nicol A., *Subjects, Citizens, Aliens and Others,* Wiedenfield and Nicolson 1990

unfair and unnecessary"[23]. Family re-unification is adversely affected by the application of the rule. The CRE gave evidence to the House of Lords Select Committee on the European Communities (1993) and asserted that the rules were discriminatory against ethnic minorities. The European Court of Justice criticised the rules in *R v Immigration Appeal Tribunal and Surinder Singh Ex parte Secretary of State for the Home department*[24]. However, a number of EU countries, including the Netherlands and France, have recently pursued the same legislative route. This was prior to the Resolution on marriages of convenience agreed in December 1997 by the Council of Justice and Home Affairs, referred to below.

British immigration law enacted under successive Conservative governments in the 1990s continued to be criticised by a number of UK and international human rights groups. The law empowers immigration officials to impose subjective tests on individuals entering the UK. The 1990s also saw the UK Carriers Liability Act 1987 taking effect. The UK was the first Member State (largely due to its geographical position) to impose fines on Airlines for carrying passengers without travel documents, other EU States, including Germany (1987), France (1992) and The Netherlands (1997) followed with similar policies. The UK recently extended carriers liability to other forms of transport including the Channel Tunnel link[25].

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23 Justice Report, *The Primary Purpose Rule: A rule with no purpose*, 1993 Working Party chaired by David Pannick QC

24 Case C-370/90 (1992) ECR I-4265, detailed in chapter 6.7, which decided that family members of British citizens who have genuinely exercised free movement rights in other Member States must be granted leave to enter and reside in its territory, regardless of nationality, as are other EU nationals who wish to bring their non-EU family member to live in the UK.

25 See, Statewatch Vol 8 No 2 March/April 1998, p. 4

The Asylum and Immigration Appeals Act 1993 was also attacked by the JCWI as being *"anti-black family"* and described as *"one step forward and two steps back"*[26]. Figures published by the Refugee Council demonstrated that refusal of applications increased dramatically from 16-75% during the first 15 months[27]. The original Asylum and Immigration Bill was intended to impose tighter restrictions on asylum-seekers and weed out *"economic migrants"* as the Conservative Government in the 1990s believed that the UK was not in a position to take on large numbers of migrants. This view was formed despite a 1992 Government publication which projected a fall in the UKs population and a report which highlighted the fact that the majority of immigrants were coming from the white Commonwealth, Europe and the US.[28]

The UK was under increasing international pressure in 1991/92, particularly from Germany, as it was not seen to be playing its part in the distribution of asylum seekers. Although increased rights were given under the 1993 Asylum and Immigration Act to those claiming refugee status, provisions were controversially included to end the right of appeal against refusal by an immigration official to grant entry to the UK as a visitor or prospective student, resulting in anger among Britain's black communities as two thirds of the average 10, 000 annual appeals against refusal were upheld. Munir [29] reported that 3,845 decisions refusing a visitor's visa were reversed on appeal in 1992.

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26 Munir, E., *One Step Forward and Two Steps Back,* New Law Journal 6th August 1993

27 Statewatch Vol. 5 No. 1, January/February 1995

28 TUC Report, Vol. 13, No 2, March 1992, The Jim Conway Memorial Foundation

29 Munir, E., op cit at note 26

He opined that it was difficult to justify the removal of these basic rights in international law.

The number of people deported or removed from the UK was reported by the Joint Council for the Welfare of Immigrants Annual Report 1991/2 as having *"reached an all time high"*. Matters came to a head in December 1993 with the deportation of Jamaican holiday makers on Christmas Day and reports that refusals of entry for Jamaican nationals had reached *"outrageous"* proportions with *"one in every 409 Jamaicans being rejected"* and *"one in four Bangladeshis and Ghananians being refused entry but only one in 3012 US citizens refused".*[30]

The Asylum and Immigration Act 1996 continued to tighten the grip on asylum seekers. It established a *"white"* list of safe countries of origin which presumed that those countries were safe to return asylum seekers to, deprived in-country and rejected asylum seekers the right to claim benefits and introduced employer sanctions along the lines discussed in intergovernmental meetings.

The controversial immigration legislation did not end with the Conservative government's reign in 1997 . The Labour Government of 1997 had agreed to review the laws when it came to power but following the election it backed away from its promises. Instead it claimed it would not enforce the controversial parts, for example, the employer sanctions. The Government abolished the primary purpose rule in 1997, although the one-year probation rule for new marriages and the tight family reunion

rules for adult relative still apply. The positive signals were short lived, however, as six months after the UK's Home Secretary announced measures to abolish the primary purpose rule the UK agreed to a resolution at the Council of Justice and Home Affairs Ministers in December 1997 to combat marriages of convenience, outlined in Chapter 8.

Signs of a breakdown in the UK immigration procedures were visible by 1998 when one London Borough, Ealing, refused to assist any more refuges and asylum seekers and challenged refugee organisations to sort out *"the mess"*. The Labour government, in opposition, opposed the removal of benefits from refugees. In power, however, they put forward the Immigration and Asylum Bill 1999, which received Royal Assent in November 1999. The Act attempts to crack down on *"bogus"* asylum seekers, provides food vouchers rather than cash, extends the use of finger printing and plans to forcibly disperse people. The latter proposal could result in refugees being isolated and vulnerable to attack by fascist and racist groups, as witnessed in parts of Germany. These proposals have once again resulted in street protests and condemnation by a number of civil liberties and human rights groups[31] and are in sharp contrast to the UK's stance on burden sharing across the EU detailed in Chapter 5.

3. 4. French, German and Dutch Immigration, Asylum and Refugees laws

In common with the UK, all three countries have tightened their immigration policies and introduced laws along the lines of the EU's harmonised policies on family

30 *The Independent* 29th December 1993, *Jamaican immigration rules 'racist'*

31 See Statewatch, Vol 9 No. 3, May-August 1999, p.20

reunification, admission of third country nationals for employment, asylum claims and combating illegal immigration.

3.4.1 Country profiles

France had two major periods of immigration, between 1920 and 1921 and between 1950 and 1973, when Turks, Yugoslavs and Moroccans sought employment in large numbers. In the 1950s and 60s labour was so urgently in demand that employers did not conceal the fact that they were hiring undocumented labour. Immigrants from former French colonies and overseas territories with French citizenship make up a large percentage of immigrant and ethnic minority populations in France today.

The number of non-French Citizens in France is around 8%. The Eurostat survey on documented residents reports that at 1st January 1991, France had the second largest percentage of other EU citizens (26%) and the second largest percentage of non-EU Citizens (24%). Of the non-EU citizens resident in France, as a percentage of the total population, 1. 1 % Algerian, 1 % Moroccan, 0. 4% Tunisian and 1. 6 other non-EU countries . Between 1990-1993 France witnessed the highest number of naturalisations (223,00) according to a Eurostat 1995 survey[32]. In common with a number of other Member States France received fewer asylum applications in 1996, 17,153, than the previous year when it received 20,415. Although UNHCR statistics highlight an

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32 Eurostat Survey 1995-11, Acquisition of Citizenship by naturalisation in the EU. These figures need to be compared to the number of non-nationals resident to comment on their accessibility though. Two thirds of non-nationals live in Germany, France and the UK but The Netherlands and Sweden actually witnessed the highest ratio of naturalisations to their non-national population

increase in asylum applications across Europe in 1998, with the majority of Member States registering increases, France was the only major destination which did not record a significant rise (see *Table 4)*.

Post-war immigration in Germany began in the 50s. Recruitment countries included Greece, Italy, Yugoslavia, Korea, Morocco, Portugal, Spain Turkey and Tunisia. They became known as *"Gasterbeiter"* (guest workers) and many of them returned home after a few years. Recruitment of foreign labour came to an end in 1973 and some of the foreign workers remained in Germany. The need for integration of immigrants led to Berlin being the first state to appoint a Commissioner of Foreigners' Affairs who has a number of duties including examining measures to improve integration.

The proportion of non-Germans living in Germany is around 6% according to the Commissioner of Foreigners' Affairs of the Berlin Senat (CFABS). Data on documented residents contained in the Eurostat survey (referring to the territorial situation prior to October 1990) reports that Germany, with the largest population in the EU, has the highest percentage of other EU citizens (29%) and non-EU Citizens (43%).Of the non-EU citizens, as a percentage of the total population, around 2,7% are Turkish, 1% Yugoslavian, 0.4% Polish and 2.1 % for other non-EU countries as at 1st January 1991. Berlin houses about 350,000 non-German residents, making up about 10% of the population. The CFABS reports that more than half of the *"foreigners"* in Berlin were born there or grew up there. It is often only their passport which distinguishes them from the Germans. Germany has traditionally experienced the largest number of asylum seekers in the EU, rising from 370,400 in 1982 to 440,000 in 1992. In common with a

large number of other EU states, Germany experienced a decrease in later years, 129,517 in 1995 and 117,333 in 1996. As in the previous four years approximately half of all asylum seekers were registered in Germany in 1996. Recent UNHCR figures highlight that Germany continues to receive the largest number of asylum seekers but that there has been a 6% drop in applications compared to other EU countries, with Germany receiving 99,000 in 1998 (see *Table 4)* [33].

The Dutch government started to restrict immigration after the second world war. Due to its colonial ties, the majority of "*immigrants*" are from former Dutch colonies and have Dutch nationality. Asylum figures have decreased to 17,600 in 1992, a reduction of 25% from 1991. Figures fluctuated between 1992-1994 and in 1995 29,258 applications were received. A 22% decrease was witnessed in 1996 with 22,857 applications. The latest UNHCR figures report an increase in the number of applications across Europe with the Netherlands receiving 45,000 in 1998, the third largest number of asylum seekers (see *Table 4).*

The minority population in the Netherlands is around 8% of the total. According to data collected by Forbes and Mead in 1992 the Netherlands had the largest percentage *"visible minority"* population in the EU at 4.9%. However, due to its relatively small population, the Eurostat 1993 survey[34] lumps it together with Belgium and Luxembourg to reveal that 17% of other EU citizens reside there and 9% of non-EU citizens. Approximately 1.4% are Turkish, 1% Moroccan 0.1% Surunamese and 1% other non-

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[34] Eurostat 1993-6 *Population by Citizenship in the EC,* 1.ll.1991., the first survey of this nature

EU countries. The rate of unemployment of minorities is three times as high as that of the majority population, reported at 27% for Turks and 44% for Moroccans[35].

Acquisition of nationality

Naturalization policies have traditionally been more liberal in France than other EU States. French nationality law is based on the principle jus soli and stems from the Napoleonic Civil Law with the definition of nationality via birth rights rather than residence although changes in 1993 have affected this principle. French law now prevents children of parents born in a former French colony from claiming nationality, undermining the long established principle of jus soli.

The acquisition of German nationality is linked to the nationality of the parents on the principle of jus sanguinis and people of German origin forming minorities in other countries can therefore claim citizenship on proving that their ancestors were German. This liberal approach is in sharp contrast to the attitude taken towards other groups interested in German citizenship, such as non-German children born in Germany, and the fairly tough residency requirements applied to economic migrants without German ancestry. The administrative regulations controlling naturalisation are not particularly supportive of the principle of naturalisation as they state that *"the Federal Republic is not a country of immigration and does not strive to increase the number of its citizens through naturalisation"*[36], naturalization is viewed as an exceptional privilege.

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35 Commission Report 1994, p.68

36 See Brubaker R., *Citizenship and Nationality in France and Germany,* Harvard University Press 1994 p.77

Non ethnic Germans applying for naturalisation had to be resident for ten years or, since 1991, eight years if they fell into a certain category of second generation immigrants [37]. German law does not recognise dual citizenship and applicants for naturalisation must renounce their original citizenship. According to the CFABS Berlin has granted the most citizenships probably due to the fact that Berlin advertises and mentions all the advantages of becoming a German citizen. However, it has been argued that the relatively small numbers of those eligible who seek citizenship is due to a desire to retain their original citizenship[38].

In recent years Parliamentary debates considered whether children born in Germany should obtain German nationality. In May 1999 the German parliament finally accepted a Bill to reform Germany's 85 year old citizenship law. The law comes into force in January 2000 and enables children born in Germany to obtain citizenship if at least one parent has been legally resident in Germany for eight years. Additionally adults can also apply for naturalisation after eight year residency if they are not dependent on social security and do not have a significant criminal record. It will not allow dual Citizenship however and a number of long term residents are therefore unlikely to apply for German citizenship. The Netherlands, on the other hand, have witnessed an increase in applications for citizenship since 1992 when dual citizenship was allowed .

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37 People between 16-23 are generally granted citizenship if they renounce their previous citizenship, have resided legally in Germany for 8 years, have attended school in Germany for six years and have no criminal record

38 Of the 15 million Turks in Germany over 1 million have been resident ten or more years, and more than 400,000 were born there but only about 1,000 acquire German citizenship each year, Brubaker, op cit at note , 36, p.78

This resulted in The Netherlands and Sweden receiving the highest number of naturalisations to their resident non-national population in the EU.

3.4.2 French, German and Dutch Immigration Policy and Practice

In 1993 Charles Pasqua, on behalf of the French Government, announced its aim of curbing immigration and bringing it *"close to nil"* as *"France no longer wants to be a country of immigration"*[39]. In late 1993 Pasqua became more explicit about his purpose and asserted that France needed to *"re-establish her sovereignty on her own soil"* and warned Muslims in France *"not to carry out on our territory political activity contrary to the interest of the French Government"* [40]. Attempts to restrict immigration ever further occurred in 1993 and the Government was accused of attempting to *"marginalise France's North African population*[41]. The French government claimed that its goal was to expel 20,000 a year arguing that immigrants are often involved in crime including drug trafficking.

German law has also been tightened.[42] The German parliament approved controversial changes to the German constitution in May 1993. Article 16[43] of the Basic Law was

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39 *Le Monde* 2 June 1993

40 *Le Monde* 7-8 November 1993

41 Husband, C., *They must obey our laws and customs: Political Debate about muslim assimilation in Great Britain, France and The Netherlands* in *Racism, Ethnicity and Politics in Contemporary Europe*, Hargreaves, A., and Leaman, L, (Editors), Edward Elgar Publishing Company, 1995, p. 120

42 The law does not formally recognise the notion of immigrants and they are identified as "foreigners" or "aliens" until they have acquired German nationality. The law controlling entrance to Germany is the Auslandergesetz (Foreigners or Aliens Law) and it attempts to control immigration by provisions relating to the period of validity of residence permits and the right of family unification[42].

repealed and a new Article 16a inserted aimed at preventing abuse of the right of asylum and allowing compliance with the Schengen Agreement and Dublin Convention[44]. People arriving via another Member State of the EU or another country party to the Geneva Convention on Refugees and the ECHR cannot claim asylum and are deported without a right of appeal. Measures were also introduced in 1993 in accordance with the *"Community preference"* rule[45] to encourage employers to hire Germans or *"privileged foreigners"*. The tighter laws could be having some affect as the latest UNCHR asylum figures report a 6% decrease in applications.

In the Netherlands laws to restrict foreigners rights to the Dutch labour market were tightened up in 1979, labour permits were limited to employers who experienced difficulty in recruiting Dutch or EU labour. A parliamentary submission in January 1994 proposed a crackdown on illegal working, stricter control on entry and more effective deportation procedures. The Law on Foreigners which was effective from 1st January 1994 and the Justice Ministry's circular on foreigners in February 1994 set out to fulfil these aims. Amendments intended to reduce the number of *"admissible"* applications for

43 Since the second World War Germany's policy on asylum has been fairly liberal. Article 16 of its Constitution (Grundgesetz) allowed anyone applying for German citizenship to stay while their application was processed and many applicants not eligible for citizenship managed to stay in Germany for several years before being extradited. Very few refugees left the country as residents from civil war countries were entitled to stay until the war was over and an estimated 20% of refugees disappear, some destroying documents of country of nationality so Germany could not send them back. The rise in asylum seekers in the late 1980s and early 1990s, the fall of the Berlin wall and the rise in racist attacks forced Germany to reconsider its policies towards refugees and immigrants.

44 Refer to Chapters 4 and 5 for details of Schengen and Dublin Convention

45 The rule sets out that a work permit should be refused if job seekers with the required qualifications are already in the country or in another Member State, see details in Chapter 5

asylum, strengthen the selection criteria, exclude *"obviously unfounded applications"*, withdraw appeal rights and listed *"no-risk"* countries of origin'

The 1994 Dutch Foreign Nationals Employment Act attempted to combat illegal working and tighten policies in line with the *"Community preference"* rule. Since the end of 1995, 100 asylum seekers have attempted suicide, 20 successfully.[46] Despite these statistics, the Dutch government announced towards the end of 1997 that it intended to tighten refugee and asylum rules even further. The proposals included deporting people arriving without valid papers who cannot prove that they did not deliberately destroy them in order to avoid being deported. On a more positive note however plans were also announced to introduce legislation to allow asylum seekers a right of appeal.

Family re-unification policies have also become more restrictive across the EU. New family reunification requirement were introduced in the Netherlands in 1993 requiring evidence of adequate housing and *"sufficient"* finances before bringing in partners. Evidence of having a guaranteed income for at least a year which is equal to the basic minimum wage is required. Automatic entitlement to family reunification lapses if family members do not join the applicant with three years of the applicant's arrival. Although the Netherlands witnessed the third largest number of asylum seekers in1998, broadly in line with previous years, its percentage increase was in the bottom half

[46] Institute of Race Relations European Race Audit Bulletin No 22, March 1997

perhaps reflecting an awareness of The Netherlands increasingly restrictive immigration policies.

French amendments affecting family re-unification require immigrants to be legally resident in France for two years, previously one year, and the local mayor must provide a *"reasoned opinion"* before their families can enter. A number of protesters, including the French immigrants rights organisation Groupe Information et de Soutien des Travailleurs Immigres, claimed the amendments violated constitutional and international law.

In an amazing departure from the previous French Conservative governments and the general *"Fortress Europe"* mentality of EU governments, the Socialist French Government elected in 1997 pledged to overturn the previous restrictive immigration measures enacted in France. In June 1997 it was announced that around 40,000 illegal immigrants and political refugees were to receive resident permits[47]. Lionel Jospin the new prime minister was seen to be publicly rejecting the ideals of the racist National Front. Orders were given to provincial authorities to speed up residence papers to families and individuals complying with one of six conditions. The conditions favour those integrated into the French way of life who have declared a wish to be naturalised, partners of French people or legal immigrants and parents of children born in France.

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[47] *The Guardian*, 11 June 1997, *"Paris reverses Gaullist stand on immigration"*

By October 1997, however, the government appeared to be backing down from its original promises on immigration and disputes were beginning to surface which led to protests within France. The French government was accused of failing to fulfil its pre election promise to abolish the controversial immigration laws. Although tensions were somewhat relieved by the change of attitude towards *"immigrants"* following the success of the French football team in the World Cup, France is still very much associated with its assimilation policies and the extreme Front National. It is not surprising therefore that, according to the UNHCR 1998 statistics asylum applications, France witnessed a greater decrease of applications than any other major EU destination.

3.5 Summary

The EU has not acknowledged any link between immigration policies and attempts to combat racism and xenophobia. The two are inextricably linked however as minority groups are disproportionately affected by immigration laws. A European Commission report commenting on legal measures to combat racism, discrimination and xenophobia acknowledged that tight immigration measures have been identified by Governments as an important mechanism for combating racism and xenophobia.

Immigration, refugee and asylum laws can, arguably, alleviate fears of being *"flooded"* and reduce tensions between minorities and the majority but measures so far enacted, often in haste due to alarmist fears, have the potential to fuel racism and xenophobia. Governments have used immigration legislation to preserve national identify and limit access to national resources. The Commission warned that overly restrictive measures

can violate the human rights of individuals under both national and international law and contribute to a climate of xenophobia [48]

Recent changes in EU Member States nationality and immigration laws, as outlined above, have been prompted by harmonisation measures as detailed in Chapters 4 and 5. States have been spurred on by each others legislation, sometimes legitimised as being necessary to comply with EU measures such as the Schengen agreement. This has resulted in a *"Fortress Europe"* mentality. During the last decade or so, Member States have systematically tightened policies and it has been argued that *"..nearly all EC and EFTA states have set out to make it impossible for immigrants and asylum seekers to enter Europe*[49]. Due to enlargement, further restrictions are also taking place in countries hoping to secure EU membership. Reports in the media claim that prospective members are bowing to pressure from Brussels and Germany as aspiring EU members of central Europe are curbing free passage, imposing bureaucratic obstacles and introducing visa requirements[50]. Poland is reported as tightening controls via a new Aliens Law which requires proof that people traditionally permitted to cross their borders, such as Ukrainians and Lithuanians, have sufficient funds for their stay. The Czech interior minister recently issued a list of 12 countries, including Russia, who will require visas.

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48 Op cit at Note 4

49 Webber, E, *The New Europe: immigration and asylum,* in Bunyan, T. (ed) *Statewatching the new Europe: a handbook on the European State,* Statewatch 1993, p. 131

50 *The Guardian* 9 February 1998, *Fortress Europe shuts window to the east*

Despite evidence highlighting a decrease in asylum seekers between 1993-1996 European governments, regardless of political persuasion, demonstrated their willingness to tighten immigration measures including restrictive carrier sanctions, naturalisation policies, family re-unification, the primary purpose marriage rules. Integration policies appear to have slipped off the EU agenda. Although socialist parties in opposition in the UK and France expressed condemnation of restrictive national immigration policies their actions in Government demonstrated some lack of conviction towards repealing these. The UK Labour Government, for example, has failed to repeal the previous Conservative Government's controversial laws and continued to introduce controversial, restrictive immigration measures.

The reported increase in asylum seekers in 1997/98 has been seized on by some Member States as a vindication of their tighter immigration policies. Critics would argue however that although immigration controls are necessary, the flagrant disregard for international agreements, the failure to recognise the economic benefits that migrants bring, the semi-secret undemocratic nature of the EU discussions and failure to adequately harmonise laws all serve to pander to racists and xenophobes

Flexibility has allowed Member States to adopt a number of different options and Member States are busy following the trend for adopting draconian measures. This has fuelled the calls from human and civil rights campaigners for common rules subject to challenge by the EU legislative system. The majority of Member States, the Commission and Parliament wanted to bring immigration into the EC Treaty prior to Amsterdam but this was initially opposed by a few Member States, notably the UK,

Ireland, Greece and Denmark, as they did not want to surrender their sovereignty in this area.

Part One of this thesis has highlighted that free movement is being impeded and racism and xenophobia in the EU is increasingly likely to be legitimised and institutionalised unless the EU acts to eliminate race discrimination and discriminatory immigration controls. Part Two will examine the legal competence of the EU in the area of race and migration prior to Amsterdam. Part Three examines the position following the Treaty of Amsterdam, which has now formally granted the EU competence on asylum and immigration.

PART TWO: FREE MOVEMENT PROVISIONS AND THE IMPACT OF EU POLICY ON RACE DISCRIMINATION AND MIGRATION CONTROLS, WITH PARTICULAR REFERENCE TO EMPLOYMENT ISSUES AND THE UK'S RESPONSE

CHAPTER 4

EC[1] POLICY AND LEGISLATION 1957-1992

4.1 Background

4.1.1 Free Movement provisions

The issue central to this thesis is free movement[2] for visible minorities, particularly workers, and the impact of race discrimination and immigration controls. The principle of free movement of people, which facilitates migration, is one of the founding freedoms of the Treaty of Rome 1957 and has been subject to a number of amendments over the years as discussed below.

Central to the EC Treaty (as amended) is the principle of an internal market which should abolish "*.... obstacles to the free movement of goods, persons, services and capital*"[3] and its desire

> "... to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of

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1 As the EU was not officially created until 1993 references throughout this chapter will be to the EC where applicable.

2 Social security provisions and restrictions on the use of diplomas and qualifications are excluded from the scope of this thesis. For a discussion of the implications of these provisions see, for example, Nielson, R., & Szyszczak, *E., The Social Dimension of the European Union.* Handelshojskolens Forlag, 1997, Chapters 4 and 2, respectively

3 Article 6EC (former Article 3cEC)

> convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity amongst Member States"[4]

The Single European Act 1986, which amended the EC Treaty, reiterated the aim

> "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty. "[5]

To facilitate free movement of people Article 39 former Article 48 (2) provides the right for workers[6] to move freely in that

> " Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. "
> (subject to the public policy, security or health limitations of 48 (3) and the public service exemption under 48(4)

The exercise of economic activity is a vital pre-requisite for free movement rights under Article 39EC (former Article 48EC). Developments in EU law have extended the right of free movement beyond the purely economic activity of the Treaty of Rome and rights have been extended to other groups such as students and retired persons, and given more prominence under former Article 8 (a) (1) TEU on Citizenship of the Union, as discussed in Chapter 7.4.

Free movement throughout the EU is not presently accessible to all people working and residing within it as lack of effective race discrimination laws and draconian asylum and

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4 Article 2EC

5 Article 14 (former Article 7a EC, ex Article 8a)

6 Article 43EC (former Article 52EC) provides a similar right for the self-employed and Article 49 (former Article 59EC) the right to provide services. As the focus of this thesis is on "workers" it will concentrate on Article 39 (former Article 48EC). Relevant case law stemming from Articles 43 and 49EC (former Articles 52 and 59EC) is however examined in Chapter 6.3.3 and 6.6.3

refugee controls, as detailed in Part One, effectively hamper free movement of some EU Nationals and legally resident third country nationals[7]. Individuals are unlikely to move to a country where they will receive little or no protection from race discrimination and the absence of a co-ordinated EC immigration policy encouraged Member States to tighten laws relating to asylum seekers and refugees and nourished racist attitudes. However, despite growing evidence of disadvantage, the EC/EU continually denied it had the powers to enact immigration laws, although its attempts to harmonise immigration controls are detailed in Chapter 3. Some Member States also contested the EU's powers to legislate in the area of race discrimination. The Treaty of Amsterdam 1997 grants competence in these areas and the Commission recently published proposals to introduce legislation as detailed in Chapters 8 and 9. In view of the criticisms surrounding the provisions[8], the history is worthy of examination as it illustrates the lack of political will to enact legislation and provides an insight into future developments.

Although the EU denied competence in the areas of race discrimination and migration until the Treaty of Amsterdam numerous debates, resolutions and a couple of related

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7 Forbes, I. & Mead, G., report covered 12 Member States and estimated that 10 million people in the EU are legally resident third country nationals. Some commentators include the 3.5 million Asian, Black and Middle Eastern people with EU citizenship to describe the whole as *"the thirteenth state"* comprising a legally disadvantaged group without adequate representation or protection (since the accession of Finland, Austria and Sweden in 1995, now known as the *"sixteenth state"*). *Measure for Measure, A Comparative Analysis of Measures to Combat Racial Discrimination in the Member Countries of the EC*, UK Department of Employment, 1992

8 The Treaty came into effect lst May 1999 and introduced a new clause on non-discrimination to include racial or ethnic origin, religion, or belief, disability, age or sexual orientation. However as any measures under Article 13 EC will require a unanimous vote, there is no time limit imposed, and it will not have direct effect, it has been subject to much debate as detailed in Chapters 8 and 9. Immigration and asylum issues are also recognised as being within the EU competence but the complexity of the different decision making procedures are likely to be problematic

Directives emerged. These are listed in *Tables 2 and 3* and the main provisions detailed in this Chapter and Chapter 5.

4.1.2 The impact of EU laws

The EU law making process and machinery are somewhat complex and have been subject to change in recent years[9]. The roles and relative power of the main institutions, namely, the Council, Commission and Parliament, will be examined throughout Part II, with particular reference to race and migration,

EU Member States are bound by the Treaties and secondary legislation - regulations, directives and decisions, the so called *"hard law"*, which can be invoked before the courts. *"Soft law"* provisions include resolutions and declarations which do not have the full force of law"[10]. The EU derives its competence from the Treaties and secondary legislation requires a specific legal Treaty base to ensure its validity.

Generally treaties and international obligations do not confer rights on individuals in

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9 Chalmers, D., commenting on EC legislative procedures , highlights that there are 22 different legislative processes within the TEU, excluding procedures for delegated legislation., which are variations of the four principal legislative procedures, namely, the consultation procedure, the co-operation procedure, the co-decision procedure and the assent procedure, *European Union Law, Volume One, Law and EU Government,* Ashgate, 1998, p.164

10 Soft law refers to rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects and are said to be "used, more problematically, to express views or issue guidelines on matters concerning which the division of powers between the EC and the Member States is not entirely, clear, or which, strictly speaking may lie outside the power of a specific institution to take binding legislation" Snyder, F., *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques* (1993) 56 MLR 19, as cited in Butterworths *Expert Guide to the European Union* , Butterworths, *1996, p.277*

their national courts, however, in the EU context individuals can access the law[11] which can result in individuals enforcing EU law in national courts. A number of general principles of EU law have been established, some emanating from the Treaty, such as the principle of non-discrimination examined below, and others developed by the ECJ such as fundamental human rights, equality of treatment and proportionality, as discussed in Chapter 6. EU institutions and national authorities acting within the realms of EU law, must abide by these principles.

If there is a conflict between National law and EU law the latter overrules[12]. Breach of Community obligations can result in court action being taken by Member States, the Commission, the European Parliament or even individuals. However, this depends on whether the EU legal provision is *"directly applicable"* or *directly effective"*.

Directly applicable law allows the provisions to take effect in the Member States' legal systems without the need for further legislation. Directly effective law allows natural or legal persons to rely on such rights in their national courts, as the courts must give effect to it even if there is no national law on the subject. EU obligations falling on member states themselves create vertical direct effect between the individual and the State. Horizontal direct effect occurs where an obligation falls on individuals.

Many of the provisions in Treaties have been held to create direct effect, including

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11 See *Van Gend en Loos v Nederlandse Administratie der Belastingen* (Case *26/62) (1963) ECR 1*

12 See for example *Van Gend en Loos, ibid,* and *Costa v ENEL* (Case *61/64) (1964) ECR 585*

Article 6EC (formerly Article 7 TOR) which has been held to have both vertical and horizontal effect [13] and Article 39EC (formerly Article 48)[14]. General Treaty principles which do not impose a commitment to actually do anything but are more of a declaration or statement, have however been held to be incapable of conferring such individual rights.

As regards secondary legislation, Regulations are directly applicable and in force 21 days after publication in the Official Journal. Directives are not generally directly applicable as they require national legislation to give them effect[15] and will usually include a 18-24 month period to allow Member States to transpose the provisions into national law. However, although a Directive cannot impose obligations on individuals they may have a vertical direct effect. This grants rights to individuals against the State as was recognised in *Van Gend en* Loos[16] and *Van Duyn v Home Office*[17] where the UK had not implemented a Directive. Therefore if, say, a time limit has passed within which the State should have implemented a directive into national law individuals can challenge the State, or organs of the state[18], even if it was merely acting as an employer

13 *Cowan v Le Tresor Public The French Treasury* (Case 186/87) (1988) ECR 195 and *Walgrave and Koch v Association Union Cycliste Internationale* (Case 36/74) (1974) ECR 1405

14 *Dona v Mantero* (Case 13/76) (1976) ECR 1311

15 This has not been without its problems as some member states have not implemented directives by the due date or implemented in a way which only partially meets the requirements of the Directive. Although the Commission may eventually start proceedings against a Member State under former Article 169 or a Member State may take proceedings against another Member State under Article, this can take many years. In the meantime individuals are often deprived of their rights.

16 Case 26/62 (1963) ECR 1

17 Case 41/74 (1974) ECR 1337

18 See *Foster v British Gas* Case C- 188/89 (1990) ECRI-3313, for a definition

e.g. *Marshall v Southampton Area Health Authority* [19]. The wording will, however, have to be sufficiently precise to allow such action to be taken.

The injustice of allowing a State employee to enforce an unimplemented Directive yet not allowing an employee in the private sector access to these rights inevitably led to this being questioned in the ECJ. The court held in *Marshall* that " ..it *follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person".* More recent challenges have relied on the fact that Directives have to be published in the Official Journal since the TEU and also that failure to implement a directive could give that Member State an unfair competitive advantage. However, as allowing horizontal effect to directives would virtually bring them in line with Regulations the ECJ has resisted the call to grant such status.

Individuals may access justice in other ways though. The concept of indirect effect requires national courts to interpret and apply national law in a way which will allow it to comply with EC obligations. The *Marleasing* case[20] expanded the impact of indirect effect by requiring national courts to interpret national legislation in a way in which it will comply with EU obligations regardless as to whether national law is passed before or after the relevant EU law.

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19 Case 152/84 (1986) ECR 723

20 Case C 106/89 (1990) ECRI-1417

The third way of accessing a remedy, in addition to the doctrines of direct and indirect effect, is through State liability. In *Francovich v Republic of Italy*[21] the ECJ extended individuals' rights by allowing them to sue the state for damages in cases where Member States failed to implement EC law, providing certain conditions were met[22]. This effectively reduces the impact of lack of horizontal effect. Recent cases have narrowed down the *Francovich* principle however, see for example joined cases *Brasserie de Peucher* and *Factortame*[23]. Of course, once Directives are transposed into national law any obligations in that Directive are enforceable against private individuals and, therefore, private employers.

4.1.3 The role of the Institutions

The relative roles and power of each of the institutions involved has been the subject of much comment since the inception of the European Community in the 1950s and some changes in the balance of power have occurred. Since its elected status in 1979 the European Parliament's (EP) original status of a *"talking shop"* with little, if any, power has evolved. Both the Single European Act 1986 and the Treaty on European Union 1993 increased the EP's powers, as discussed in Chapters 4 and 5. The role of the European Court of Justice (ECJ) and the European Parliament, the lack of accountability and the so called *"democratic deficit"* have been at the centre of much of the institutional debate[24]. It was argued that the EU should be more democratically

21 Joined cases C6/90 and C9/90 (1991) ECRI-5357

22 See Evans, A, *A Textbook on EU Law*, 1998, Hart Publishing p. 195

23 Joined Cases C-46/93 and C-48/93 (1996) ECR I-1029, (1996) 1 CMLR 889

24 See for example *The Democratic Deficit: Democratic Accountability and the EU*, Justice Report

accountable, that the European Parliament requires more involvement, that national parliaments should scrutinise EU laws more effectively and that the legislative process should be transparent. The European Commission in particular was strongly criticised recently for administrative bungles on a grand scale[25]. Following an independent committee of inquiry, and calls for resignations from the EP, the Commission resigned en masse in 1999 amidst accusations of mismanagement and corruption. A fundamental shift in the EU's balance of power with a trend towards democratic accountability and more involvement of the EU, is increasingly emerging and is likely to shape future directions post Amsterdam as detailed in Chapters 8 and 9.

The role of EU institutions in the law making process depends on the choice of primary legal base for secondary legislation which determines how far the institutions are involved and the voting requirement. Careful selection[26] is required as use of the wrong base is ground for annulment or challenge in the ECJ[27]. The role of the ECJ in interpreting and filling gaps in the Treaties is explored in Chapter 6.

Historically, voting in the European Community was largely unanimous. Six countries founded the Community (France, Belgium, W.Germany, the Netherlands, Luxembourg)

1996

25 See, for example, *The Guardian* November 9 1998, *"New human rights body planned in wake of Brussels bungling"* which reported that Amnesty International, Human Rights Watch and other groups had sent an unprecedented joint letter to the Commission warning of serious administrative bungles which were so serious that they endangered human rights projects and amounted to a " nail in the Commission's coffin".

26 The ECJ has asserted that the choice of base must be related to objective factors capable of judicial review e. g. Case 45/86 *Commission v Council* (1987) ECLR-1493

27 See for example the UK's challenge against the selection of Article 137EC (former Article 118)

and up to 1979 members of the European Assembly (the forerunner of the European Parliament) were nominated by national parliaments. Enlargement of the Community during the 70s and 80s witnessed the birth of the European Parliament with directly elected MEPs in 1979 and inevitably led to the first major amendment to the founding Treaties in 1986.

Unanimity of voting in the Council was greatly challenged by the Single European Act 1986 which amended the Treaty of Rome and extended the use of majority voting and introduced a co-operation procedure giving greater involvement to the European Parliament. It has led to a skilful manipulation of the law which has been described as *"The Treaty Base Game"*. As some Articles require unanimity, if there is opposition to a proposal it is more likely to succeed if a qualified majority base is used. The TEU 1993 continued to extend the use of majority voting and this will also be examined in Chapter 5.

This chapter will examine EU policy and legislation relating to race equality and immigration, refugees and asylum policies from 1957-1992. Policy and legislation following the Treaty on European Union up to Intergovernmental Conference in 1996 will be examined in Chapter 5. An analysis of the relevant case law is contained in chapter 6 and provisions relating to free movement and EU citizenship in Chapter 7. The Treaty of Amsterdam 1997 and future policies will be examined in chapters 8 and 9, respectively.

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as a base for the Working Time Directive, Case C-84/94 (1996) ECR I-5755

4.2 Impact of Article 12EC (Formerly Article 6EC, ex Article 7) and Article 39EC (former Article 48) on issues of race and migration

Although the Treaty of Rome clearly set out principles of non-discrimination these are explicitly restricted to nationality under Article 12 (former Article 6EC ex Article 7), taxation of goods under Article 90EC (former Article 95EC), Agriculture under Article 34EC (former Article 40(3)) and gender under a revised Article 141EC (former Article 119) with relation to equal pay. The principle of equal treatment relating to sex has been extended via a number of Directives[28].

Community sex discrimination law has been described as having two purposes, that of *"equality of opportunity (at the start) or outcome (at the finish)"*[29]. The equal pay directive is said to aim for equality of outcome and the equal treatment directive for equality of opportunity. Subsequent ECJ judgments as detailed in Chapter 6 have assisted in elevating the principles of equal treatment as one of the fundamental rights protected by Community Law[30]. There has been controversy[31] recently relating to the potential to take positive action resulting in an amendment to former Article 119EC, as detailed in Chapter 9.2.3.

Non-discrimination on grounds of race, in sharp contrast to the status given to gender,

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28 Secondary legislation was enacted using Articles 94 and 308EC (former Articles 100 and 235EC) relating to pay and equal treatment. The Treaty of Amsterdam extends the principle of non-discrimination on grounds of gender, however, to include equal opportunities and equal treatment in matters of employment and occupation as a general principle and also includes a new Article 13 which includes discrimination on grounds of race

29 Blainpain, R., & Engels, C., *European Labour Law*, Kluwer, 1998, p.256

30 Nielsen, R and Szyszczak,E., op cit at Note 2, p. 151

was not explicitly recognised as a legitimate Community aim. Initial discussions regarding the European Community's competence in the area of discrimination on grounds of nationality and race, centred largely on the nationality provisions in former Article 6EC (ex 7 TOR) and free movement of workers provisions in former Article 48.

Interpretation of the Treaty has led to vigorous debates, which is not surprising given that it was drafted in relatively short time between June 1955 and April 1956 and worded in four different languages. Interpretation of the Treaty falls to the European Court of Justice. Debates as to whether the right to free movement and non-discrimination is available to all workers or restricted to Community nationals have been ongoing. The Treaty does not define the term *"worker"* but it has been defined in *Unger v Bestuur*[32] as having a Community meaning. Bohning[33] argued the right is available to all workers regardless of nationality but Edens and Patijn[34] disagreed claiming the right was only available to Community Nationals. The European Court, as detailed in Chapter 6, agreed with the latter.[35]

The relevant articles in the TOR will be examined here. The European Courts' decisions will be examined in Chapter 6 in more detail.

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31 See, for example, Schiek, D., *Sex Equality Law after Kalanke and Marschall*, (1998) 4 ELJ 148-166

32 Case 75/63 (1964) ECR 1977

33 Bohning W., *The Scope of the EEC System of Free Movement of Workers* (1972) 9 CMLRev 81

34 Edens, D.F. and Patijn, S, The Scope of the EEC System of Free Movement (1972) 9CMLR 322-328

35 See for example, Case 238/83 *Meade* (1984) ECR 2631

4.2.1 Article 12EC (former Article 6 EC ex Article 7)

> Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
>
> Prior to SEA: The Council may, on a proposal from the Commission and after consulting the Assembly, adopt, by a qualified majority, rules designed to prohibit such discrimination.
>
> After SEA and prior to TEU: The Council acting on a proposal from the Commission and in Co-operation with the European Parliament may adopt by a qualified majority rules designed to prohibit such discrimination
>
> *(Article now reads: The Council acting in accordance with the procedure referred to in Article 251 may adopt rules designed to prohibit such discrimination).*

As Member States have their own definitions of *"nationals"*, in accordance with international law on sovereignty, inevitably this has led to differences. Some Member States have special relationships with other Countries, for example The Netherlands, France and the UK, and allow some third country nationals to be regarded as nationals of their State. Following enlargement of the Community in 1972 to include the UK, a declaration was appended to the UK's Act of Accession narrowly defining the term *"national"* for Community purposes. In contrast a wider definition is provided for non-EC/EU purposes incorporating various forms of nationality under the British Nationality Act 1981 (see Chapter 3). The lack of a consistent Community wide definition of nationality, including criteria for naturalisation, is inequitable and inconsistent with the approach taken in *Unger.*[36].

Sundberg Weitman[37] contended that Article12EC (former Article 6EC ex Article 7) had

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36 For a discussion of the controversy surrounding nationality refer to Chapter 7. See also Chapter 6.3.1 for a discussion of relevant case law including *Michelletti*, Case C-369/90 (1991) ECR I-4329

37 Sundberg Weitman B., *Discrimination on Grounds* of *Nationality in Free Movement* of *Workers and Freedom* of *Establishment under the EC Treaty*, North Holland 1977

an independent function and it could be applied in cases of discrimination not affected by *"any special provision against discrimination"* and be used as a general rule to interpret the Treaty. The ECJ in 1996 held that the Article should not be applied where a specific Treaty provision could be found[38]. The complexities of the European Community's recognition of nationality is further highlighted by *Article186EC (former 135EC)*

> "Subject to the provisions relating to public health, public security or public policy, freedom of movement within Member States for workers from the countries and territories, and within the countries and territories for workers from Members States, shall be governed by agreements to be concluded subsequently with the unanimous approval of Member States".

These agreements have not been finalised, which led Sundberg-Weitman[39] to observe that workers from certain non-European countries may not be able to invoke the benefits of the provisions laid down in Regulation 1612/68 (detailed below in 4.3.1)

4.2.2 Article 39 (former Article 48)

The scope of Article 39EC (former Article 48EC) has also been widely debated. Plender[40], for example, asserted that the draftsmen of the Treaty did not necessarily intend to restrict freedom of movement to nationals of Member States. He pointed to the fact that the word *"nationals"* is excluded from Articles 39-42EC (former Articles 48 to 51EC), whereas the articles following immediately after refer to freedom of establishment being enjoyed by nationals, and concluded that the contrast appeared to be

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38 *Criminal Proceedings Against Skanavi and Chryssanthakopoulos,* Case C-193/94 (1996) ECR I-929, discussed in Chapter 6.4.1

39 Op cit at Note 37

40 Plender, R., *An Incipient Form of European Citizenship,* in Jacobs, G.F. (ed.) *European Community law and the Individual,* North Holland 1976

deliberate. Plender further commented that limitations have been imposed on the term *"worker"* despite the fact these have not been expressly provided for in the Treaty nor discussed by the Court of Justice. Secondary legislation, as detailed in section 4.3 below, does however explicitly extend the rights of free movement to workers families.

It seems that there are limitations to the use of Article 39EC (former Article 48EC) in that an EC national must move to another Member State in order to activate the Article. Case law surrounding this, and the exceptions to Article 39EC (former Article 48EC) detailed in 48(3) *'public policy'* and 48(4) that it *'shall not apply to employment in the public service'* are discussed in chapter 6.3.2. The ECJ has played a major role in establishing the rights of workers.

4.3 Secondary Legislation granting rights to workers and others

Rights of free movement were initially limited to Member States workers. However, a number of measures have been enacted to extend these rights to other categories, including family members and students. Other agreements, such as the European Economic Area involving Norway, Iceland, Liechtenstein and national agreements with for example, Turkey, have also extended free movement rights to nationals of the countries concerned

4.3.1 Regulation 1612/68 [41]

[41] Refer to Chapter 6.3.2 and 6.6.3 for relevant case law which demonstrates the ECJ's liberal approach and wide interpretation of secondary legislation. The regulation is interpreted in accordance with the requirement of respect for family life in Article 8 of the Convention on Human Rights

Articles 1-5 deal with eligibility for employment, 7-9 employment and equality of treatment and 10-12 workers' families. The Regulation is limited to nationals of EU member states but fairly extensive rights are granted to non-EU nationals.

Article 10 states

> "The following, irrespective of their nationality have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State... (a) his spouse and their descendants who are under the age of 21 years or are dependants (b) dependants relatives in the ascending line of the worker and his spouse"

Article 11, gives rights to a spouse and children under 21 "*to take up any activity as an employed person .... even if they are not nationals of any Member State*" and *Article 12*, gives children rights of access to "*general educational, apprenticeship and vocational training courses under the same conditions as the nationals of the State, if such children are residing in its territory*"

4.3.2 Directive 68/360 and Regulation 1408/71

The Directive applies to nationals of Member States and members of families covered by Regulation 1612/68. It grants the worker and his/her family the right to leave their country to pursue employment in another Member State on production of a valid identity card or passport[42]. Member States may not require exit visas or entry visas from workers or members of their families. Workers may stay up to three months to find a job Regulation 1408/71, Social Security Rights of Migrant Workers, grants an entitlement to three months unemployment benefit.

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42 See, for example, *Procureur de Roi v Royer*, Case 48/75 (1976) ECR 497 where the ECJ ruled that the workers right to reside is not dependent on possession of a residence permit

Article 4 of Directive 68/360 requires a residence permit to be issued to the worker and members of the family who are nationals of Member States of the EU. Members of the workers family who are third country nationals must be issued with a residence document which is valid on the same terms. A number of categories or residence apply:

a) workers with a job of more than 12 months are granted a permit entitling six years residence (unless they become voluntarily unemployed or breach the public policy requirements of 48(3)

b) workers who have a job for between 3 -12 months and seasonal workers employed more then three months are issued with a temporary residence permit

c) workers employed less than three months and frontier workers have a right to reside for the duration of employment

The Commission issued a proposal in 1989 for an amendment of Directive 68/360 to ensure that people entering had sufficient resources or insurance to avoid becoming a burden on the State. Case law such as *Antonissen*[43] have sought to extend the rights of workers where possible however and give Article 39EC (former Article 48EC) a wide meaning. The case involved a Belgian national who went to the UK in 1984 seeking work but did not find any and following his arrest and imprisonment in 1987 was deported. On an application for judicial review in the High Court and an ECJ reference, the ECJ decided that an interpretation of Article 39(3)EC (former Article 48(3)) excluding the right of a national of a Member State to move freely and to stay in the territory of the other Member States to seek employment was contrary to the Article, although it was held to be lawful for a Member State to deport a worker if they had not found work within a reasonable period of time and cannot show they are continuing to

[43] Case C-292/89 (1991) ECR 1-745

seek work.

4.3.3 Regulation 1251/70 right to remain in territory after employment

This Regulation grants the right of residence after employment to the those retiring and those incapacitated. Those retiring receive this if they have reached the retirement age for a pension of the host State have been employed in that State for at least 12 months and have resided continuously in that State for more than three years. Workers who become incapacitated have the right to remain if they have resided in that State for at least two years or if the incapacity resulted from work in that State they may be entitled to remain regardless of length of residence. Workers families may also acquire a right to remain although it is not certain whether a non-EU spouse can remain in the host state following the breakdown of a marriage[44], the right does exist following the death of a migrant worker.

4.3.4 Other Rights of Residence

Three Directives granted rights or residence to certain individuals. Directive 90/365 for employees and self employed people who have ceased their occupational activity. Directive 90/366 to students enrolled on vocational training courses and Directive 90/364 to those who do not enjoy this right under any other provision of Community law. However, the proposals were subject to challenges regarding the legal bases before being finally implemented as discussed in Chapter 7, which considers the rights of free movement granted under the EU citizenship provision and the relationship with former

[44] See for example, case *Diatta v Land of Berlin*, Case 267/83 (1985) ECR 567 and *Surinder Singh*, Case C-370/90 (1992) ECR I-4265

Article 14EC (Article 7a) single market provisions..

4.4 European Parliament Initiatives on Racism and Migration (1985-1991)

The European Parliament took the lead amongst the EC institutions in attempting to recognise and meet the needs of ethnic minority groups in the Community. Between 1985 and 1990 the Parliament commissioned two reports on racism, since 1990 has been involved in an annual debate on racism and xenophobia and also contributed to the debate on migration and integration of third country nationals (see *Table 2 and 3* for list of measures)

4.4.1 The Evrigenis Report on the Rise of Facism and Racism in Europe 1985

A Committee of Inquiry examining the rise of facism and racism in Europe was set up in 1984. The Inquiry concluded that the rise of racism and facism was cause for concern. Recognition of a social malaise brought on by economic and social conditions, were said to exacerbate the situation and Evrigenis called for new policy measures. Forty Recommendations were outlined including a call for countries to ratify international conventions and implement the provisions into domestic law, extending free legal aid to disputes relating to racial discrimination, specialist national bodies to protect and promote equal opportunities and a revision of the Treaty under Article 308EC (former 235EC), if necessary, to provide powers and responsibilities in the area of race relations. A recommendation urged implementation of the Communication from the Commission for an EC policy on immigration.

Only a few of the recommendations were carried out. On 11 June 1986 a *"declaration*

against racism, racial discrimination and xenophobia and in favour of harmonious relations among all the communities existing in Europe" was agreed by the European Parliament, the Council, the Representatives of the Member States meeting with the Council and the Commission. The Declaration was one of principle rather than legal consequence and was described as *"a simply insipid document"* by the German MEP von Stauffenberg. *A* Council reply to a written question submitted by the European Parliament stressed that "*....racism and xenophobia as such are a matter of public policy in each individual Member State"* but went on to say *"that racism and xenophobia may be an obstacle to the actual exercise of freedom of movement of persons, and in particular of workers within the Community"* [45].

A Eurobarometer study on racism and xenophobia carried out in October and November 1988 and presented to the Parliament in November 1989 presented some optimism. Although one European in three believed that there were too many people of another nationality or race in his or her country, *"a considerable minority of those questioned"* viewed the presence of immigrants in their country as a negative factor and

> "Three out of four EC citizens were in favour of improving, or at least maintaining, the rights of immigrants and they count on the European Institutions to do this" and "one European in three would like to see the adoption of Community-wide legislation in relation to non-nationals residing in a Member State" and "only one European in five was in favour of unilateral decisions taken by individual Member States with respect to foreigners from third states"

It concluded that it was

> "... up to the European Institutions to take the appropriate measures in the field in integration and tolerance of people with different nationality, race, religion and culture, taking the direction indicated by the opinion of the majority of EC Citizens [46]

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45 Written Question No. 2381/86, March 10 1987, my emphasis

46 Eurobarometer 1989, Racism, Xenophobia & Intolerance, Special Issue

The Runnymede Trust report[47] commissioned following Evrigenis recommended that new legislation be enacted as a *"clear lead"* was necessary. Action along the lines proposed by the Runnymede Trust Report was not forthcoming however.

4.4.2 The Second Report of the Committee of Inquiry into Racism and Xenophobia (The Ford Report, July 1990)

In 1989 a more comprehensive report considered how the 1986 Joint Declaration against racism and xenophobia together with a number of related matters could be implemented. Glyn Ford, the rapporteur, received assistance from two organisations Migrants Newsheet, published by the Churches' Committee for Migrants in Europe, based in Brussels, and Searchlight, an institution based in London which collects information on fascist and extreme right wing groups based in Europe.

The Ford Committee found that only a few of the Evrigenis recommendations had been carried out and none of these had resulted in major changes in anti-racism legislation or action at the Community level. It claimed that the failure of Member States to implement the recommendations had resulted in a rise of racism and xenophobia in several Member States and reported that extreme right-wing groups were expanding and networking with groups in other countries.

The draft Council resolution to combat racism and xenophobia, June 1998 was criticised by Ford. The final text adopted was watered down so much that the Commission,

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47 Runnymede Trust, *New Approaches: A Summary of Alternative Approaches to the Problem of Protection Against Racism in Member States of the EC*, 1986

refused to associate itself with it. The controversy surrounded deleting reference to non-EC nationals from the text which was agreed by the 11 other Member States to satisfy the UK. The Ford report commented that :

> "All 12 Member States described the final text adopted as an important step forward aimed at eliminating racism and xenophobia among citizens of the various Member States. In fact, in refusing to include non EC residents within the scope of the resolution, the resolution adopted signified a step backward since it clearly goes against not only the spirit but also the contents of the June 1986 Joint Declaration against Racism. and Xenophobia"

Seventy seven recommendations were listed in the Ford report for either the Commission, Council or Member States to address. Recommendations to the Commission included preparing a directive providing a Community framework of legislation against any discrimination connected with belonging or not belonging to an ethnic group, national region, race or religion. It was recommended that it should cover all Community residents and that a European Residents Charter be drafted together with a Convention on a common refugee and asylum policy. The Council were advised to wind up all activities relating to the free movement of third country nationals currently dealt with by intergovernmental fora and transfer matters to the appropriate community bodies. Member States were encouraged to enact anti discrimination law condemning all racist acts. The Parliament endorsed the recommendations by a narrow majority. The French Chairman voted against as he did not support recommendation 64 giving legally resident third country nationals in France the right to vote in local government elections. The Recommendations for concrete legislation was not adopted by the Council.

The European Parliament attempted on a number of occasions to draw attention to the 1986 Joint Declaration on Racism and Xenophobia due to growing evidence of racism

and xenophobia and the Parliament's dissatisfaction with action taken by the Commission, the Council and the Member States to implement the Joint Declaration.

4.5 Commission and Member States Initiatives

4.5.1 Migration proposals

During this period it became increasingly clear that the Commission and member states had different views on whether a community or intergovernmental approach towards migration was necessary. The increasing significance of the presence of migrants in the Community led the Commission to establish an Action programme for Migrant Workers in 1976 aimed at developing a Community policy relating to employment and the integration of migrant workers into host societies. Articles 94 and 308EC (former Articles 100 and 235) were used as a base to enact measures relating to migrants. Their effect was fairly limited due to the requirement for unanimity. If the political will existed the Articles could have been effectively implemented.

Article 94EC (former Article 100EC, approximation of laws)

> "The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provision laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market. The Assembly and the FSC shall be consulted in the case of directives whose implementation would in one or more Member States involve the amendment of legislation"

Article 308EC (former Article 235EC, legislation to achieve one of the objectives of the Community)

> "If action by the Community should prove necessary to attain, in the course of the operation of the common market one of the objectives the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures."

The Commission's programme was not particularly effective as the only concrete piece

of legislation resulting was the Directive on the education of migrant workers' children[48] based on Article 308EC (former Article 235). Provisions to include non-EC migrants were excluded when examined by the Council as it was argued that immigration issues were not a legitimate Community objective. A declaration was annexed to the directive concerning third country migrants which included recognising the importance of tuition in the mother tongue, history and culture. A draft directive on illegal immigration based on Article 94EC (former Article 100EC) also failed to receive approval as the Council continued to resist Community competence in immigration as Member States saw this as a threat to their sovereignty.

The Commission adopted a Decision on a migration policy on 8 July 1985 along the lines of para 376 of the Evrigenis Report. Its aim was to try to introduce some consistency into national immigration policies. It used Article 137EC (former Article 118EC)as its legal base and declared that each Member State should give prior notice to both the Commission and the other Member States of draft national or international agreements to be implemented concerning third country migrants. The Commission envisaged setting up a consultation procedure between the Commission and the Member State to identify common problems and exchange information with a view to adopting a joint response.

Five Member States, Denmark, France, the FRG, the Netherlands and the UK filed complaints with the ECJ contending that the Decision was not within the Commission's

[48] Directive 77/486/EEC OJ 1977 L 199/32

competence and migration policies were outside the field of social affairs, as stated in Article 137EC (former Article 118)[49]. The ECJ rejected the arguments that migration policies were outside the Article 137EC (former Article 118) provision and the Commission's Decision was amended on 8th June 1988 to state that co-operation between Member States in social affairs included migration policies concerning non-member States[50]. Member States were not willing to co-operate with the Commission however. The Ford Report 1990 highlighted that some Member States had adopted certain controversial migration policies[51] vis-a-vis third countries since the publication of the Decision and the Commission had, on at least two occasions, requested more information from the Member States concerned without success.

4.5.2 The Single European Act

The Single European Act 1986 amended the EC Treaty. It aimed to enable the Community to move toward its aim of a single internal market by 31st December 1992 *"an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured"*[52]. The 1985 White Paper confirmed Member States sovereignty in relation to the *"rights and interests of employed persons"* requiring any decisions to be unanimous, creating a potential social vacuum. However, the Commission was of the opinion that some form of harmonisation of social policy was crucial to the development of the internal market. Jacques Delors, the European Commission President, expressed a

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49 *FRG* (case 281/85) *France* (case 283/85) *the Netherlands* (case 284/85) *Denmark* (Case 285/85) *the UK* (case 287/85) as detailed in Chapter 6.

50 The ECJ annulled part of the Commission's Decision as detailed in Chapter 6.6.1

51 Chapter 3 highlights some of the controversial migration policies referred to

desire to link social policy to the internal market provisions:

> "The creation of a vast economic areas, based on the market and business co-operation, is inconceivable – I would say unattainable – without some harmonisation of social legislation. Our ultimate aims must be the creation of a European Social area"[53]

This eventually led to a Community Charter of Social Rights for Workers, as discussed in Section 4.5.4 below.

Increased majority voting in Council was granted and the Single European Act was said to have resulted in radical changes as Member States were *"less tolerant"* of attempts to use the power of veto[54]. The area of free movement took on a new approach. Prior to the Single European Act unanimous voting was required and the Parliament only needed to be consulted. However, after the Act, and prior to the TEU, decisions could be agreed by qualified majority in co-operation with the EP, with the exception of social security measures.

The Commission and Parliament were of the view that Article 14EC (former Article 7a) required the abolition of all border controls but the UK and Denmark disagreed claiming that it allowed Member States to retain border controls. Differences between Member States resulted in some countries creating a system outside the EC structures by way of the Schengen agreements, as detailed in Section 4.5.3 below. The impact of relaxing internal borders was a cause of concern for some commentators. Paul Gordon[55] opined

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52 Article 14EC (formerly Article 7a EC ex Art 8a)

53 Bulletin of the EC 1986, p.12

54 Chalmers, D., op cit at Note 9, p.41

55 Gordon, P., *Fortress Europe*, Runnymede Trust 1989

that it would affect immigration policies and result in external borders being strengthened, particularly to prevent entry from the Third World.

A number of Declarations were attached concerning race. The Joint Declaration *"..against racism, racial* discrimination and *xenophobia and in favour of harmonious relations among all the communities existing in Europe"* agreed by the Community institutions as outlined in section 4.1 was one of these. In addition, a General Declaration on Articles 13-19 stated

> "Nothing in these provisions shall affect the right of Member States to take such measures as they consider necessary for the purposes of controlling immigration from third countries and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques"

and a Declaration by the Governments of the Member States

> "In order to promote the free movement of persons, the Member States shall co-operate without prejudice to the powers of the Commission, in particular as regards the entry, movement and residence of nationals of third countries. They shall also co-operate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques"

The two appear to be contradictory and conflicting as the former recognises the power of the Member States to retain sovereignty over migration issues while the latter appears to confirm the powers of the Commission. The grouping together of matters relating to immigration with terrorism, crime and drugs again attracted critical comment as it could only serve to exacerbate racist attitudes rather than seek to ease the growing racism and xenophobia in the Community.

4.5.3 Immigration Groups and Agreements – Ad hoc group, Trevi and Schengen

As the Community lacked competence to deal with third country immigration matters, discussions and agreements were reached via semi secret intergovernmental

arrangements, outside the Community framework. Groups working on immigration proposals included the ad hoc Immigration Group and the Trevi Group of EC Justice ministers, which was concerned with fighting terrorists and drug smugglers (see Appendix 5). The Trevi group met in secret and therefore very little information was forthcoming[56].

Belgium, the Netherlands and Luxembourg had agreements which permitted their nationals to move freely across their borders and in 1985 France and Germany joined to sign the Schengen Agreement[57]. The Agreement sought to arrive at a common policy within the internal borders of the countries in question relating to crossing common external frontiers, visa policies, entry and residence conditions, movement of non-National asylum applications, and the co-operation of law enforcement authorities. The group drafted measures which resulted in the Schengen Supplementary Agreement in June 1990, although measures were not implemented until 1995 and have been problematic as discussed in Chapter 5.

The Commission had observer status at Schengen meetings and did not draft its own proposals on immigration and asylum as there was still a dispute between Member States, particularly voiced by the UK government, surrounding the competence of the EC. The Council of Ministers did set up a *"Group of Coordinators"* and an ad hoc

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56 For further details on the working of Trevi see Bunyan, T., *Trevi, Europol and the European State* in *Statewatching: the New Europe, a Handbook on the European State*, Statewatch 1993

57 Since agreed to by all Member States apart from the UK and Ireland (who resisted involvement due to their borders being entirely bound by water unlike the other EC States), see chapter 5 for up-date and chapter 9 for further developments following the TOA 1997

group on immigration, comprising interior ministers, in 1986 following a request from the UK. The Group of Coordinators presented proposals known as the Palma document, adopted at the Madrid summit in June 1989. Measures included a common negative list, a common list of inadmissable persons and procedures for dealing with them, a procedure for preventing asylum seekers applying to more than one member state, accelerated procedures for handling *"manifestly unsound"* asylum claims, acceptance of identical international commitments on refugees, definition of common measures for checks on external borders, combating illegal immigration networks, establishing information exchange systems, deciding which state is responsible for removing immigrants and rejected asylum seekers and setting up a financing system for expulsions.

In 1987 the ad hoc Immigration Group proposed sanctions on airlines bringing in asylum seekers possessing false documents or no documents. By 1990 the group had produced the Dublin Convention determining the State responsible for examining asylum applications and preventing asylum seekers making more than one application in the EC. This was signed by all member states in June 1990[58]. Later that year the group also produced a draft convention on harmonisation of controls at external borders and the following year set out proposals for fingerprinting asylum-seekers. Controversially the group refused to allow the UNHCR access to its deliberations.

Both the Schengen and Dublin Conventions have been surrounded in controversy due

[58] The Dublin Convention was agreed by the Member States in 1990 but was not officially in force until September 1997

largely to the semi-secret nature of the proposals conducted outside the legislative framework excluding the Parliament, Commission and ECJ. The Dublin Convention operates under international law rather than EC law as it was agreed via intergovernmental discussions and was not subjected to the legislative procedures of the EC. A number of human rights groups and commentators[59] expressed concern over the Schengen Agreement particularly the lack of attention to the human rights dimension. The European Parliament also criticised the Schengen Agreement and adopted a joint resolution calling on Member States to subject any such work on free movement to Community procedures including the Parliament.

4.5.4 Further Proposals

A 1988 EC Commission report acknowledged that identity checks would need to be transferred to external borders to prevent the entry of undesirable persons into any part of the Community. In 1988, following the European Council in Hanover, a study was commissioned regarding the social integration of third country nationals[60]. Although the report detailed the issues connected with third country nationals living in the Member States it did not contain any recommendations. Recommendations were put forward in a later report[61] but no action was forthcoming from the Council of Ministers. The Charter of Fundamental Social Rights of Workers, which promoted improved living

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59 For example, Statewatch, an organisation monitoring the state and civil liberties in the UK and Europe and O'Keeffe, D., *The Free Movement of Persons and the Single Market (1992) 17* ELRev 3-19

60 The social integration of third country migrants residing on a permanent and lawful basis in the member states (Brussels, 1989, SEC (89) 924 final)

61 Policies on immigration and social integration of migrants in the European Community (Brussels, 1990 SEC 90) 1813 final)

and working conditions for workers, was adopted in December 1989 by 11 Member States with the exception of the UK[62]. It has no binding effect but intended to shape future social policy and led some commentators at the time to suggest that it could have a significant impact due to the perceived political will on the part of the 11 Member States who signed it. Its impact has been minimal and it was described as *"....another fine, but ultimately toothless piece of Euro-rhetoric"*[63]. Its importance has been reasserted by Amsterdam's revised Article 136 EC (former Article 117) which expressly refers to the Charter.

Uncertainty surrounded whether the Charter applied to all workers or just Member States workers. Bercusson[64] noted that the final draft of the Charter replaced the word *"citizens"* with *"workers"* and this could include all workers regardless of nationality/citizenship but Watson[65] disagreed arguing as third country workers were not specifically referred to in the main text they were *"plainly excluded from the Charter"*. A Report from the Commission in 1992[66] however refers to third country workers in the *"Improvement of Living and Working Conditions"* section.

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62 The UK Conservative governments consistently opposed proposals to regulate the employment market. Led initially by Margaret Thatcher, and subsequently John Major, they supported measures to deregulate the employment market as they believed that too many regulations led to greater unemployment and was harmful to workers generally

63 Ward, I., *A Critical Introduction to European Law*, Butterworths, 1996

64 Bercusson, B., *"The European Community's Charter of Fundamental Social Rights of Workers" (1990) 5* 3 MLR 626

65 Watson. P. *"A Community Social Charter" (1991)* 28 CMLRev. 37

66 *Second Report from the Commission to the Council on the Application of the Community Charier*

Four proposals on immigration and asylum were put forward by the Luxembourg Presidency in January 1991. Firstly, the continuation of intergovernmental co-operation, secondly reference could be made to the EC Treaty to co-operate in the area, leaving the Council to elaborate the precise details at a later stage, thirdly a number of Treaty provisions could be elaborated defining the fields to be covered and their related decision-making procedures and finally policies in the area could be integrated fully in the EC Treaty. Only Denmark supported the first option. The UK, Ireland and Greece supported the second, France, Germany and Portugal supported the third option, although France and Germany saw this as a short term proposal leading eventually to the fourth proposal. The Netherlands, Belgium, Italy and Spain preferred the fourth option. At least six countries were in favour of incorporating immigration and asylum into Community law[67], but this was vigorously resisted until the Amsterdam Treaty in 1997, detailed in Chapter 8.

Two communications were issued by the Commission in 1991[68], one concerning the right of asylum, acknowledging that measures should respect the Geneva Convention, and the other on immigration highlighting problems associated with abuse of the asylum procedure, the need to manage migration flow, and integration. The latter communication acknowledged that the integration of legally resident third country

of Fundamental Social Rights COM (92) 562 final of 23 December 1992 p. 12-13

67 Guild, E., *The Emerging European Immigration and Asylum Policies of the EU*, Kluwer, 1996,. p 43

68 Commission Communication to the Council and EP on immigration SEC (91) 1855 final and Communication from the Commission to the Council and the EP on the right of asylum SEC (91) 1857 final

nationals was a fundamental objective for society and recommended that they be given access to employment across the EU. It laid the foundation for further proposals in 1994.

Meetings of Member States Immigrations ministers taking place in 1992 were held amidst growing controversy and concern about the UK's attitude towards asylum seekers, particularly those from war-torn ex-Yugoslavia. Some countries, most notably Germany, asserted that the UK was not taking its share of the *"burden"*. Attempts by the nine Schengen countries to secure a declaration that there would be no systematic border controls within the EU continued to be resisted by the UK, Denmark and Ireland. A number of resolutions, decisions and conclusions were however agreed in 1992[69]. The status of the measures were uncertain, some involve obligations while others are merely intentions. Flexibility to adopt differing approaches to each of the provisions proved problematic as it resulted in different measures being adopted as highlighted in Chapter 3.

The Commission's increasing concern regarding third country nationals was witnessed in 1992 when it expressed the view that the free movement provisions of Article 14 (former Article 7(a) ex 8(a)) should include third country nationals in the EU[70]. A

69 Resolution on manifestly unfounded applications for asylum (30.11.92), Resolution on harmonised approach to questions concerning host third countries (30.11.92), Conclusions on countries in which there is generally no serious risk of persecution (30.11.91), Decision establishing the clearing house (30.11.1992, Decision setting up a Centre for Information, Discussion and Exchange on the Crossing of Borders and immigration (30.,11.1992), Recommendation regarding practices followed by Member States on expulsion (30.11.92), Recommendation regarding transit for the purposed of expulsion (30.11.92)

70 See Commission Communication SEC (92) 877 final on the lifting of border controls which states that free movement of persons refers to all persons, whether or not they are economically

comparative study on anti-discrimination legislation in Member States published by the Commission in 1992 also expressed concern about the different levels of protection amongst the Member States. No action on any of the Commission proposals was forthcoming from the Council.

4.6 Further debates surrounding competence in race and migration

The Community 's continual denial of competence in the areas of race and migration and the problems associated with the harmonisation of migration led to various organisations and commentators seeking a way forward for a common race discrimination and migration framework.

4.6.1 Debates on immigration measures, including use of Article 94 and 308EC (former Articles 100 and 235)

O'Keeffe[71] asserted that the changes should, and legally could, take place within the Community's legal framework and not left to inter-governmental conferences. He acknowledged Member States reluctance to relinquish their powers in home affairs and internal security but claimed competence to act in this area existed in either Article 94 or 308EC (former Article 100 and 235EC). O'Keeffe was writing before the Maastricht Summit and did not speculate on its outcome. He came down strongly in favour of Community legislation though as he argued that a Community approach would allow judicial review and uniform interpretation. Shaw argued that the bulk of academic opinion agreed the Community at the very least, had competence in relation to its

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active and irrespective of their nationality

71 O'Keeffe,D., op cit at note 59

internal borders but acknowledged that *"Academic opinion counts for nought in the face of political authority".*[72]

Articles 94 and 308EC (former Articles 100 and 235EC) were both used as a base for the equal treatment directives relating to gender and Article 308EC (former Article 235) has also been used to allow programmes benefiting people with disabilities and education of migrant workers children, as indicated above. However, Article 308EC (former 235) should not be used unless there is no other Treaty provision granting Community institutions necessary powers to adopt measures, otherwise it will be struck down[73]. Both Articles required a unanimous vote and consultation of Parliament and the need to demonstrate that measures introduced are furthering the economic aims of the Community. As Member States could not agree on community competence in the area of immigration policy, detailed further in chapter 5, a unanimous vote was not forthcoming.

4.6.2 Debates concerning the TOR and Community competence on race - Article 137EC (former Article 118 EC) and the Declarations attached to the SEA

One of the most forceful challenges to lack of competence in the area of race discrimination came from the UK's Commission for Racial Equality (CRE) in 1991. It centred largely on Article 137EC (former Article118) and the Declarations attached to

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72 Shaw, J, *Immigration, The Single Market and European Union (1992) 5* Journal of Social Welfare and Family Law, 457

73 See for example the European Parliament's challenge to the choice of base for Directive 90/366, Case C-295/90 (1992) ECRI-4913, which challenged the choice of Article 308EC (former Article 235) as a base

the Single European Act. The legal status of the Declarations attached to the SEA had been a cause of some debate and disagreement. Toth [74] argued that they cannot be used as an aid to interpretation as they were *"more in the nature of statements"* containing opinions, expectations, clarifications and interpretations expressing their authors' understanding of or position in relation to, certain provisions of the Act.

However, a contrary view was expressed following the UK's Commission for Racial Equality instructions to Richard Plender[75], QC, to draft a proposed amendment to the EC Treaty clarifying the Community's competence to legislate against racial discrimination. In his reply, Richard Plender drew the Commissions attention to Article 137 (former Article 118 EC, as amended) which required a qualified majority vote and the Declarations attached to the SEA arguing that the Community already had some competence in the area.

Article 137 (former Article 118)

> "Without prejudice to the other provisions of this Treaty and in conformity with its general objectives the Commission shall have the task of promoting close co-operation between Member States in the social field, particularly in matters relating to:
> -employment
> -labour law
> -basic and advanced vocational training
> -social security
> -prevention of occupational accidents and diseases
> -occupational hygiene
> -the right of association and collective bargaining between employers and workers
>
> To this end, the Commission shall act in close contact with Member Stales by making studies, delivering opinions and arranging consultation both on problems arising at national level and on those of concern to international organisations

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74 Toth, A, T*he Legal Status of the Declarations annexed to the Single European Act (1986)* 23 CMLRev 203

75 Plender, R., Draft Amendment and Note to the CRE 26th June 1991

> Before delivering the opinions provided for in this Article, the Commission shall consult the ESC"

Plender[76] argued that recent decisions of the European Court[77] confirmed that Article 137 (former Article118) conferred the power to adopt measures designed to promote the integration of third country workers into the workforce. With reference to the Joint Declaration of 11 June 1986 attached to the SEA he asserted that it could be argued that the elimination of racial discrimination is within the remit of the Community. Plender acknowledged Toth's arguments but stated *"the matter (of legal status) is far from settled"* advising the CRE *"to avoid any public statement implying that the Community institutions have no present competence in the matter"*. As a fall back measure Plender suggested amendments to the Treaty. These included amending Article 3 as follows:

> "(1) the elimination of discrimination against persons or groups of persons on the grounds of racial, religious, cultural, social or national differences and the promotion of harmonious relations between such persons or groups of persons"

and Article 139EC (Former Article 118 B) to include

> "(former) Article 118C The council, acting by a qualified majority on a proposal from the Commission, in co-operation with the European Parliament and after consulting the ESC, shall issue directives or make regulations setting out the measures required to eliminate discrimination against persons or groups of persons on the grounds of racial, religious, cultural, social or national differences and the promotion of harmonious relations between such persons or groups of persons. In particular, such regulations or directives shall apply to the activities of governments and bodies created by public law, to employment, housing and the provision of goods, facilities and services." (underlining added)"

Encouraged by Plender's opinion, the Director of the CRE wrote to the Prime Minister, John Major, in September 1992 regarding the implementation of a draft directive *"The Starting Line"* sponsored by the CRE and compiled by a panel of international experts[78].

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76 ibid

77 Cases 281/86,283/86,287/86, Germany, France, Denmark and UK v Commission, discussed in Chapter 6

78 See Chapter 9 for an examination of the latest Starting Line proposal

The Prime Minister replied that he had doubts about a Community wide Directive but said he would consider whether the UK would take this forward during the UK's forthcoming presidency.

Commenting on the impact of the SEA Declarations, Article 137 (former Article 118) and the Commission Decision 85/381EC adopted on 8 July, Szyszczak [79] expressed the view that Member States did not regard themselves bound by the Declaration. However, as the ECJ had acknowledged that migration policy could fall within Community competence it might provide a basis for policies to combat race discrimination and grant fundamental human rights to non-Community migrants, if the Commission can demonstrate that such measures are necessary for the functioning of the Community

4.7 Summary

When the EC was first established in the 1950's, following the second world war, migration for employment purposes was welcomed and a number of member states actively encouraged migration from third country nationals as a cheap labour force essential to re-building parts of Europe. The Movement of third country nationals was increasingly restricted in the 1980s and 1990s as detailed in Chapter 3 as the Community moved towards *"Fortress Europe"*. Different levels of protection against race discrimination, as detailed in Chapter 2, have the potential to hamper the free movement of black and ethnic minority Member States nationals.

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[79] Szyszczak, R., *Race Discrimination: The Limits of Market Equality, in* Hepple, B. and

Two approaches to migration policies developed[80]. The community approach, which involved all the community institutions, was largely used to facilitate free movement of EC citizens within the Community, and equal treatment on grounds of gender. The intergovernmental approach, involving consultations between the Member States, was mainly used in the area of immigration of third country nationals, refugees and asylum seekers. However, a "*quilting*"[81] of third country national migration policy was continually witnessed in the late 1980s/early 1990s with the plethora of measures.

The period 1957-1992 also witnessed a growing institutional awareness of the inequalities facing different groups of workers and the resulting restrictions on their mobility. Despite numerous calls to enact Community wide immigration and race discrimination legislation the response in the area of race relations continued to take the form of soft law resolutions and declarations condemning racism and xenophobia[82]. This is not unprecedented, as Chalmers points out when commenting on the general impact of soft law, and it has often been "*.....the starting point of the 'communitarisation' of a particular policy area, acting as the precursor to the development of hard law.*"[83] The Treaty of Amsterdam, which provided the competence for the Commission's proposals

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Szyszczak R., (eds.) *Discrimination: The Limits of the Law,* Mansell Publishing 1992, p140

80 See Guild, op cit at Note 67, .p.3

81 See Huysmans, J, as cited in Chalmers D. & Szyszczak, E (eds) *European Union Law, Volume 2, Towards a European Polity?,* Ashgate Publishers, p. 117

82 In the absence of more concrete measures and commenting on the impact of Community soft law, Szyszczak, E., opined that "It may give rise to indirect effects and a Community national may be able to rely on the human rights concepts implicitly within the Resolution as a means of interpreting national law so as to conform with Community law. It may also be a tenuous building block from which further measures to combat race discrimination may be enacted, op cit at note 78, p.143

for a Directive on Race as discussed in Chapter 9, could well result in concrete legislation on race discrimination if sufficient political will is forthcoming.

As for immigration policy Member States, urged on by the Commission, were increasingly aware of the need for a common policy. However, fears surrounding loss of sovereignty, particularly voiced by the previous UK Conservative governments during the period, continued to ensure that policies were mainly intergovernmental outside the remit of the EC's legislative framework. Attempts to adopt common policies and harmonise migration policy were somewhat thwarted by different degrees of interpretation and implementation by the Member States, although they were all increasingly restrictive. The Schengen Agreement, which attempted to implement Article 14EC (formerly 7a) on the internal market by establishing common rules for control at external borders and establishing a single market, was plagued with implementation difficulties.

The complexity and *"quilting"* of measures led to a move to *"Europeanise"* migration policy. The Parliament, Commission and majority of member States expressed a desire to incorporate immigration matters within the EC Treaty. A minority of Member States, including the UK, Ireland, Greece and Denmark, were reluctant to lose their sovereignty in the area however. This resulted in the Maastricht agreement, signed in February 1992, which established *"three pillars"*, including the third pillar of Justice and Home Affairs as detailed in Chapter 5.

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[83] Chalmers, D., op cit at note 9, p. 162

The increasingly hostile attitude towards migrants, asylum seekers and refugees and the lack of political will to enact race discrimination controls fuelled the campaigns of groups concerned with human and civil rights. These groups included the UK's Commission for Racial Equality, the Standing Conference on Racial Equality, Justice and the Joint Council for the Welfare of Immigrants amongst others. In 1991 the Commission convened the Migrants Forum comprising delegates representing both EC and non-EC workers. Human rights and race equality campaigners set their sights on lobbying the UK government due to take over the presidency from June-December 1992.

Given that the UK is perceived as having the best race discrimination laws in the Community, campaigners such as the Commission for Racial Equality sought to capitalise on concerns relating to the absence of EC wide protection against race discrimination. Low levels of protection in some Member States is likely to result in the exploitation of workers providing some employers with an unfair competitive advantage. The Community's power to legislate in areas where the labour market position appears to conflict with the principles of an internal market led to the inclusion of former Article 141EC (former Article 119EC) equal pay provisions as the French were worried that France would be at a competitive disadvantage.

The CRE's attempts[84] to persuade the UK Prime Minister, John Major, had a mixed reception. In his letter to the CRE John Major reiterated his opinion that good race

[84] The CRE wrote to John Major in December 1992 in connection with the draft Directive *"The Starting Line"* sponsored by the CRE and compiled by a panel of international experts. An

relations was not a legitimate Treaty objective and that informal methods would be more appropriate. The Edinburgh Summit endorsed the need for race legislation although it did not state whether it was needed at Community or national level. The statement was nevertheless more positive than John Major's, demonstrating once again a lack of political will on the part of the UK.

The Treaty on European Union, signed in Maastricht in 1992, eventually came into force in 1993. Free movement provisions and the impact of EU policy on race discrimination and migration post Maastricht up to the Treaty of Amsterdam 1997 will be examined in the next chapter. The Maastricht agreement continued to deny competence in the area of race but acknowledged limited competence in the area of immigration.

analysis of the latest proposal *"The New Starting Line"* issued in 1998 and the Commission's subsequent proposals is included in Chapter 9 when discussing the way forward.

PART TWO: FREE MOVEMENT PROVISIONS AND THE IMPACT OF EU POLICY ON RACE DISCRIMINATION AND MIGRATION CONTROLS, WITH PARTICULAR REFERENCE TO EMPLOYMENT ISSUES AND THE UK'S RESPONSE

CHAPTER 5

EU[1] POLICY POST MAASTRICHT LEADING UP TO THE TREATY OF AMSTERDAM 1997

Despite the growing recognition that different categories of workers with different rights can potentially hamper the internal market and inhibit free movement, as highlighted in Chapter 4, the period 1957 to 1992 was dominated by *"soft"* law resolutions and recommendations in the area of race relations, which were often no more than political rhetoric. Controversial concrete proposals in the field of migration largely conducted outside the usual legislative framework, due to limited competence, were enacted by Member States. This chapter examines the period post Maastricht up to the Intergovernmental Conference (IGC) of 1996/7 which eventually led to the Treaty of Amsterdam, the third time in a decade that the Treaty has been reviewed, and where EU competence in the areas of migration and race discrimination were finally recognised as detailed in chapter 8.

The *"democratic deficit"* debate calling for greater involvement of the Parliament, Court and national parliaments in scrutinising EU laws together with greater

1 The change in name from a "Community" to a "Union" is an important indicator of its future direction. Blanpain and Engels, opine that the term "...constitutes a closer, a more intense relationship than a mere Community: a Community relates to people with the same characteristics or interests; a union means a far-reaching involvement, an intimate working together towards a common goal...." *European Labour Law*, Kluwer, 1998, p.36

transparency continued[2]. In 1996 the EU finally bowed to pressure in relation to openness and transparency[3] and agreed that future immigration and asylum measures, and those agreed between November 1993 and 1996, would be published in the Official Journal. Since the Treaty of Amsterdam has entered into force Member States proposals on immigration are usually published in Official Journal.

5.1 The Treaty on European Union (Maastricht Treaty)

The Treaty on European Union (TEU) signed at Maastricht in December 1991 eventually entered into force in November 1993. It was surrounded by controversy at an unprecedented level. A number of countries, including France, Ireland and Denmark decided to hold referendums. The French voted in favour by a narrow majority and the Danes voted against. Denmark faced a second referendum in May 1993 when 56.8% voted in favour. The UK experienced growing opposition, including a number of dissenters from the former UK Conservative Government's own party, but the Government ignored calls for a referendum. The final stages of enacting the Treaty were overshadowed by German constitutional delays. In the meantime, intergovernmental co-operation in justice and home affairs continued.

Some commentators have been critical of the perceived failure at Maastricht to deal with the EU's constitutional position arguing the *"Maastricht has done nothing to clarify the constitutional position"* and that the overriding weakness of the Union

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2 See for example *The Democratic Deficit: Democratic Accountability and the EU,* Justice Report, October 1996

3 See Chapter 7 for comments on the challenges by organisations such as Statewatch to secure openness for EU citizens

structure is the lack of legal personality[4]. Curtin opined that *"The result of the Maastricht summit is an umbrella Union threatening to lead to constitutional chaos; the potential victims are the cohesiveness and the unity and the concommitant power of a legal system painstakingly constructed over the course of some 30 odd years..."*[5].

There is no denying, however, that the Treaty was a landmark in EU history and its implications were far reaching as it formally established the European Union, widened the scope of responsibilities, incorporated new areas within its jurisdiction and made a number of amendments to the original Treaty. The Treaty is of constitutional significance as it deals with divisions of responsibilities between Brussels and Member States. The concept of subsidiarity, which entails making decisions at the lowest possible level in the Community where appropriate, was also formally introduced[6].

The Treaty created three pillars, the central , or first pillar, continued to issue Community legislation in accordance with increased powers. Of particular importance to this thesis are the provisions on EU Citizenship which were incorporated into the EC Treaty under Article 17-22 (former Article 8) as detailed in chapter 7 and the limited rights for the EU to act on immigration issues under former

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4 Ward, I. *Identity and Difference: The European Union and Postmodernism*, in *New Legal Dynamics of European Union*, Shaw, J. & Moore, G. (eds.), Clarendon Press, 1995, p.20

5 Curtin, D., *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 CMLRev (1993) 67

6 Former Article 3 (b) EC. Revised at Amsterdam and now contained in Article 5 as discussed in Chapter 8. See Chalmers, D., *European Union Law Part One*, 1998, Ashgate, p. 223 for a discussion of the principle and Ward, op cit at Note 4 for a critical analysis of the potential offered by subsidiarity, p.15-28

Article 100c.[7] The second pillar relates to the common foreign and security policy and the third pillar concerns justice and home affairs.

Any initiatives brought under the first pillar require approval of the Commission, the European Parliament and the Member states. The second and third pillars operate outside the usual Community legal framework under Article 46 TEU (former Article L TEU[8]). Any initiatives under the second and third pillar therefore required less involvement by the Commission, the European Parliament and the European Court of Justice (ECJ) and contributed to the democratic and judicial deficit. The British, Irish, Greek and Danish governments were largely responsible for the third pillar remaining outside the area of Community competence as they wished to retain sovereignty in this area.

Article 48 TEU (former Article N2 of the TEU) called for an intergovernmental conference to be convened in 1996 to review the Treaty in accordance with the objectives set out in Articles 1 and 2 TEU (former Articles A and B). This eventually resulted in the Treaty of Amsterdam 1997.

Title 1 of the Treaty on European Union states:

> "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen"[9]

The objectives of the Union are stated as[10]:

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7 This Article was repealed at Amsterdam, refer to Chapter 6 and 8 for details

8 Article 46 (former Article L) TEU was amended at Amsterdam , refer to Chapter 8

9 Article 1 (former Article A) TEU

10 Article 2 (former Article B) TEU

"-to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area with internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency.....

- to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence
- to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union (this is examined in more detail in chapter 7)

- to develop close co-operation on justice and home affairs (detailed in former Title VI Article K, see below for further details)

- to maintain in full the "Acquis communautaire" and build on it with a view to considering, through the procedure referred to in (former) Article N(2), to what extent the policies on forms of co-operation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community

The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in former Article 3b of the Treaty establishing the European Community."

The Treaty on European Union is a framework Treaty requiring secondary legislation to give it effect.

5.1.1 The impact of the TEU on the EU institutions

A number of institutional reforms were introduced, the most significant included the increased powers for Parliament, increase of qualified majority voting and the creation of new bodies such as the Ombudsman[11]. Although the Parliament's function remained largely consultative a new co-decision and assent procedure increased its significance. The co-decision process allows the Parliament and the Council to share in the power. Enactments in the area of freedom of movement need the assent of Parliament[12].

11 Refer to Chapter 7 on Citizenship for a discussion of the role and impact of the Ombudsman

12 Article 18 (former Article 8a. 2) EC

The increased powers granted to the Parliament have been criticised for not being sufficient to satisfy the *"democratic deficit"*[13] and it was argued that the Treaty on European Union was *"A Timid Step Forward'"*[14] for democracy. The Parliament still remained relatively powerless in a number of areas, including the third pillar area of justice and home affairs, but it could no longer be ignored, at least within the parameters of the co-decision and assent procedures. The new indirect right of legislative initiative was introduced to allow the Parliament more influence over the Community's legislative programme but this had limited impact.

The ECJ continued to be excluded from immigration and human rights issues. Arnull[15] asserted that it is was likely that Member States would seek to remove other areas from its powers and made reference to a judge of the Court who has acknowledged that this line of reasoning contains *"more than a kernel of truth"* as some Member States were increasingly frustrated with the impact of the ECJ's judgments. The previous UK Conservative government, for example, expressed its concerns relating to pension and maternity rights judgments, which had enormous financial implications, and continually voiced its opposition to the Court's involvement in immigration issues[16]. The role and impact of the ECJ is discussed in Chapter 6 and Chapter 8 highlights its changing role.

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13 Curtin, D., op cit at Note 5, p. 35-39

14 See, for example, Raworth, A Timid Step Forward. Maastricht and the Democratisation of the European Community (1994) 19 ELRev 33

15 Arnull., A., *Judging the New Europe*, 19 ELRev (1994) 3-15

16 See for example the UK Conservative government's submission to the IGC, *A Partnership of nations: the British approach to the European Union Intergovernmental Conference* 1996, London Foreign and Commonwealth Office 1996, outlined below in section 5.7

5.1.2 The Social Dimension after the TEU 1992-1996

The change of title of the European Economic Community (EEC), to the European Community (EC) and since Maastricht the European Union (EU) goes some way to demonstrating its changing nature. The Union developed beyond the purely economic nature of the Treaty of Rome as created in 1957 and now embraces a social and broader mantle as detailed in this chapter.

The former UK Conservative government continued to resist attempts to assume a social dimension[17] and the proposed extension of the qualified majority vote. This was dramatically demonstrated at Maastricht when the former UK Conservative government refused to compromise on social policy and the chapter on Social Policy was removed from the TEU and set out as a Protocol and Agreement for the other 11 Member States to sign

The inter-governmental Protocol allowed co-operation between Member States other than the UK, attempted to expand the areas covered by the Qualified Majority Voting system and encourage social dialogue between management and labour. Measures adopted under the Protocol were not binding on the UK as it was under no legal obligation regarding social policy[18]. Article 2 stated that the UK should not take part in any deliberations and adapted the voting procedure accordingly.

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17 The UK Conservative government had voiced its opposition to expanding the EU's powers in the social field on a number of occasions prior to Maastricht as demonstrated by its refusal to sign the Social Charter adopted by 11 Member States in December 1989 as discussed in Chapter 4. It was of the view that there should be as little intervention in the labour market as possible to ensure the free operation of markets. Opponents disagreed and argued that the market could not operate effectively without a social dimension.

18 The Labour Government elected in 1997 signed up to the Social Policy provisions fairly soon after being elected and The Treaty of Amsterdam incorporated the social provisions in the EC Treaty as discussed in Chapter 8

The Agreement attached to the Protocol set out to *"..implement the 1989 Social Charter on the basis of the acquis communautaire"* and detailed a number of objectives such as promoting employment, improved living and working conditions, proper social protection, the development of human resources with a view to lasting high employment and the combating of social exclusion. The legal status of the Protocol and Agreement was the subject of much comment, some fearing that the legal base had been fragmented[19] while others were more optimistic.[20] The UK was not involved in future discussions, although this lack of involvement was contested in the European Parliament and UK MEPs were allowed to enter into debates on such issues.

Although activity in the social policy area increased in the 1990s[21], limited legislative progress was made under the Social Policy provision during 1992 to 1996. This was partly due to the UK' s opt out of social policy and the EU's reluctance to create a *"two speed"* Europe excluding the UK. The President of the Commission, Jacques Santer, was of the view that the UK's opt out from EU social policy should be abolished as it was impeding progress on social policy[22]. Where possible provisions were enacted under qualified majority voting procedures to include the UK.[23]

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19 See for example, Szyszczak, E., *Social Policy: A Happy Ending or a Reworking of the Fairy Tale* in O'Keeffe and Twomey (Editors) *Legal Issues of the Maastricht Treaty*, Chancery Press 1994

20 Bercusson,. B., *The Dynamics of European Labour Law After Maastricht*, (1994) 23 ILJ 1

21 Due to the increase in qualified majority voting under former Article 118a EC and, arguably, greater political will on the part of the 11 Member States signing the Charter of Fundamental Rights of Workers 1989

22 *The Independent* 18th January 1994, *"UK opt out stops progress"*

23 An example is the Working Time Directive which was adopted in 1995 under former article 118 qualified majority provisions thereby including the UK. Although, the previous UK Conservative government challenged this in the EC J (case C-84/94, *United Kingdom v*

Whiteford[24] claims the Commission's traditional role, of laying down minimum standards in a basic floor of rights, changed during the 1990s as evidenced by the number of derogations permitted in Directives such as the one on working time. She argues that the Commission followed a path of soft law provisions as a pragmatic solution to the stalemate often encountered in the social policy field.

Following the repeal of the Social Policy Protocol and Agreement at Amsterdam in June 1997, the social policy provisions have been re-written and added to Articles 136-145 (amended former Articles 117-120 EC), as discussed in chapter 8, and include the UK. In the meantime the Directives enacted under the Social Policy provisions relating to part time workers, parental leave, works councils and burden of proof were extended to the UK[25].

5.1.3 Impact of the TEU on Free Movement, Race discrimination and migration policies

Member States disagreement as to the scope of Article 14EC (former Article 7a) continued to cause problems for the internal market and free movement of people. Both the Commission and the Parliament reiterated their view that Article 14 EC (formerly article 7a) involved dismantling of all border controls. The UK and Denmark persisted in challenging this with the UK in particular arguing that Article 14 EC (formerly Article 7a) allowed Member States to retain the right to check

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Council) the UK lost and had to accept therefore that it would have to implement the Directive

24 Whiteford, E., *W(h)ither Social Policy?*, in Shaw J. and More G. (eds.) *New Legal Dynamics of EU* (1995) Clarendon, p.111-128

25 These Directives were extended to the UK, prior to the Treaty of Amsterdam entering into force, under former Article 100 following the election of the Labour Government in 1997. See Chapter 9 for a discussion of the Burden of Proof Directive

nationality. This was not resolved at Maastricht. Disageement in relation to Schengen therefore continued as did differences regarding the External Frontiers Convention, due to arguments between the UK and Spain re Gibraltar. As the right of freedom of movement was restated and given more prominence in the Citizenship provisions under Article 18 EC (formerly Article 8a) and granted to all EU citizens the relationship between Article 18 EC (formerly Article 8a) and Article 14 (formerly 7a) was viewed with interest as detailed in Chapter 7.4. Case law surrounding free movement rights is detailed in Chapter 6.

Immigration matters were expressed as a matter of *"common interest"* under Article 29 TEU (former Article K.l) and still not strictly regarded as being within the competence of the EU, but its formal recognition in the third pillar, compared to its previous ad hoc treatment by semi-secret inter governmental groups, was a stepping stone for the amendments at Amsterdam in 1997[26]. The Trevi and Ad Hoc Immigration groups were replaced by a more formal structure (*see Table 5).* The Immigration Ministers meetings were incorporated into the Justice and Home Affairs Council, the "K4" Committee took over the role of the Co-ordinators Group and "Steering Group I" took on the work of the Ad Hoc Immigration Group.

The pillar approach involved the JHA Council meeting twice a year to decide on proposals which had been initiated by Member States and Commission in the first 6 areas of *"common interest"* outlined in Article 29 TEU (former Article K1 TEU)[27]

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26 The Amsterdam Treaty moved competence on asylum and immigration into the first pillar, for a discussion of this refer to chapter 8

27 Asylum, external borders, immigration, combating drugs and fraud and judicial co-operation on civil matters

and on Member States initiative in the last three areas[28]. Decision were taken by unanimous vote unless they decided to adopt a "joint position"[29] and Conventions could be adopted by two-thirds majority.

Although Justice and Home Affairs was still largely to be dealt with by intergovernmental conventions, former Article 100c EC granted limited powers in the first pillar to

> "The Council acting unanimously on a proposal from the Commission and after consulting the European Parliament shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Members States"

and stated:

> "...in the event of an emergency situation in a third country posing a threat of a sudden inflow of nationals from that country into the Community the Council may acting by a qualified majority on a recommendation from the Commission introduce, for a period not exceeding six months, a visa requirement for nationals from the country in question (this may be extended)"

Concrete action in the field of race discrimination was not forthcoming at Maastricht despite the controversy surrounding the EU's non-interventionist stance. The consequences for *"visible minorities"* following the Treaty on European Union was gloomily predicted by some commentators *"On the basis of economic analysis, we suggest that the Maastricht Treaty will lead to a process of continent-wide deflation that could exacerbate the already high levels of racism in the European Community*[30]. Their

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28 judicial co-operation in criminal matters, customs and police co-operation

29 The status of joint positions and joint actions is unclear. Some commentators claim that joint actions are usually regarding as binding, see for example *Justice, The Union Divided: race discrimination and third country nationals in the EU,* February 1997, Peers refers to the "continuing dispute" as to whether all joint actions are legally binding, the view of the majority, and the UK's view that only some are binding, *Undercutting Integration: developments in Union Policy on Third Country Nationals (1997)* 22 ELRev 82

30 Baimbridge,M. Burkitt, N. and Macey, M., *The Maastricht Treaty: exacerbating racism in Europe? (1994) 17 Ethnic and Racial Studies 420-433*

prediction of high unemployment was realised and the issue dominated Union discussions during the period up to Amsterdam thereby potentially exacerbating racist tendencies. However, the Summit did not even address the possibility of introducing Community legislation on race or amending the Treaty. Instead yet another *"soft law"* declaration against racism and xenophobia[31] was added. All Member States agreed though that the European Convention on Human Rights and Fundamental Freedoms was part of the general principles of Community law[32]. In addition, the TEU substituted "Article 189c" (now Article 252) for "co-operation" in Article 7 of the original EC Treaty, dealing with discrimination on the grounds of nationality, and renumbered it at Article 6. It is now Article 12 (former Article 6, ex Article 7):

> "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on the grounds of nationality shall be prohibited. The Council acting in accordance with the procedure referred to in Article 189c (on a proposal from the Commission and in co-operation with the European Parliament) may adopt (by a qualified majority) rules designed to prohibit such discrimination"
>
> (The words underlined were added by the TEU and the words in brackets were deleted by the TEU)

The lack of involvement of the European Parliament and Court of Justice in the areas covered in the second and third pillars, and the fact that they allowed for *"co-operation"* rather than a set of binding Community rules, resulted in any measures

31 Conclusion on racism and xenophobia, 9 and 10 December 1991, Maastricht

32 See Article 6 TEU (Former Article F2, TEU)

adopted being subject to international rather than EU law. It was argued[33] that the ECJ would have power to enforce measures only where Member States specifically agree and that in some instances work under the first two pillars could result in a treaty requiring ratification by Member States under national constitutional procedures. This led the UK's House of Lords to call for greater national parliament supervision of work under the inter-governmental pillars of the EU and it recommended that documents should be provided to Parliament if they qualify under any one of three tests *".....significance, eventual need for UK legislation or imposition of legal commitments on the UK"*[34]

5.2 Major Developments in Migration Policy and attempts by the EU Institutions to Tackle Race Discrimination 1993-1997

Following the TEU migration policy became even more complex and the *"quilting"*[35] process and *"Europeanisation"* of immigration policy continued. Firstly, the Treaties and secondary legislation, allowed legally binding *"hard"* laws to be enacted where competence permited[36]. ECJ judgments, where appropriate,

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33 House of Lords, Scrutiny of the Inter-Governmental Pillars of the EU, November 1993

34 Ibid, para 65 and 66 p 26

35 See Huysman, J., *Securitising Europe, Europeanising Security, The Construction of Migration in the EU.* Paper presented at a conference *Defining and Projecting Europe's Identity: Issues and Trade Offs,* The graduate Institution of International Studies, Geneva, 21-22 March 1996, as cited in Chalmers, D. & Szyszczak, E., *European Union Law Volume Two,* Ashgate, 1998, p.117

36 As discussed in Chapter 4, legal bases considered include Former Articles 118,100 and 235, although not all successfully. Since the TEU limited competence on visas was contained in Article 100c (repealed at Amsterdam). It should be noted also that EEA Agreements extend the full range of free movement rights to nationals of Norway, Iceland and Lichenstein and limited rights are also granted to third country nationals under Agreements with third countries. The Agreements are mainly trade agreements, however, largely dealing with free movement of goods. They have direct effect but do not entitle third country nationals to entry and residence rights. Rights are limited to equal treatment in employment and social security. Agreements include Turkey, N. Africa, Mediterranean, Eastern Europe, Russia. These

interpreted the law and established general principles. Secondly, it was argued that action could be taken under the Social Policy Protocol annexed to the EC Treaty for purposes outlined in the Agreement on Social Policy annexed to the Protocol[37]. Finally, action could be taken in accordance with the third pillar provisions in the TEU (which replaced the intergovernmental co-operation proceedings previously adopted as outlined in Chapter 4).

As the Social Policy Protocol and third pillar operated *"... without prejudice to the powers of the EC"* if there was a base in the EC Treaty in relation to migration policy that had to be used. The principle of subsidiarity, under Article 5EC (former Article 3b) also applied. It was argued that the existence of the provisions on co-operation could lead to the conclusion that Member States have an option, rather than an obligation, to use the EC Treaty as the basis for action.[38]

5.2.1 Major Initiatives between 1992-1996[39]

European Parliamentary Debates

The EP continued to debate issues connected with racism and xenophobia on an annual basis and commissioned a number of reports on immigration and asylum in 1992 and 1993 calling on the EU to recognise the issues confronting the Union and

agreements have led to numerous ECJ judgments, particularly the Turkish agreement as detailed in Chapter 6

37 Handoll, J., *Free Movement of Persons in the EU*, Wiley, 1995, p. 380, argues that the member States may act under the Social Policy Protocol annexed to the EC Treaty for the limited purposes identified in the Agreement on Social Policy annexed to that Protocol . Action on this basis during the period up to 1997 would of course have precluded the UK. No action was forthcoming.

38 Handoll, ibid, p.396 although he accepts that this conclusion may be resisted on constitutional grounds as argued by Timmermans in *Free Movement of Persons and the Division of Powers between the Community and the Member States,* Schermers et al (Editors) p.352.

to consider the human rights issues. Two of the reports proved to be too controversial for adoption, namely, Tazdait's a report on the status of nationals of non-member countries in the EU and Imberi's one on citizenship and the Union[40]. Tazdait's report recommended that legal residents should be able to move freely within the Union and secure employment on the same terms as Member State nationals. Imberi's report recommended that long term residents be given full citizens rights.

Noya's report on a draft charter for third country nationals resident in the EU set out rights and duties of immigrants, including the right to move freely throughout the EU, family reunification, equal pay and conditions, social security, health care, decent housing, equal treatment for men and women and the right to vote and stand in local elections. The draft Charter stated that children of migrant families born in an EU country should automatically acquire its nationality as their second nationality. Noya expressed the committee's view that lack of equal rights and duties for all EU residents increased racial discrimination.

Opponents argued that attempts to grant privileges and create a Charter of Rights would attract millions more immigrants into the EU exacerbating the unemployment problems. Padraig Flynn, replying for the Commission, agreed with concerns outlined in the debate and expressed his preference for a step by step approach. He revealed that the Commission would be issuing a new communication on

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39 See Tables 2 and 3 for an overview of initiatives

40 European Parliament Report on the status of nationals of non-member countries in the EU (Rapporteur Djida Tazdait) A3-0332/93, and Report on Citizenship of the Union (Rapporteur R. Imberi) A3-0437/93, Report on Migrants and a European Charter on Immigration (Rapporteur Magnani Noya) A3-0338/93 and A3-0144/94

immigration in 1994. Noya's report eventually fell when the Parliament was dissolved for the 1994 EP election. Despite the positive mutterings from Flynn about the Council's intentions, the Commission Communication issued in 1994, did little to enhance the position of third country nationals as detailed below.

The Green Paper November 1993[41]

The Green Paper aimed at encouraging debate about the future of social policy in the EU was issued in November 1993. This was the first time such a consultative process had occurred. The introduction reiterated the view that the Community is fully committed to *"ensuring that economic and social progress go hand in hand"* and claimed *"much of Europe's influence and power has come precisely from its capacity to combine wealth creation with enhanced benefits and freedoms for its people"*. The paper acknowledged the importance of social integration and identified equal opportunities for third-country immigrants and the fight against racism and xenophobia as two issues to be addressed.

The Commission sought views on how to "..... *improve and broaden the promotion of measures in the field of education, information and legislation as tools in counteracting racist attitudes, acts and discrimination? "*

Communication from the Commission to Council and EP on Immigration and Asylum Policies, February 1994[42]

Given the promising indications in the Green paper regarding race discrimination and migration issues, the Communication was a step backwards as it suggested

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41 COM (93) 552

42 COM (94) 23

codes of practice rather than concrete legislation[43]. The Communication was largely an elaborated version of the Commission's 1991 proposal on immigration and asylum, highlighted in Chapter 4.

Claims that since 1986 the fight against racism and xenophobia had been identified as a *"priority objective by the European Council"* appeared rather hollow as evidence of priorities on the part of the Council suggested the opposite. The reluctance to enact legislation was still apparent and confirmed in the Communication which stated that *"scope"* exists for improving *"co-operation"* at the Union level in the fight against racism and xenophobia. The *"co-operation"* and soft law approach to dealing with racism and xenophobia had little impact during that period. The Commission did not grasp the nettle and push for legislation at that stage, perhaps due to the belief that the time was not yet right.

Proposals included developing a European immigration and asylum policy, including taking action on migration pressure and controlling migration flows, and improving the situation of third country nationals within the Community by harmonising the legal status of legally resident third country nationals to bring them in line with EU nationals. Such third country nationals would have to satisfy *"stability criteria"*, not detailed in the Communication. Steps to realise free movement for legally resident third country nationals and to review member states legislation in order to remove unjustifiable conditions of nationality for the exercise

43 Ibid, para 146

of rights/or granting of benefits were also suggested[44]. These have never been actioned, however due to differences in opinion among Member States.

Corfu Summit and Franco-German initiative against racism and xenophobia June 1994

The Corfu Summit involved the EU's four prospective Member States at that time, namely, Austria, Sweden, Finland and Norway. An important, but little publicised, issue discussed at Corfu was the Franco-German initiative against racism and xenophobia which was unanimously adopted. A Consultative Committee on racism and xenophobia, chaired by M. Jean Khan of France, was established. Kamlesh Bahl, chair of the UK Equal Opportunities Commission and Baroness Flather from the UK were also on the Committee. An interim report by the Consultative Committee was presented in November 1994 and a final report in April 1995. Following a request by the Council to continue its work two more reports were produced in November 1995 and May 1996. The April 1995 report made a number of recommendations including a Treaty amendment and argued that a general principle of EU law established in the first pillar creating direct effect should be enacted.[45]

The European Council responded by establishing a European Observatory on Racism and Xenophobia which later became the Monitoring Centre. The Centre was originally opposed by the UK Conservative government but following a U-turn in

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44 Ibid, para 19 and 20

45 It should be noted that although the Treaty of Amsterdam now grants competence to non-discrimination matters, including race, New Article 13 EC does not have direct effect as discussed in Chapter 8

1997 it eventually came into being. It aims to establish a network and set up databases and an information service on racism.

The White Paper on Social Policy July 1994[46]

The European Commission's White Paper *"European Social Policy - a way forward for the Union"* 1994, followed the consultative 1993 Green Paper. The Social Policy White Paper was discussed amidst the EU's concern about unemployment[47] and another Commission White Paper *"Growth, competitiveness and employment"*, December 1993. Commissioner Padraig Flynn declared that European social policy should operate in the interests of the Union as a whole and that the Union's social policy should not play second string to economic development or to the functioning of the internal market.

Despite representations by many pressure groups during the period leading up the White Paper, including a draft Directive in 1992 entitled "The Starting Line" urging the EU to introduce race discrimination legislation, the White Paper lacked commitment to introduce Community wide discrimination legislation. In fact the White Paper included few concrete proposals for legislation as the Commission believed sufficient social legislation already existed and there was no need for new legislative proposals. Yet again there was no firm proposal relating to race discrimination. The Commission made reference to the present lack of explicit competence to legislate on preventing discrimination on grounds of race, religion, age and disability and suggested that consideration should be given to ensuring competence at the IGC revision in 1996.

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46 COM (94) 333

The political will to adopt such legislation was still lacking. Of the Government submissions to the White Paper on the field of equality only Portugal made any reference to combating race discrimination. A number of MEPs expressed their dissatisfaction at the lack of concrete proposals[48] but the Commission expressed its support for continued monitoring of incidents of racial harassment, increasing financial support for anti-racism projects and the possible adoption of a code of good employment practice against racial discrimination.

The White Paper recognised that freedom of movement of peoples was not yet a *"daily reality"* and that the Commission would establish a *"high level panel"*[49] to investigate the problems. Commitment to encourage improved employment conditions for legally resident third country nationals, finalising a review of the EC Turkish Association Council Decision on the position of Turkish workers employed in the EU (followed by a similar review of the Maghreb countries in Northern Africa) and presenting a proposal to give priority to permanent legally resident third country nationals when job vacancies cannot be filled by EU nationals were outlined. The commitment to third country nationals has not yet materialised as demonstrated by the soft law measures adopted as outlined below in 5.2.3.

The 'Starting Point' initiative and proposed draft directive, July 1994

Frustrated by the lack of response to the *'Starting Line'* draft Directive, discussed in Chapter 4, its sponsors proposed the *'Starting Point'* in July 1994. This suggested

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47 The annual average rising form 8.3% in 1990 to 10.9% in May 1994

48 Agence Europe No. 6280 25/26 July 1994 page 12

49 The Veil Committee reporting in 1997, see below

amendments to the Treaty to incorporate the elimination of racial and religious discrimination in the list of Article 3 community activities. The amendments were inserted to counter opposition from those arguing that the Treaty, at that time, lacked an appropriate base. The initiative recognised that any Directive must be granted under the first pillar of the EU, thereby requiring support from the Commission, the European Parliament and the Member States. The Commission and the European Parliament had expressed their support on a number of occasions but the stumbling block was the Member States, particularly the former UK Conservative government. Bindman[50] reported that John Major communicated in a letter to the President of the UK Law Society, that as far as EU legislation is concerned

> " . . we do not accept that a European Community directive on racial discrimination is the best way to proceed, even if there were competence to do it..... .. We believe that the best approach is to share information and expertise, to encourage best practice, but to leave the exact legislative arrangement to Member States, taking into account their own particular circumstances and the different background and nature of the issues they face".

Schengen Agreement Update, March 1995

The 1990 Schengen Convention, discussed in Chapter 4, entered into force on 26th March 1995. It had been ratified by the majority of EU states (except UK, Sweden and Finland). Austria applied on 6th March 1995 and Denmark applied for observer status. As the Schengen Agreement was negotiated outside the framework of EU law the non-participation of some States was not insurmountable. Travellers entering the Schengen area from non-participating EU states were categorised as "EU non-Schengen" at airports and still needed to show their passports but were not subject to

[50] Bindman, G., *The Starting Point*, New Law Journal, 12th January 1995, p.62-64

visa controls. The Agreement formed part of International law and not EU law[51] but the Commission appeared to recognise it as a mechanism for developing EU policy in this area. The irony of Schengen being used as a model for EU immigration policy was seized on by O'Keeffe who pointed out that Schengen was subject to criticism from bodies such as the Dutch and French Councils of State, lawyers groups concerned with human rights and by academics[52]. Annual reports on Schengen continually highlight problems as detailed in Chapter 8 which examines the incorporation of the Schengen acquis in the Treaty of Amsterdam.

The European Commission Communication December 1995 on racism, xenophobia and anti Semitism[53]

The Commission Communication stated that:

> "The continuing presence of racism, xenophobia an anti-Semitism across the European Community presents a major challenge for our societies. Although the extent of the problem is hard to quantify, it is impossible to ignore. Violent, racist, crimes are reported throughout the Community with sickening regularity hat is more an undercurrent of prejudice and discrimination can be seen in many walks of like, and the language of racism has become increasingly common in public, political manifestations in all the member states of the Community"

It pointed to a number of social factors including lack of integration, poor education, unemployment and poverty stating that they *"contribute to creating a climate that is conducive to racism"* and although the main responsibility for combating racism rests with the Member States the Commission considers that European-level action is justified when there is *"clear added value"* to what can be achieved at national level

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51 The TOA moves immigration issues from the third pillar to the first pillar and the Schengen acquis, comprising the 1985 Agreement, the 1990 Convention implementing the Agreement and a number of Accession Protocols and Agreements and Decisions and Declarations adopted by the Schengen Executive Committee, is incorporated into the framework of the European Union, as discussed in Chapter 9

52 O'Keeffe, D., *The Emergence of a European Immigration Policy*, 20 ELRev 1995 p. 23

53 COM (95) 635 final

alone, or where action is required to help ensure respect for basic rights and attainment of Treaty objectives throughout the Community. The Communication suggested placing the issue of amending the Treaty on the IGC agenda.

Challenges by the European Parliament

Parliament has attempted to flex its muscles on occasion as witnessed in 1995 when it adopted a report questioning the Council proposal to adopt rules concerned with the Centre for Information, Discussion and Exchange on the crossing of frontiers and immigration (CIREFI) exchanging information on combating illegal immigrants. The Parliament report objected to the Council proposals as Parliament had not been consulted, as laid down in former Article K6, or given access to documents revealing the scope of CIREFI. A Justice report in 1996 commented that some observers criticised the Parliament for not being more forceful as although the Council was held to be in breach of its Treaty obligation no further action was taken[54]. The Parliament did mount a successful legal challenge against the Council in December 1995, however, when it used Article 230 (former Article 173 EC) to annul a Council Regulation relating to visas for third country nationals as detailed in Section 5.2.2 below.

Justice Report February 1997

A further Justice report[55] argued that the lack of specific European wide race discrimination laws, combined with discrimination against third country nationals,

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54 Justice, op cit at Note 2, p. 13

55 Justice, *The Union Divided, race discrimination and third country nationals in the EU,* February 1997

has negative consequences for *"17 million people"*[56]. The report referred to the fact that a number of European bodies have published reports[57] highlighting the impact of racism and the legal provisions required to combat it and argued that the evidence for action against racism is overwhelming requiring concrete legislative action from the Intergovernmental Conference.

5.2.2 Binding Provisions between 1993-1997

Use was made of new powers under Article 100c EC and a list of countries requiring EU visas was drawn up by the Commission in November 1993, based on the list agreed between the nine member countries of the Schengen Agreement. It included thirty eight countries, largely from the Commonwealth, only seven of which currently require visas to enter the UK. The list was attacked by a number of civil rights groups as being *"anti-black"*. The Commission's list did not include the Schengen list of twenty *"white"* countries including Andorra, Austria, Canada, Czech Republic, Finland, Hungary, Iceland, Japan, South Korea, Liechtenstein, Malta, Monaco, New Zealand, Norway, San Marino, Slovak Republic, Sweden, Switzerland, USA and the Vatican.

The Commission agreed the model for a new common European Union visa in July 1994. However disagreement regarding the list of countries to which the visa applied continued. The former UK Conservative government continued to argue that

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56 Ibid, the report states that it is estimated that there are around four million non-white citizens of member states, three million nomadic people living in the Union and least ten million legally resident third country nationals.

57 Referring to the Evrigenis and Ford EP Reports 1985 and 1990, the Committee of Experts on Community Relations report 1991, International Alert and the Netherlands Institute of Human Rights report 1991, Meijers Committee of Dutch legal experts report 1995, Khan Commission report 1995,

the list was too long and damaging to UK interests as it included countries whose citizens did not need visas to visit Britain. Opposition also stemmed from the fact that as the measure were being agreed under 100c it would allow the ECJ to have some input on immigration matters, a matter which the UK had greatly resisted.

Council Regulation 2317/95, OJ 1995 L 234/1, was eventually adopted under Article 100c EC provisions. The list of countries agreed by the Justice and Home Affairs Minister in September 1995 established a group of States whose nationals require a visa when crossing the external borders of all Members States. As the list included a large number of countries from Africa and the Caribbean it had racist overtones. The Council rejected a draft directive proposal from the Commission to harmonise visa policy fully as some Member States still believed competence on third country nationals was lacking under the first pillar.[58] A Joint Action on visa free travel rights for resident third country nationals was proposed in June 1996 which claimed to be *"a positive policy to ensure better integration"* but Peers opined that *"its text is more restrictive than the Commission's 1995 proposal"*[59]. The Regulation was eventually deemed to be illegal by the Court[60] following a challenge by the European Parliament under Article 230 EC (former 173) as the Council did not consult the Parliament following substantial amendments to the Resolution but an identical measure was introduced later[61].

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58 See, Peers, S., *The Visa Regulation: Free Movement Blocked indefinitely*, 1996, 21 ELRev 150

59 Peers, S., ibid p.84

60 Case C-392/95 *Parliament v Council* (1997) ECR I-3213, (1997) 3 CMLR 896

The only Directive directly relevant to this Chapter adopted during 1993-1997 was the Posted Workers Directive which attempts to facilitate the employment of migrant workers posted from one EU country to another by their employer. It was not without controversy however. A draft directive was adopted by a qualified majority vote on 3 June 1996 with the UK and Portugal continuing to oppose it. It was finally adopted by the Council of Ministers at the Labour and Social Affairs Council in September 1996 and the text of the Directive appeared in the Official Journal on 21 January 1997[62]. Although the Directive aims to protect posted workers from the different levels of labour and social protection between Member States, which can unfairly penalise workers and lead to *"social dumping"*, and allows for greater mobility of workers, its adoption was more than likely influenced by economic rather than social pressures. The potential to assist the economic viability of organisations and prevent countries being flooded with cheap migrant labour no doubt encouraged a number of Member States to support the proposal.

The Directive follows the line adopted towards posted workers in cases such as *Rush Portugesa* and *Van der Elst*, detailed in Chapter 6.6.4, and allows workers to be protected by a *"hard core"* of rules relating to the maximum hours of work, rest periods, weekend work, night work and shift work, public holidays and minimum paid holidays, minimum rates of pay, equality of treatment between men and women, and the prohibition of discrimination on grounds of colour, race, religion, opinion, national origin, social background or sexual orientation. The Directive

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61 Regulation 574/99 OJ 1999 L 72/2

62 Directive 97/71/EC

guarantees the right to be covered by the Member States employment rules and there is no intention to harmonise labour rules generally.

There was little concrete action in the field of non-discrimination on grounds of race between 1993-1996. In July 1995 the Spanish presidency put forward proposals for a joint action under the third pillar, Title VI TEU, provisions. Originally it involved harmonisation of national laws to create criminal offences[63] but this proved too controversial was rejected by the Council and watered down and redrafted to include *"judicial co-operation"* in prosecuting certain types of offence. Proposals included public incitement to discrimination violence or racial hatred, public dissemination or distribution of pictures or other material containing expressions of racism or xenophobia and participation in the activities of groups, organisations or association which involved discrimination, violence, or racial, ethnic or religious hatred. No action was taken on these proposals.

Apparently the former UK Conservative Government was the only Member State to reject the draft, stating that it would involve Parliament in criminalising a lower level of behaviour than the UK does at present, such as "discrimination" (which is a civil matter in the UK) and that the inclusion of religion was also problematic. In March 1996 the UK agreed to an amended text[64] and Justice observed that although the Joint Action was relatively weak compared with the original proposal, it was a

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63 Draft joint action concerning action to combat racism and xenophobia, 1162/95, Brussels, COREPER, 17 November 1995

64 Council Document 5727/96 (meeting of 19/20 March 1996), *Migration News Sheet* April 1996

valuable precedent for action in the area under Title VI. It also allowed Europol to be involved in police cooperation over racist offences [65]

5.2.3 Soft Law Provisions

Due to the limited EU competence in the field of immigration and the growing awareness of the need to adopt an EU wide approach there was an abundance of soft law resolutions in this period as detailed below. They are political acts rather than legally binding EU instruments and each Member State can change their national legislation where necessary. Their status is complicated by the fact that Member States are free to go beyond the minimum requirements agreed. Recommendations are not legally binding but can be given legal effect by the Court of Justice. Peers, an academic and active campaigner in the field of civil liberties, has examined documents detailing the negotiations regarding the status of each of the provisions adopted and comments that harmonisation measures resulted in a *"race to the bottom"* [66], as witnessed in several Member States detailed in Chapter 3. Many of the provisions could be re-adopted in accordance with the new powers granted at Amsterdam, although some of these will probably be re-negotiated as they will have a different legal significance.

Resolution on harmonisation of national policies on family reunification, June 1993[67]

A Resolution on the harmonisation of national policies on family reunification required. Member States *"to have regard"* to the proposals when revising national

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65 Ibid, p. 16

66 For a detailed discussion of each of the provisions see Peers, S., *Building Fortress Europe: The Development of EU Migration Law*, 35 CMLRev (1998) 1235-1272

67 Document SN 2828/1193,1 June 1993 not published in the Official Journal

legislation and to *"seek to ensure"* that national legislation reflects the proposals by 1 January 1995. The proposals are not legally binding and relate to family members of third country nationals lawfully resident in a Member State, excluding refugees. Family members include resident's spouse, the children, but not adopted children, of the resident and spouse, children adopted by the resident and spouse while resident together in a third country. Member States can reserve the right to insert a more liberal definition. General conditions of entry are also detailed and include criteria such as adequate accommodation, sufficient resources, existence of sickness insurance and reservations permitting refusal on grounds of national security, public policy or health. Member States can subject a third country national to a waiting period. Although the resolution was an attempt to harmonise national policies the flexibility permitted resulted in widely differing interpretations in the Member States, as highlighted in Chapter 3. Peers claims that some of the more liberal Member States are observing the rules but the conservative ones are ignoring them.[68] The Resolution attracted criticism as it was argued that the provisions are more restrictive than required by the ECHR[69]. Following the Amsterdam Treaty, rules on family re-unification can be agreed in accordance with Article 63 (3) and form part of EU law. The Commission presented proposals for family reunification in December 1999 as highlighted in Chapter 9.

Resolution on admission of third country nationals for employment 1994[70]

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68 Peers, op cit at Note 66 p.1267

69 Boeles., P & Kujer, A., *Harmonisation of Family Reunification* in Boeles, P. et al (Editors) *A New Immigration Law for Europe,* Utrecht: Dutch Centre for Immigrants, 1993, p. 26

70 OJ1996, C274/3

The possibility of strengthening integration policies for third country nationals within the Community as outlined in the Commission's Communication in February 1994 proved to be short-lived. On 20th June 1994 the Justice/Internal Affairs Council meeting in Luxembourg agreed that admission of third country nationals *'...for employment purposes, could now only be considered purely exceptionally".* The Resolution has been described as *"the most disputed"* [71] third pillar measure thus far and was agreed from a text which had been proposed in 1992 during the UK presidency and altered by several drafts from Member States, namely, Denmark, Belgium and Greece.

Despite the remarks made by Louis Tobback, the Belgium interior minister, that such measures would once again project an image of *"Fortress Europe"*, the agreement was unanimous. The twelve stressed that the present high levels of unemployment in the Member States increased the need to bring Community employment preference[72] properly into practice by making full use of the EURES system to improve the transparency of the labour markets and facilitate placement within the European Community.

The principles agreed included; requests for admission should only be considered where vacancies in a member states cannot be filled by Community nationals or non-community nationals lawfully resident on a permanent basis in that Member State already forming part of the workforce; third country nationals can be admitted on a temporary basis for a specific duration where employment is of a special nature in

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71 Peers, S., op cit at Note 66 p.1242

72 This relates to giving preference to nationals of Members States, EEA States and family members. For a discussion of the history of community preference see Usher, pl3-16

view of, for example, the requirement of specialist qualifications; the period of admission is subject to restrictions including: a maximum of 6 months in any 12 months for seasonal workers, trainees a maximum of one year in the first instance and other for a period not exceeding four years in the first instance. An amendment was inserted by Germany to allow Member States to continue to admit third country nationals from countries with which it has especially close links to its own territory for employment purposes as long as the arrangements were concluded before adoption of the resolution. The resolution was agreed a couple of months before the *Van der Elst Judgment* in the ECJ which confirmed employers' rights to move legally employed third country national employees from one Member State to another as detailed in Chapter 6. People entering the EU for non-remunerated activities or to create/manage a business/enterprise which they effectively control are not covered by the resolution.

Statewatch reported that during the Justice/internal affairs Council meeting in June 1994, a *"major row broke out"* between the Ministers, when discussing the Convention on Europol and the Customs Information System[73]. The argument centred on the need to consult the EP on developments on justice, policing and immigration under Article 34 TEU (former Article K6) and concerned those who merely wanted to inform the EP and a few who sought consultation. Padraig Flynn, for the Commission, argued strongly to adhere to *'the letter and spirit' of (former) Article K6 and said that it 'is inconceivable' not to refer the drafts to the EP for comment saying there was 'an obligation to consult not merely inform the parliament'.*

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[73] Statewatch Vol 4 No 4, July /August 1994, p.10

Resolution on admission of self employed persons, December 1994

The Council adopted a Resolution on the admission of third country nationals seeking to be self employed in December 1994. The negotiations for this resolution were much smoother than the resolution for employment purposes as Member States recognised that the admission of *"independent"* workers may be beneficial as jobs could be created and the economy boosted. Provisions include documents required to satisfy status and states that people authorised to exercise an independent activity cannot take up a salaried job after entry, with the exception that Member States may allow this where the independent worker has acquired long term or permanent residence. It doe not affect third country nationals lawfully resident on a permanent basis in a Member State.

Resolution of students, December 1994

A Resolution on the admission of third country nationals to the Member States for purposes of study was also agreed in December 1994. Its adoption was relatively straightforward as there was not large scale disagreement amongst Member States. The resolution confirmed that international exchange of students and academics is desirable but at the end of their period of study students should return to their country of origin. This measure prevents students from switching to employment but does little to encourage integration. Member States may allow prospective students entry to apply for programmes of study. Third country national students should not generally engage in employment although Member State may permit short term employment which does not affect their studies and is not an indispensable form of finance. It does not affect third country nationals lawfully resident on a permanent basis in a Member State.

Resolution on Procedures for determining asylum claims, June 1995

A draft Resolution on manifestly unfounded applications for asylum Procedures for determining asylum claims were put to the interior and justice minister meeting in Brussels at the beginning of December 1994. The draft resolution was surrounded in secrecy but Statewatch expressed fears as to its contents as it "*....was widely believed to include the abolition of suspensive rights of appeal in 'fast track' cases, which would mean that if the authorities deemed the an application for asylum 'manifestly unfounded'. the asylum seeker is removed before the appeal in which the court decides if the expulsion was lawful* "[74].

Due to disputes regarding refugees of European origin between Spain and other EU countries, particularly Belgium who had accepted an asylum application from a Basque couple, the resolution was not adopted until June 1995. As detailed in chapter 3, several EU countries have already removed appeal rights under national immigration laws and have been criticised by International bodies concerned with human rights. As the Treaty of Amsterdam introduced a new Article 63 EC empowering the EU to act on immigration and asylum, and specifically states that measure must be adopted in accordance with the Geneva Convention of 1951, future proposals in this area are likely to be closely scrutinised by civil rights watchers.

Recommendation on harmonising means of combating illegal immigration and illegal employment and improving the relevant means of control, December 1995 and Recommendation on combating illegal employment of third country nationals, September 1996

Earlier action on illegal immigration and employment failed to gain support.[75] The

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74 Statewatch, Vol 4 No 6, Nov/Dec 1994

75 A Commission Directive in 1976 failed as Member States argued that the EC did not have competence in the area, see Guild, E., *The Emerging Immigration and Asylum Policies of the EU* (1996), Kluwer, p281-292 for further discussion

1995 Recommendation exempts citizens of the Union or the EEA and their family members[76] and encourages identity checks *"where a person appears to be residing in the country unlawfully"* to *"ward off threats to public danger or security"*. It also states that Member States should encourage employers to check residence and work permits of applicants, consider vetting applications with the immigration authorities and that employers should be subjected to *"appropriate penalties"* where unauthorised foreign nationals are employed. Peers argues that the *".... the Recommendation is an implicit cue to racist behaviour by national authorities. "*[77]

The 1996 Recommendation focused on illegal employment only and supplements the 1995 recommendation and tightens the penalties on employers. Although the 1996 Recommendation includes anyone *"in a situation covered by Community law"*, unlike the 1995 Recommendation, it does not make reference to the ECHR. As detailed in Chapter 3 a number of Member States adopted laws implementing these controversial recommendations prior to the 1996 Recommendation.

Resolution on burden sharing with regard to the admission and residence of displaced persons on a temporary basis, September 1995

Following repeated calls from Germany, the Council agreed a Resolution on burden sharing in connection with the temporary protection of displaced persons. It states that there should be *"an equal share of the costs relating to temporary admission and stay of displaced persons"*. The resolution expects Member States contributing significant military forces to a crisis to take less refugees. Implementation of the resolution is

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76 Peers, Op Cit at Note 29 p.81, notes that it does not acknowledge that citizens of other states have residence and work right under EC -Turkey Decision 1/80, the Europe Agreements

77 Ibid, p.81

not without problems in practice and there are serious doubt as to whether it is fully achievable. The UK Government has expressed reservations about the viability of the proposals which is in stark contrast to its recent domestic legislation facilitating the dispersal of refugees throughout the UK, as discussed in Chapter 3.

New Article 63(2) EC introduced at Amsterdam deals specifically with this issue. As discussed in Chapter 8, it only requires Member States to adopt measures *"promoting a balance of effort"* therefore Countries such as Germany could still suffer the burden of unequal distribution of refugees and displaced persons. New Article 64 (2) EC permits provisional measures in the event of an emergency influx, following a qualified majority vote.

Resolution on integration of long term residents (LTRs) March 1996

The preamble to the Resolution agreed in March 1996 states that Member States *"must make progress in the adoption of measures to facilitate the integration into the host society of third country nationals settled in their territory"* as they *"contribute to greater security and stability, both in daily life and in work, and to social peace"* and that a *"number of principles common to the Member States"* should be agreed. The Resolution does not apply to a number of groups including refugees, students and researchers.

Long term resident is not defined. Member States are left to decide their own definition but it should not be longer than 10 years residence. People outside the specified criteria may be granted the same status if a Member State allows this, thereby including family members. Long term residents and family members are provided with a number of rights, namely the right to a residence authorisation,

authority to travel throughout that Member State, the same treatment as nationals in working conditions, trade union membership, public housing, social security, emergency health care, schooling and possibly non-contributory benefits.

The resolution aimed to introduce a *"successful integration policy"* which was broadly welcomed but contradicted a number of measures agreed so far. Peers[78] argues that *"Since the Council is clearly more committed to further action on illegal immigration than on integration, the contradiction is bound to become ever more manifest until the Council makes a genuine commitment to developing an integration policy".* He also points out that the proposal never incorporated the notion of nationality/citizenship and did not consider religion, culture and language.

Resolution of the Council and the representatives of the governments of the member states, meeting within the Council of 23 July 1996 concerning the European Year Against Racism (1997)

The Resolution included a recognition that there is a *"fundamentally European dimension to the problem"* and *"racist and xenophobic attitudes can constitute an obstacle to the effective exercise of the rights of free movement"* and declared 1997 the European Year Against Racism. The aims include highlighting the threat posed by racism, encouraging reflection and discussion on measures required to combat racism, promoting the exchange of experience and dissemination of information on good practice and effective strategies to combat racism, and publicising the benefits of immigrant integration policies.

5.3 Intergovernmental Conference 1996/7 (IGC)

[78] Peers, S., op cit at Note 29, p. 76

The Reflection Group set up at the Corfu Summit in 1994 submitted a report to the Madrid Council in December 1995 concluding that the IGC should adopt three broad themes, namely, making Europe more relevant to its citizens, enabling to Union to work better and preparing for enlargement.

It has been argued that the IGC was not suited to radical reform as Member States were deciding on issues which would result in loss of their power.[79] Disagreements between Member States continued to surface. Some Member States, Austria, Greece, Germany, Ireland, Italy and the Benelux countries were in favour of strengthening supranational powers while others such as Portugal and Finland were in favour of further integration but somewhat doubtful about the degree necessary. A minority of States were fairly opposed to too much reform. Spain did not want to increase the use of majority voting, France objected to increasing the Parliaments power and Denmark was in favour of applying the principles of subsidiarity more stringently. At the far end of the scale was the former UK Conservative Government. It was opposed to radical reforms, in particular, increasing either the ECJ or Parliament's powers and increasing the use of qualified majority voting. Differences between the UK and other Governments came to a head over the beef crisis in early 1996 when, following a ban on UK beef, the UK Government embarked on a policy of non co-operation using its veto to the full. The rift was eventually settled in June 1996 but it resulted in many wasted months of the Italian Presidency leading to a recommendation that the Irish Presidency should deal with the draft Treaty.

Responses of Member States and EU Institutions to the IGC, with particular reference to free movement, race discrimination and immigration

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79 Chalmers, op cit at Note 6, p.69

Of all the submissions put forward to the IGC only three countries called for amendments to the Treaty to include discrimination on grounds of racism and xenophobia, The Netherlands, Finland and Greece. The Dutch government said it would favour a Treaty amendment to include a ban on discrimination and a specific anti-racism provision provided the legal consequences were identified and the provision carefully worded on that basis[80]. The Government in Finland declared it was *"positively disposed"* towards a general ban of discrimination, including rejection of racism and xenophobia, being included in the Treaties [81] and the Greek government asserted that the revised Treaty should include *"specific provisions"* prohibiting any form of discrimination and explicitly condemning racism and xenophobia[82]. The position of the former UK Conservative Government was clearly reiterated when it declared that it did not believe the EU needed to intervene in the area of race discrimination, as it did not consider the EU to be the appropriate context for protection of fundamental rights or for a general clause prohibiting discrimination.[83].

The Comite des Sages[84] a group established by the European Commission produced a Report entitled *"For a Europe of Civic and Social Rights"*. This was examined by

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80 *Between Madrid and Turin: Dutch priorities on the eve of the 1996 IGC* (public information document, undated) p. 3

81 *Finland 's point of departure and objectives at the 1996 Intergovernmental Conference* (Report to the Parliament by the Council of State, 27 February 1996) p.l4

82 *For a democratic European Union with political and social content: Greece's contribution to the 1996 Intergovernmental Conference* (Ministry of Foreign Affairs 1996) p. 13

83 *A Partnership of nations: the British approach to the European Union Intergovernmental Conference 1996* (London Foreign and Commonwealth Office, 1996) p.24

84 The *"Committee of the wise(men)"* was established under the Commission's Social Action Programme 1995 to examine the future of the Community Social Charter 1989

government representatives and non-governmental organisation at the 1996 Social Policy Forum. It proposed that consideration should be given to incorporating a Bill of Rights into the EC Treaty including fundamental social and civic rights and a general right to non-discrimination. The Committee also suggested that a bottom-up constitutional debate was needed and proposed that an Article should be included

> "To set in motion a wide-ranging, democratic process of compiling, at Union level, a full list of civic and social rights and duties. Initiated by the European Parliament on a proposal from the Commission, this process, which must closely involve national parliaments and which would require input both from the traditional social partners and from non-governmental organisations, should culminate in a new IGC within five years time"[85]

The Commission's proposals to the IGC were not as bold though. A Commission Background Report in 1995[86] acknowledged that the third pillar *"has been ineffective"* and it questioned whether the legal instruments and working methods for co-operation in the fields of Justice and Home Affairs are "*adequate*" citing the fact that unanimity in all areas covered by Justice and Home Affairs "*.... has proved to be a major source of paralysis"*

Surprisingly, despite the lack of explicit commitment to non-discrimination in the Member States submissions, the June 1996 Florence European Council meeting suggested that there was a consensus to amend the Treaty. There still appeared to be some major differences of opinion though on the issue of rights for third country nationals and policies relating to immigration. The Reflection Group leading up to the IGC reported that a number of Member States believed that third country national issues should be brought within the competence of the EU and that some of the members were in favour of granting freedom of movement and a right of

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85 *For a Europe of Civic and Social Rights*, Comite des Sages chaired by Maria de Lourdes Pintasilgo, Luxembourg OOPEC 1996

86 Commission Background Report, The Intergovernmental Conference, B/9195, September 1995

residence to established third country nationals.[87] The UK Conservative government remained opposed to extending community competence in this area and the Labour Party (which eventually came to power in May 1997) did not make a commitment to protect third country nationals but clearly asserted that immigration matters should remain within the competence of the UK government, opposing merging of the three TEU pillars.

Other Representations and Reflection on the IGC

A number of commentators grasped the opportunity to contribute to the debate on the future of the European Union. These included the Federal Trust which set up a *"Round Table"* on the IGC, chaired by former Commission President Lord Jenkins of Hillhead, designed to stimulate discussion about the future of European democracy. Federal Trust discussion papers called on the IGC to include the elimination of ethnic and religious discrimination as one of the main activities of the Union[88] and argued that the Schengen Agreement could, and should, easily be transposed into Community law.

Writing on the prospects of a non-discrimination Article in the Treaty, Bell and Waddington[89] concluded that the weight of support for an amendment to the Treaty was now wide ranging and urged the Union to enact laws rather than repeat the *"...same old solemn declarations"* which were pointless while policies remained the

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87 Reflection Group 's Report (note 72) pp V and 13

88 *Justice and Fair Play, The Intergovernmental Conference of the EU 1996,* Federal Trust Papers 6 p.15

89 Bell, M. and Waddington, L. *The 1996 Intergovernmental Conference and the Prospects of a Non-Discrimination Treaty Article,* (1996) 25 ILJ .320

same. Szyszczak[90] argued for the introduction of a general non-discrimination standard to be *"free standing"* within human rights measures rather that aligned to economic rights in the Treaty.

Draft Treaty submitted by Irish Presidency December 1996

The Irish Presidency proposals for amendment of the Treaty, chapters 2 and 3, set out provisions to *"strengthen"* the area of free movement of persons, asylum and immigration as co-operation in this field has *"in the view of many, lacked sufficient coherence, consistency and impetus"*. It proposed moving Title VI of the TEU (the third pillar) into the first pillar, acknowledging that a number of Member States had indicated that they would not accept the transfer from the third to the first pillar. The majority of third pillar provisions were eventually moved into the first pillar at Amsterdam , as discussed in Chapter 8.

The Dublin proposal for a general law making power allowing the Council unanimously on a proposal from the Commission *"to prohibit discrimination based on sex, racial, ethnic or social origin, religious belief, disability, age or sexual orientation"* resulted in much activity before it was eventually incorporated in to the Treaty of Amsterdam. First drafts of the Dutch *"non papers"* removed any mention of disability, age, social origins and sexual orientation from the clause but they resurfaced in later drafts. Member States finally bowed to the mounting political pressure and a non-discrimination clause was finally agreed at Amsterdam, Article 13 EC.

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90 Szyszczak, E., *Building a European Constitutional Order: Prospects for a General Non-Discrimination Standard* in Dashwood, A. & O'Leary, S. (eds.) *The Principles of Equal Treatment in EC Law*, Sweet & Maxwell, 1997

5.4 The Veil Report on Free Movement of Persons March 1997 and Commission Proposals July 1997

The Report of the *"High Level Panel"*[91] on free movement of persons was completed and presented to the European Commission in March 1997. According to Statewatch[92] when it was researched there were 370 million EU nationals in the member states of whom 5.5 million live in a member state other than their own and 12.5 million long settled non-EU citizens. The group found numerous barriers to free movement of people but advocated greater co-operation between member states rather than new legislation.

Recommendations included a single Commissioner for free movement to work with the Ombudsman and the European Parliament Committee on Petitions; all third country nationals legally resident and insured in a member state should have the right to travel freely within the EU and receive the same level of social protection as nationals; equalising family reunion rights and greater transparency, including a Treaty right of access to information.

The Commission draft Convention on the admission of Third Country Nationals to the member States of the EU was produced in July 1997 using the Title VI TEU right of initiative[93]. Peers[94] argued that the *"ambitious"* proposal, if adopted, would eliminate some of the distinctions between third country nationals based on

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91 Appointed following the White Paper on Social Policy in 1994

92 Statewatch, Vol 7 No 6, November-December 1997 p.20-21

93 The Commission anticipates presenting the proposals as a directive when the Treaty of Amsterdam becomes law

94 Peers, S., *Raising Minimum Standards, or Racing to the Bottom?: The Commission's Proposed Migration Convention,* in Guild, E. (ed.) *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union, 1999,* Kluwer

nationality, together with abolishing elements of the reverse discrimination rule affecting many third country national family members of EU citizens. While he welcomed these provisions Peers predicted that some provisions could result in Member States reducing the rights available to third-country citizens or create a risk of a *"race to the bottom"* and a lowering of standards among Member States.

The Convention set out common criteria for entry and residence for non-EEA workers, the self employed, students and family members. It also outlined the proposed rights for long term residents. It severely restricts rights to enter for work and is limited to jobs which cannot be filled by EU, EEA citizens or third country nationals in the existing EEA workforce. Provisions for the self employed continue to be less restrictive. Evidence of *"sufficient resources"* and benefit to employment in the EU is all that is required. Free movement for study or training is restricted to prevent people switching to employment on entry. People entering to live on an independent income have to prove that it was acquired legally. The majority of categories of entrant, apart from students who must wait two years, are permitted to bring in family members after a year as long as they remain in the UK for another year. Eligible family members are spouse and unmarried children, elderly parents, grandparents and grandchildren may be admitted at discretion. The definition of family members is narrower that for EU workers as they allow anyone living with them as a dependant to enter. Family members are banned from working in the EU state of residence for six months.

The proposal grants formal status as it proposes that after five years lawful residence

third country nationals should be allowed to stay for a further five years and should be recognised as long term residents with rights to work, study, set up in business and bring relatives. It also proposes protection against expulsion and equal access to employment, training, housing education, trade union and association rights as those of EU national. Additionally long term residents should be able to move to other member states for purposes of employment and study.

Although the proposals grant rights to third country nationals they do not address the issue of rights of citizenship of member states or the EU. They fall short of demands made by a number of commentators, as detailed in Chapter 7, to grant citizenship to lawful residents born in Member States. The Commission announced its intention to put forward the proposal as one of the first immigration measures following the ratification of Amsterdam. The Starting Line group of international experts put forward a Directive based on the Commission's Convention in 1998, as discussed in Chapter 9.

5.5 Summary

Member States continued to tread softly post Maastricht from 1992-1996 leading up to the Intergovernmental Conference 1996 and the period was dominated by "soft" law proposals in the field of race discrimination. Some commentators argued that the Maastricht Treaty would *"exacerbate"* racism and that the Treaty had *"...stressed financial and trade factors at the expense of human rights"*[95] . Concrete action, prior to Amsterdam, was limited to a joint action in 1996. Two important proposals were put forward during this period. The Khan Committee, set up following the Franco-

[95] Baimbridge, et al, op cit at Note 30, p. 420

German initiative against racism, recommended in 1995 that a Treaty amendment should be introduced incorporating a general principle of non-discrimination creating direct effect. The Comite des Sages, established by the European Commission in 1995, suggested introducing a Bill of Rights to include fundamental social and civic rights and a general right to non-discrimination to be incorporated into the Treaty. There was increasing academic argument to support this[96].

1997 proved to be a relatively positive year for the race discrimination protection lobby. The European Year Against Racism was officially launched on 30 January 1997. Four months into the European Year Against the Racism, and a month before the UK General Election, the previous UK Conservative Government did a U-turn and announced that it would not block the establishment of a centre to monitor racism and xenophobia. The Centre, has the power to gather information on the activities of far right racist groups. It is perhaps no coincidence that the former Conservative government bowed to public pressure shortly before the general election. Despite disagreement between the Member States relating to a non-discrimination clause it was eventually incorporated into the Treaty of Amsterdam at Article 13EC, however, it will not have direct effect as its provisions are too vague. The Commission's proposals for a draft Directive on race, presented to the social affairs Council in November 1999, are discussed in Chapters 8 and 9.

96 See, for example, the powerful arguments put forward by Guild, E., *EC Law and the Means to Combat Racism and Xenophobia*, in Dashwood, A. and O'Leary, S. (eds.) *Principles of Equal Treatment of EC Law*, Sweet & Maxwell, 1997

The TEU marked the beginning of the pillar approach to immigration and asylum. A 1991 Commission report approved by the Council at Maastricht and elaborated on in the Commission's Communication on Immigration and Asylum in February 1994, set out the European harmonisation agenda. Amidst fears of increasing immigration, refugees and asylum seekers the Recommendations were agreed under the third pillar, outside of the democratic processes of Community law, tightening the grip of *"Fortress Europe"*. Although human and civil rights groups continued to lobby and express concerns regarding human rights violations, and Eurostat reported a drop in the number of asylum seekers in between 1993 to 1996[97], the harmonisation programmed resulted in a levelling down as the hostility of Member States to many of the provisions resulted in compromises having to be reached. Provisions enacted also undermined the integration policies proposed by the Commission. Commenting on the resolution to integrate third country nationals resident in a Member State and recommendations on checking illegal immigrants agreed in 1996 Peers[98] opined that it was obvious that Member States are *"...as reluctant about further integration as they are enthusiastic about removing immigrants and sanctioning employers..."*. The documentary evidence Peers gathered under the rules of access to documents seems to substantiate this claim[99].

The majority of the Resolutions agreed between the Member States were enacted into national law but Member States were allowed to vary their responses to the resolutions as highlighted in Chapter 3. This resulted in a complex set of responses

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97 The figures increased again in 1997/98 caused largely by the crisis in Kosova see Table 4.

98 Peers, S., op cit at Note 29, p.76

99 For further comment on rights of access to documents refer to Chapter 7 on EU Citizenship provisions

and a plethora of different national laws. Peers[100] questions the competence of some of the measures taken by the Member States during this period under the third pillar as he argues they conflict with a number of Community law provisions, for example the Austrian measures requiring all posted workers to seek entry visas from their country of nationality potentially breaches former Articles 59/49EC. National legislation on immigration and asylum became increasingly restrictive as a result of EU negotiations and agreements were mirrored by countries hoping to secure membership. This fuelled calls from human and civil rights campaigners for common rules subject to challenge by the EU legislative system.

The human rights dimension of the EU has been subject to much comment and debate as highlighted throughout Part One of this thesis. The paradox of human rights in the EU is examined in Chapter 8. Immigration, refugee and asylum measures have been enacted in haste and have potentially fuelled racism and xenophobia. The non-discrimination clause in Article 13 EC could alleviate increasing racist hostility and discrimination and create a more positive climate.

There was growing recognition during 1992-1997, that different categories of workers were emerging and that this hampers the competitiveness of the EU, is a waste of resource and has the potential to lead to growing social unrest. The different categories comprise:

i) the first category which includes EU nationals (with EU Citizens rights), see Chapter 7.

ii) the second category includes certain family members who may also obtain free movement rights under secondary legislation as detailed in Chapter 4,

100 Peers, S., op cit at Note 66, p. 1268

and EEA nationals, but they do not acquire right granted under citizenship of the Union in accordance with Article 18 former Article 8a EC

iii) the third category encompassing workers covered by Association Agreements (for example Turkish workers), refer to Chapter 6 for case law, and

iv) the fourth category including employees covered by the rulings in Rush Portugesa and Vander Elst under rights acquired via Articles 43 and 49 EC (former Articles 52 and 59) refer to Chapter 6)

v) the lower category which includes all those not included in the other categories

The integration and equal treatment of all workers, particularly those lawfully resident in Member States for a number of years, is essential to the workings of the internal market and adheres to the principles of social inclusion espoused in this thesis. The inequitable messy hierarchy of workers needs to be dismantled as the EU cannot continued to deny rights to the estimated 12.5m long settled non-EU citizens.

Views as to how the EU should tackle the issues of third country nationals varied amongst the institutions. The European Parliament continued to call for rights for third country nationals and demonstrated that it would flex its muscles if the Council attempted to by-pass the Parliament, mounting a successful legal challenge in 1995 to annul a Council Regulation. The Commission and some Member States were increasingly of the opinion that urgent action was needed at EU level but some States, most notably the UK and Denmark, continued to be reluctant to commit themselves to major change in the area of immigration. This eventually resulted in a number of *"opt out"* Protocols at Amsterdam in 1997 as discussed in Chapter 8.

1997 was also significant as the Commission's *"ambitious"* draft Convention proposed to reduce some of the distinctions between third country nationals based on

nationality and the Veil Report recommended that all third country nationals legally resident and insured in a member state should have the right to travel freely within the EU and receive the same level of social protection as nationals. The Commission expressed its intention of putting the Convention forward as one of the first proposals for Community law on migration following the Treaty of Amsterdam coming into force in 1999. Its prospects for success may be hampered by the reorganisation of the Commission in July 1999, following the Commission's mass resignation in March 1999 in the light of a report into mismanagement and nepotism, and the fact that migration measures still need a unanimous vote for at least 5 years. The migration proposals currently under discussion at the Tampere Summit, October 1999, do appear though to be more encouraging than previous EU Presidency proposals, as discussed in Chapter 9.

Although the Court's powers have been somewhat curtailed, as outlined in this Chapter and Chapter 4, it has nonetheless played a fairly significant role in areas connected with this thesis. This is explored in Chapter 6 and its new jurisdiction under the Treaty of Amsterdam explored in Chapter 8. The impact and relevance of Citizenship and nationality is considered in Chapter 7. The Treaty on European Union formally granted EU Citizenship to nationals of Member States and the new rights, successes and failures are examined. The rights of free movement in Article 14 (former Article 7a) and the relationship with Articles 18 (former Article 8a EC) are also examined together with the impact of EU Citizenship provisions on non-EU nationals and the prospects for EU Citizenship being granted to third country nationals.

PART TWO - FREE MOVEMENT PROVISIONS AND THE IMPACT OF EU POLICY ON RACE DISCRIMINATION AND MIGRATION CONTROLS, WITH PARTICULAR REFERENCE TO EMPLOYMENT ISSUES AND THE UK'S RESPONSE

CHAPTER 6

RELEVANT EUROPEAN COURT OF JUSTICE (ECJ) CASE LAW[1]

6.1 Role of the ECJ

The European Court of Justice is responsible for making sure that the rule of law is upheld and the other institutions act within the limits of their powers as granted by the Treaty. Its role in the Community order as established under Article 220EC (former Article 164 EC) has been the subject of much comment since its inception through to the present day. Lord Denning's infamous pronouncement goes some way to illustrating this:

> "The EC Treaty is quite unlike any of the enactments to which we have become accustomed.... It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but the would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by the judges, or by regulations or directives. It is the European way"[2]

The Court is modelled on the Continental civil law system and while it is not strictly bound by its own previous decisions case law demonstrates that the judges constantly

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1 The focus is on race discrimination and migration with particular reference to employment issues. Social security provisions and restrictions on the use of diplomas and qualifications are excluded from the scope of this Chapter. For a discussion of the implications of these provisions see, for example, Nielson, R., & Szyszczak, *E., The Social Dimension of the European Union.* Handelshojskolens Forlag, 1997, Chapters 4 and 2, respectively

2 Lord Denning, *Bulmer v Bollinger* (1974), 2 All ER 1226, my emphasis

refer to previous judgments and will not depart from them unless there is good reason. Advocates General present cases to the Court and provide an Opinion. The opinion is not binding but is persuasive and historically the ECJ has tended to follow the majority of Advocate General Opinions[3]. The ECJ gives a single judgment which does not allow for dissenting or concurring opinions. Although this leads to a number of benefits it can be disadvantageous if the judgment stems from compromise[4].

The Court's main functions involve interpreting and delivering judgments in cases before the court or it can be asked by national courts to interpret the law via a preliminary ruling[5]. In the latter the national courts will apply the law. The ECJ also fulfills the role of a constitutional court in that it oversees and interprets the legislation within the framework of the Treaties[6]. Indeed, Mancini has argued that the *"main endeavour"* of the Court of Justice has been to attempt to *"constitutionalise"* the Treaty.[7] Perceived excessive activism has been the subject of criticism by some Member States,

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3 Notable exceptions relevant to this thesis include the recent case of *Grant v South West Trains*, Case C-249/93 (1998) ECR I-621, discussed below in section 6.4.2

4 For a discussion of the operation of the court see Chalmers, D., *European Union Law Volume One, Law and EU Governance*,, 1998 Dartmouth p. 138

5 Article 234 EC (former Article 177) reference

6 See for example, Mancini, F, *The Making of a Constitution for Europe*, (1989) 26 CMLRev 595-614 and Curtin, D., and O'Keeffe, D. (eds.) *Constitutional Adjudication in European Community and National Law*, Dublin 1992, Chalmers *The Development of the Court as an Incipient Constitutional Court*, p. 282 op cit at note 4

7 Refer to Chapter 9 for a discussion of the constitutional position of the EU

not least the UK, and efforts have been made to curtail its powers[8], as discussed in Chapter 4.

A number of approaches are said to be used by the ECJ, namely, the literal, historical, contextual and teleological approaches[9] but judgments of the Courts would suggest that the contextual and teleological approaches are most frequently used. O'Leary[10], commenting on the rights of free movement and residence, claims that via the teleological approach, which examines Treaty provisions in light of Community objectives, the Court has expanded Community rights of entry and residence beyond what was originally expected.

The ECJ has played a significant role in extending the impact of secondary legislation implemented by Directives. As discussed in Chapter 4.1.2, Directives have vertical direct effect (imposing liability on the state, including the state as an employer) but not horizontal effect (thereby excluding private employers) and as this results in inconsistency the ECJ has assisted in the pursuit of justice. The Court has attempted to do this by establishing the right to claim damages where a Member State does not implement Community law[11]

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8 Examples include a unsuccessful private members Bill brought before the UK Parliament in 1996 by Ian Duncan Smith MP which sought to disapply judgments of the ECJ and the previous UK Government's submission to the IGC *A Partnership of Nations*, London Foreign and Commonwealth Office 1996 as discussed in Chapter 5

9 Brown, L.N. & Kennedy, T., *The Court of Justice of the European Communities*, 1994, Sweet & Maxwell

10 O'.Leary, S. *The Evolving Concept of Community Citizenship :From the Free Movement of Persons to Union Citizenship*, Kluwer, 1996, p. 107

11 *Francovich and Bonifaci v Italy*, Joined Cases C-6/90 and 9/90 (1991) ECR I-5357

Following the Treaty on European Union, and prior to the Treaty of Amsterdam, the Court's jurisdiction was largely confined to the first pillar and it was not allowed to rule on the majority of the third pillar Justice and Home Affairs provisions[12]. Criticism of this "*judicial deficit*" is detailed in Chapters 4 and 5. Nonetheless, the ECJ made great inroads into a number of areas related to the thesis as detailed below. The Treaty of Amsterdam extends the jurisdiction of the Court into Justice and Home Affairs as detailed in Chapter 8[13].

6.2 General Principles

A number of general principles of EU law, derived from Member States national laws or international treaties, have been established. Some of these are expressly stated in the Treaties e.g. non-discrimination on grounds of nationality in Article 12 EC (former Article 6,ex Article 7, discussed in Chapter 4). The Amsterdam Treaty goes even further to recognise equal opportunities and equal treatment, as it relates to gender, as a general principle.

The nature and role of general principles of law is well established and can be said to fulfill two distinct purposes. Firstly, they will allow the Court to declare an annulment of a Council or Commission act following a direct action under Article 230 EC (former Article 173), for example, and secondly they are used by the judges in making their

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12 The exception being former Article K.3.2 (c) whereby Conventions agreed within the remit of JHA may grant jurisdiction to the ECJ

13 For a discussion of this see, for example, Albors-Llorens, A., *Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam (1998) 35* CMLRev 1273-1294

decisions. Ellis[14] observes that general principles of law will not allow the Court to "*override*" specific Treaty provisions but they are used on occasion to provide justification for *"a liberal interpretation of what might otherwise seem to be a narrow rule"* and therefore their potential is far reaching.

The ECJ is not required by any express Treaty provision to apply the general principles of law of Member States legal systems (except for the Article 288, former Article 215, provisions of non-contractual liability) but case law has demonstrated its application, including protection of fundamental human rights[15]; equality of treatment relating to gender[16] religion[17] and employees who are HIV positive[18]; with legal certainty[19], proportionality[20] protection of legitimate expectations[21].

Usher[22], commenting on the development of general principles of EC law, observed that the incorporation of an express obligation in Article 6 TEU (former Article F(2)

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14 Ellis, E., *European Community Sex Equality Law*, 1991, Clarendon Press, p.124-126

15 *Stauder v City of Ulm* Case *29/69 (1969) ECR 419 (1970) CMLR112*

16 *Sabatini* Case 20/71 (1972) ECR 345 (1972) CMLR 945

17 *Prais v Council Case 130/75 (1976) ECR 1589 (1976) 2 CLMR 708*

18 *A v E.C. Commission Case T- 10/93. (1994) 3 CMLR 242*

19 Da *Costa en Shaake cases 28-30/62 (1963) ECR 31 (1963) CMLR*

20 *Internationale Handelsgesellschaft* Case 11/70 (1970) ECR 1125

21 *Mulder v Ministry of Agriculture and Fisheries* Case 120/86 (1988) ECR 2321 (1989) 2 CMLR 1

22 Usher, J., *General Principles of EC Law*, European Law Series, Longman, 1998, p. 1. Usher comments that the Treaty of Amsterdam takes this further by expressly mentioning the principle of proportionality in its Protocol on Subsidiarity

TEU[23]) to respect the principles underlying the European Convention on Human Rights and the fundamental rights flowing from national constitutions as *"general principles of Community law"'* under the Treaty on European Union was recognition of this *"judge-made law"*. However, although Article 6 TEU (former Article F(2)) gave political recognition to the principle of fundamental rights, as it falls outside the legal order it was not actionable by the ECJ according to former Article L TEU (now renumbered Article 46 and amended since Amsterdam).

No recognition, political or otherwise, had been given to the general principle of equality on grounds of race or other forms of discrimination prior to Amsterdam and the input of the ECJ was seen to be vital[24]. The ECJ was given an opportunity to pronounce on the issue of race discrimination in the staff case of *Oyowe and Traore v Commission*[25] but it chose to concentrate on freedom of expression. Although there was no express Treaty provision at that time to cover race or religious discrimination, the absence of express authority did not prevent the Court pronouncing on religious discrimination in the case of Prais[26]. It would appear that the issue of race proved too politically sensitive for the Court. Case law on discrimination on grounds of nationality

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23 Refer to Chapter 8 for a discussion of the fundamental rights provisions following Amsterdam

24 See, for example, Justice Report , *The Union Divided: race discrimination and third country nationals in the EU*, February 1997

25 Case 100/88 (1989) ECR 4285

26 Case 130/75 (1976) ECR 1589 2 CMLR 708

is well established, as discussed below, but the Treaty did not expressly accommodate discrimination on grounds of race prior to Amsterdam[27].

The ECJ has pronounced on a number of cases relating to free movement of workers, freedom of establishment and freedom to provide services and judgements have demonstrated that it is generally in favour of extending the principle as it recognises its importance as one of the fundamental rights of the Community. Johnson and O'Keeffe[28] observed that the Court of Justice has been responsible for some *"crucial developments"* in the area of free movement of workers and took the lead in determining the shape of the scope of EU law. Martin and Guild [29] comment that the ECJ has made *"landmark decisions"* in this area and has been *"pivotal"* in interpreting agreements with third countries.

However, criticism has been levelled at the ECJ in connection with its role in extending the principle of equality and the notion of fundamental rights. It has been accused of using the term fundamental right in an *"instrumental way"* thereby *"devaluing"* the notion[30], allowing a *"market-integrating rationale"* to supercede the

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27 Amsterdam amendment in new Article 13 will bring race discrimination within the ambit of the first pillar, see chapter 8 for a discussion of this

28 Johnson, E. & O'Keeffe, D., *From Discrimination to Obstacles to Free Movement: Recent Developments concerning the Free Movement of Workers 1989-1994 (1994)* CMLRev 1313

29 See the Preface of Martin, D., and Guild, E., *Free Movement of Persons in the European Union,* Butterworths, 1996

30 Coppell J. & O'Neil, A., *The European Court of Justice:Taking Rights Seriously* (1992) 29 CMLRev 692

equal treatment rationale[31] and of being *"fairly conservative in the rights which it has recognised"* as it has not yet recognised discrimination on grounds of race, lesbian and gay rights or the rights of the disabled[32]. Refer to Sections 6.4 and 6.5 below for an account of how the principle of equal treatment and the development of human and fundamental rights have been developed by the ECJ.

6.3 The Rights of EU Nationals to Free Movement and Non-Discrimination

As the emphasis of this thesis is on employment matters, the case law examined will reflect this. In interpreting who is entitled to rights of free movement regard has to be paid to nationality and general principles of law including non-discrimination, equality and fundamental human rights as discussed below. The Council has demonstrated a reluctance to extend free movement rights to third country nationals, has endorsed increasingly restrictive immigration policies and, until the TOA, refused to accept competence in the field of race discrimination. All these policies have had a negative impact on "*visible minorities*" in particular and the language of fundamental human rights does not appear to have entered the discussions on policy formulation. The role of the ECJ in extending any rights in this area is therefore vital.

6.3.1 The impact of nationality

The national status of people attempting to claim free movement rights in the EU is important as Member State nationality is often a pre-requisite to obtaining any rights.

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31 De Burca, G., *The Role of Equality in European Community Law* in Dashwood, A. & O'Leary, s. (eds.) *The Principle of Equal Treatment in EC Law*, 1997, Sweet & Maxwell, p. 23

32 Chalmers, D., op cit at Note 4 p. 510

The significance of national status and citizenship therefore necessitates a special focus and are dealt with in more detail in chapter 7 .

EU law allows Member States to determine who qualifies as a national in accordance with National law. While this is in line with public international law, as discussed in Chapter 7, it has attracted criticism and is said to be at odds with the ECJ's ruling in *Ungur* (detailed below) which ruled that the concept of worker cannot be determined by national law as this would result in different interpretations and *Commission v Belgium*[33] where the ECJ outlines criteria for the public service definition in an attempt to give it a Community definition.

The case of *Micheletti v Delgacion del Cobierno en Cantabria*[34] fell to the ECJ to decide. The case concerned an Argentine national who possessed dual nationality, including that of Italy. On the basis of his Italian nationality he wanted to establish as an odontologist in Spain. However, Spanish law counted the last habitual place of residence for its purposes and as Micheletti had arrived in Spain from Argentina he was considered on the basis of his Argentinean nationally. The ECJ had to consider the position of nationals of a member of State under Article 43 (former Article 52 EC)[35] and held that the definition of the conditions of acquisition and loss of nationality fall within the competence of each Member State in accordance with international law and that this competence should be exercised so as to respect Community law. It also held

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33 Case 149/79 (1980) ECR 3881

34 Case C-369/90 (1992) ECR I-4329

that legislation of a Member State cannot restrict the effects of the acquisition of the nationality of another Member State by imposing an additional condition on recognition of that nationality for the purpose of the exercise of fundamental freedoms provided for by the Treaty

Some commentators are of the opinion that although the exclusive competence of Member States to define nationality may produce anomalies, the attitude of the Member States reinforced by the *Micheletti* judgment, would suggest that neither EU legislation or the case law of the Court will alter the competence of the Member States in this domain and that change is more likely to result from success of the Union and internal market[36]. Others have pointed to ambiguities in the ruling and that the court inferred that all Member States determination of nationality might not be consistent with Community law and therefore subject to review in the court[37]. The court did not elaborate. however, on what the limits might be.

Citizenship of the EU, as detailed in Chapter 7, was a result of recent TEU amendments to the Treaty and has enhanced the principle of free movement granted in Article 14EC (former Article 7a) extending freedom of movement to all Citizens regardless of

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35 Right of establishment, as discussed below in Section 6.3.3

36 See for example O'Keeffe, D., *Union Citizenship,* in O'Keeffe, D. & Twomey, P. (eds.) *Legal Issues of the Maastricht Treaty,* 1994, London Chancery p. 92

37 See, for example, O'Leary, S., op cit at Note 10, p.34 and Handoll, *J., Free Movement of Persons in the EU,* Wiley, 1995, p. 67

whether they are involved in an economic activity e.g. as workers. or not. The ECJ's pronouncements on the scope of EU Citizenship is discussed below in Section 6.3.4

6.3.2 Article 39 EC (former Article 48)

An examination of the ECJ's case law demonstrates the inroads made by the court not only under Article 39 EC (former Article 48) but in other related areas. The definition of "*worker*" in Article 39 EC (former Article 48), in the absence of a Treaty definition, was defined in *Unger*[38] and has been extended over the years to include a wide range of workers including part time, temporary and seasonal workers amongst others. However, the definition has not been extended to include legally resident third country national workers per se thereby reinforcing the hierarchy of workers. In *Caisse d'Allocations Fasiliales v Meade*[39] *the Court* explicitly held that Article 39 EC (former Article 48) does not apply to non-EU Nationals unless they are members of the workers families. The Commission's written observation suggested that the provisions are restricted to Community nationals, without prejudice to Art 2 Regulation 1408/71, which extends social security benefits to stateless persons or refugees residing within the territory of one of the member states and the ECJ held *"(former) Article 48 guarantees free movement of persons only to workers of the Members States ".* Third country nationals may, however, accrue direct rights under Association agreements or indirectly as, for example, a spouse under secondary legislation Regulation 1612/68, see section 6.6.3 below.

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38 Case 75/63 (1964) ECR 177

39 Case 238/83 (1984) ECR 2631

In *Antonissen*[40] the ECJ was asked to clarify the right of residence for job seekers a right falling within the scope of Article 39 EC (former Article 48) as recognised in *Royer*[41]. The court adopted the principle of reasonableness to assist with the interpretation and stated that job seekers should be given sufficient time to seek employment, thereby clarifying their right of residence[42].

In *Commission v The Netherlands*[43] the court held that Member States were not allowed to impose additional conditions on entry over and above those stated in Directive 68/360 and Regulation 1612/68 and *Commission v Belgium*[44] held that systematic, arbitrary or necessary restrictive checks at the borders were contrary to Community law. The *Bosman*[45] case where a Belgian footballer challenged the FIFA/UEFA rules which effectively restricted his employment opportunities, extended the principle of free movement beyond discrimination to prevent any hindrance to free movement.

The rights granted under Regulation 1612/68 are generally limited to workers who are nationals of Member States (Article 1), but can grant indirect rights to third country nationals as discussed in Section 6.6.3 below. Such rights include equality of treatment

40 Case C-292/89 (1991) ECR I-745

41 Case 48/75 (1976) ECR 497

42 See O.Leary, S., *The Principle of Equal Treatment on Grounds of Nationality in Article 6EC: a lucrative source of rights for Member State nationals?* , for a discussion of this case and some of the problems posed by the reference to "a reasonable time", p. 115 in Dashwood, A. & O'Leary, S. (eds.) op cit at Note 31

43 Case C-68/89 (1991) ECR I-2637

44 Case C-321/87 (1989) ECR 997

45 Case C-425/93 (1995) ECR I-4705

in employment and working conditions (Article 7), including the same social and tax advantages as national workers 7(2)), TU rights (Article 8) and housing (Article 9).

The ECJ has interpreted the provisions broadly illustrated by, for example *Commission v Belgium*[46] where it was held that income support, old age benefits and disability allowance came within Article 7(2) of Regulation 1612/68 and could be classified as a 'social advantage' and *Reed*[47] where it was held that although unmarried partners of EU National workers are not covered by the word "*spouse*" in Article 10(1) Regulation 1612/68 "*cohabitation*" could be regarded as a "*social advantage*".

Article 39 (3) (4) EC (former Article 48 (3) (4) exceptions)

> "(3) It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made (b) to move freely with the territory of member States for this purpose (c) to stay in a member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action (d) to remain in the territory of a member state after having been employed in that state, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
>
> (4) The provisions of this Article shall not apply to employment in the public service"

As the temptation to use the exceptions granted under Article 39 (3) and (4) (former Article 48 (3) (4)) to favour their own nationals may be too much for some Member States to resist, the ECJ has taken on the mantle of ensuring that it is not abused. An examination of case law highlights the Court's restrictive approach to the exceptions under Article 39 (3) (4) (former Article 48 (3) and (4)), a tough stance against Member

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46 Case C326/90 (1992) ECR 1-5517

47 Case 59/85 (1986) ECR 1283 (1987) 2 CMLR 448

States seeking to rely on the exceptions and demonstrates that any exercise of such exceptions will be subject to review.

In the first Article 39 (3) EC (former Article 48 (3)) public policy case to be considered by the ECJ, *Van Duyn v Home Office,*[48] involving a Dutch national who was refused entry to the UK to take up employment with the Church of Scientology as the Home Office was of the opinion that such practice was undesirable, the court adopted a broad view that favoured the UK. However, the court subsequently became more restrictive as in *R v Bouchereau*[49] and decided there should be a sufficient degree of social harm which poses a genuine and serious threat. As regards the public service proviso, although the ECJ has again restricted Member States autonomy in cases such as in *Bleis v Ministere de l 'Education Nationale*[50], where the Court held that secondary school teachers are not employees of the public service. nationality can still be a barrier to employment in the public service sector.

Willkinson[51], commenting on the extent to which member states may legally discriminate against nationals of other Member States in the context of the provision on free movement of workers, suggests that the cases on Article 39 EC (former Article 48)

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48 Case 41/74 (1974) ECR 1337 (1974) 1 CMLR 347

49 Case 30/77 (1977) 2 CMLR 800

50 Case C-4/91 (1991) ECR I-5627

51 Wilkinson, *B., Free Movement of Workers: Nationality, Discrimination and European Citizenship,* in Dine, J. and Watts, B. (Editors) *Discrimination Law: Concepts, Limitations and Justifications,* Longman 1996, p.132

demonstrate that the Court gives priority to the free movement provisions over virtually all other considerations and demonstrating its desire to sacrifice the autonomy of the member states in favour of integration. With the introduction of EU citizenship, attempts to rely heavily on exceptions seem absurd, particularly as an EU Citizen could have the right to reside and vote in another Member State (as detailed in Chapter 7) but be excluded from employed.

6.3.3 Article 43 and Article 49 EC (former Articles 52 and 59)

Article 43 EC (former 52), the right of establishment, and Article 49 EC (former Article 59), the freedom to provide services, provides rights for the employer, self employed and professional people. The right of establishment is the right of a person or company to settle in a Member State for the purposes of economic activities, it involves settlement in a Member State and has a sense of permanency. Freedom to provide services on the other hand concerns a person or company established in one Member State providing services in another, as in the case of a dentist established in the UK visiting a patient in France. The provision of services may necessitate temporary residence in the host State as in the case of a UK business consultant advising a German company. If residence is temporary the activities fall within Articles 49-55 EC (former Article 59-66) on freedom to provide services, it is permanent they will be governed by Articles 43-48 EC (former Article 52-58). As with Article 39EC (former 48 EC), the ECJ has adopted a broad approach to case law in these areas. In *Factortame*[52] the ECJ held that the right of establishment involved being able to pursue

[52] Case C-221/89 (1992) ECR I-4097

an economic activity. In *Her Majesty's Custom and Excise v Schindler*[53] attempts by the UK to ban lotteries was held to be an obstacle to freedom to provide services under Article 49 (former Article 59), although justified in the public interest.

The Court's pronouncement in the Grogan[54] case which was concerned with the dissemination of information in Ireland relating to legal abortion services in the UK, has been criticised however as it failed to consider issues raised by Article 10 of the ECHR which guarantees freedom to impart information[55]. Decisions in relation to Articles 43 and 49 EC (former Articles 52 and 59) affecting third country nationals have had a major impact in cases such as *Rush Portugesa*[56] and *Van der Elst,* detailed below in section 6.6.3.

De Burca[57] argues that within the scope of Articles 39,43 and 49 EC (former Articles 48, 52 and 59) the Court has moved away from equality of treatment to an emphasis on removing barriers to the completion of the single market and that although this could be a positive development for free movement provisions it presents a *"challenge"* to the notion of equal treatment as a fundamental principle of EU law.

6.3.4 EU Citizenship and free movement rights

53 Case C-275/92 (1994) ECR I-1039

54 Case C-159/90 (1991) ECR I-4685

55 Justice Report, *Judging the European Union: Judicial Accountability and Human Rights,* 1996, p. 11

56 Case C-113/89 (1990) ECR I-1417

A detailed analysis of the impact of EU Citizenship and its connection with free movement rights is contained in Chapter 7. This section considers the role of the ECJ in shaping the citizens rights to free movement.

Article 18 EC (former Article 8a) granted rights to Union Citizens to *"..move and reside freely within the territory of the Member States"*. They are not linked to economic activity. When the Article was introduced at Maastricht *"dynamic"* prospects were envisaged for Citizenship provisions as the Court would be involved in developing the rights. As Member States have continually disagreed about the extent of the relaxation of internal borders, as detailed in Chapters 4 and 5 and later witnessed in the UK Courts refusal in *Flynn*[58] to refer a case to the ECJ to clarify the effect of Article 14EC (former Article 7a), the prospect of enhanced rights was eagerly awaited.

It was argued that Union Citizenship could remove the notion of fundamental rights from the constraints of economic activity. O'Leary[59] asserted that one of the most

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57 De Burca., G., op cit at note 31, p.23

58 *Ex parte Flynn* (1997) 3 CMLR 888 (CA). Some Member States believe that neither Articles 14 or 18EC (former Article 7a or Article 8A EC) precludes national legislation of a Member State imposing an obligation, such as presenting a Passport, at an internal border. The Spanish, Irish and UK governments do not interpret former Article 7a or 8a as having direct effect. The Netherlands Government has also argued that former Article 7a has no direct effect, and the Commission agrees with this. The Commission consider that former Article 8a has direct effect. See *Wijsenbeek* detailed in Note 71 below.

59 O'Leary, S., op cit at Note 10, commented in particular that the implicit reliance on the 1990 Directives in (former Article 8(a)) overlooks the fact that sufficient resources and medical coverage have been made conditions for the grant and maintenance of the right of residence contained therein. The right of residence is withdrawn if these conditions are not fulfilled "... which sits uncomfortably with the logic of Union citizenship unless one accepts the latter as a highly circumscribed status still dependent on the fulfilment of economic criteria. In addition were the Court to decide cases in future from the perspective of a constitutionally established right of residence, it might have to alter its interpretation of permissible public policy considerations or justifiable and fundamental interest of society which it has been will to accept

important features of Union Citizenship was its constitutional promise and predicted broad judicial interpretation of the provisions. However, the Court decided the rights are not the basis for a constitutional analysis of the rights to free movement as demonstrated in *Skanavi and Chryssanthakopoulos*[60] .

The *Gerard Adams case*[61] which also raised issues relating to the rights of free movement was eventually withdrawn from the ECJ. The case concerned the legality of an exclusion order made by the UK government under the Prevention of Terrorism Act 1989 and was referred by the High Court in London to the European Court of Justice for a ruling to decide whether Article 18 EC (former Article 8a) granted additional rights of free movement. As Article 18 EC (former Article 8a) is not generally subject to exceptions such as those contained in Article 39 (3) (4) EC (former Article 48 (3) and (4)) it was not clear whether a residence permit could be denied on public policy, public security and health grounds[62] by a person exercising rights to move, rather than "*working*" in the EU. The order was lifted by the UK Government before the point of law could be decided though[63].

to date as valid restrictions on individual rights and as a valid exercise of Member State discretion", p. 138

60 Case C-193/94 (1996) ECR I-929, (1996) 2 CMLR 372

61 Case C-229/94, OJ 1994 C 275, *The Queen v Secretary of State for the Home Department ex parte Gerard Adams*

62 Directive 64/221 Article 3 (1) and 4(1)

63 1995 OJ C 159/20

The failure to develop the EU Citizenship provisions has been subject to criticism[64]. Szyszczak[65] registered her impatience with the court in this area and criticised the court for *"...the failure to breathe life into the Citizenship provision of (former) Articles 8-8e EC by using them a interpretative aids in cases such as Dori[66] where a strict textual reading of the Treaty dominated ".*

Chalmers & Szyszczak further comment that Advocate General La Pergola urged the Court in *Stober and Pereira*[67] to examine the relationship between Article 8a and the economic free movement rights but the Court decided not to address the question[68].

The recent ruling in *Maria Martinez Sala v Freistaat Bayern*[69] was a positive step forward. The case concerned a Spanish national who lived in Germany since 1968 and had various jobs before claiming social assistance under the Federal social welfare law. She had obtained residence permits until 1984 and after that she obtained documents certifying that she had applied to extend her residence permit. In 1993, during the period when she did not have a residence permit, the German authorities rejected her

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64 See, for example, Closa, C., *The Concept of Citizenship in the Treaty on Europe Union (1992)* 29 CMLRev 1137-1170 and O'Keeffe, Op Cit at Note 36

65 Szyszczak, E., *Making Europe More Relevant To Its Citizens. Effective Judicial Process (1996)* 21 ELRev p.351-364

66 Case C-91 (1994) ECR 3325

67 Joined Cases C-65/95 and C-111/95 *Stober and Pereira v Bundesanstalt fur Arbeit* (1997) ECR I-511

68 Chalmers, D., & Szyszczak, E., *European Union Law*, Volume 2, 1998, Ashgate, see the discussion at page 68

69 Case C-85/96 (1998) ECR I-2691

application for child raising allowance on the grounds that she did not have German nationality, a residence entitlement or a residence permit. German nationals were not expected to produce documentation proving residence entitlement or a permit. In April 1994 Mrs. Sala' s residence permit was granted.

The German court referred a number of points to the ECJ and the Court pronounced that Mrs Sala had a right of residence under Article 18 EC (former 8a) and that as a national of a Member State lawfully resident in the territory of another Member State she had the right not to suffer discrimination on grounds of nationality under Article 12 EC (former Article 6). The ECJ ruled that nationals of a Member State can rely on European Citizenship for protection against discrimination on grounds of nationality by another Member State regardless of economic activity.

O'Leary[70] opined that although the case has "*far-reaching consequences*" in relation to migrant EU nationals benefits, the judgment provides scope for future references to the Court as it did not deal with the question of whether Article 18 EC (former Article 8a) is directly effective and the scope of residence rights. The case of *Wisenbejk*[71] came before the Court in September 1999. The Court was asked to rule on the effect of Article 14 and 18EC (former 7a and 8a). Mr. Wijsenbeek argued that since 1 January 1993, former Article 7a has direct effect involving a "*complete transfer*" of competence to the Community. The Court decided that as there were no common rules on external frontiers, immigration, visa and asylum "*at the time of the events in*

[70] O'Leary, S., *Putting the Flesh on the Bones of EU Citizenship*, (1999) 24 ELRev p.68-79

question", "even if" Article 7a or Article 8a granted nationals of Member States an unconditional right of free movement, Member States retained the right to check internal frontiers in order to decide whether the person concerned is a national of a Member State.

6.4 The Right of those Protected by EU Law[72] Not to be Discriminated Against

When examining the right of free movement of workers it is necessary to examine any protection against discrimination afforded those workers. The general principle of non discrimination on grounds of nationality enshrined in Article 12 EC (former Article 6 EC, ex Article 7), is one of a number of articles establishing non-discrimination.[73] Article 39 (2) (former Article 48(2)) is a specific implementation of the principle in relation to workers. The ECJ has said that these provisions are merely specific provisions of the general principle of equality which is one of the fundamental principles of community law[74]

The Court has also used the general principle of equality of treatment to extend the scope of protection from discrimination, for example, in the context of pension

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71 Case C-378/97, judgment 21 September 1999

72 That is, EU Member States nationals, and others who can claim to be protected by the law under EU Agreements and secondary legislation

73 Similarly, Article 34 EC (former Article 40(3)) prohibits discrimination between producers or consumers in the context of the common agricultural policy and Article 141 (former Article 119) prohibits discrimination based on sex in the context of the pay of men and women, this Article being used also as a base for secondary legislation on equality of treatment between men and women.

74 See cases 103, 145/77 *Royal Scholten-Honig v IBAP* (1978) ECR 2037 (p.2072) and Case 300/86 *Van Landschoot v Mera* (1988) ECR 3443 (D.3460).

rights[75], religion[76] and more recently the Court of First Instance has recognised the principle of equal treatment in that *"employees who are HIV positive but who do not show any symptoms of AIDS should be looked on as normal employees"* [77]. There has been some criticism of the Court's conservative approach in this area however.[78] The recent decision in *Grant v S.W. Trains*[79] demonstrated reluctance on the part of the ECJ to extend the principle to sexual orientation as discussed in section 6.4.2 below.

Whether Article 12 EC (former Article 6) is just a general treaty principle which will assist in interpreting specific rules has been the subject of debate as discussed in Chapter 4. O'Leary contends that the Court has interpreted Article 12 EC (former Article 6) "*generously*" by insisting the principle covers covert as well as overt discrimination[80].

6.4.1 Article 12 (Former Article 6 EC , ex Art.) non-discrimination on ground of nationality

75 *Barber*, Case 143/83 (1985) ECR427

76 *Prais v Council*, Case 130/75 (1976) ECR 1589 (1986) 2 CMLR 708

77 *Case T-10/93 (1994) 3 CMLR 242, A v EC Commission* the Court concluded that while this principle could not be treated as provisions of the Staff Regulations or of Community legislation "they must be treated as rules of practice which the administration imposes on itself and from which it may not depart without specifying the reasons for doing so, since otherwise the principle of equal treatment would be infringed "

78 See, for example De Burca., G. *The Language of Rights and European Integration* in Shaw., J & More G. (eds.) *New Legal Dynamics of European Union* (1995) Clarendon Press

79 Case C-249/96 1998 ECR I-621

80 O'Leary, S. op cit at Note 10, p.105

Sunberg Weitman[81], as discussed in Chapter 4, claimed that the original Article 12 EC (Article 7 at the time of writing) has an independent function. This is seen in cases where for example specific Articles did not extend to individuals as in *Gravier v City of Liege*[82] where a French national wished to study cartoon making on an arts course in Belgium and had to pay the course enrolment fee which Belgians did not have to pay . He was unable to rely on the provisions of Articles 49-55 EC (former Articles 59-66) but could rely on Article 12 (formerly Article 6 ,ex Article 7) in claiming equality with Belgian nationals as Article 151 EC (former Article 128) allowed vocational training to fall within the "*scope of the Treaty*" which is required for Article 12EC (former Article 6, ex Article 7) actions.

Although Article 12 EC (formerly Article 6, ex Article 7) is capable of being applied as an independent rule it has not been successfully used to accommodate third country nationals as the EU has refused to recognise any explicit competence in this area. In *Criminal Proceedings Against Skanavi and Chryssanthakopoulos* [83] the ECJ held that Article 12 EC (formerly Article 6, ex 7) only took on an independent function in areas covered by Community law which are not specifically covered by Treaty provisions on non-discrimination. Therefore Article 12 (formerly Article 6, ex Article 7) should not be applied where a specific Treaty provision can be relied on.

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81 Sundberg Weitman,, B. *Discrimination on Grounds of Nationality* in *Free Movement of Workers and Freedom of Establishment under the EC Treaty*, North Holland 1977

82 Case 293/83 (1985) ECR 593 3CMLR

While the wording of Article 12 (former Article 6,ex Article 7 EC) does not confine itself to EU nationals and it has been argued that the original Treaty never intended to limit itself in this way[84] the trend of secondary legislation specifically referring to EU Nationals and ECJ rulings has tended to rule against the inclusion of third country nationals. See, for example, the interpretation of Article 39 EC (formerly Article 48), above, and other EU initiatives such as Regulation 1612/68 specifically referring to EU Nationals.

One of the most important cases relating to the scope of Article 12 EU (ex Article 6, ex Article 7) is *Cowan*[85] which examined the extent of Article 49EC (formerly Article 59) and held that the principle of non-discrimination extends to areas covered by EU law. The Court has given a wide interpretation to the Article and included indirect discrimination as demonstrated in *Sotgiu*,[86] where it was held that covert forms of discrimination based on nationality are also prohibited. In the *Allue*[87] case rules imposed by Italy on the duration of employment on foreign language assistants where held to be indirectly discriminatory and in *Scholz*[88] where it was held that discrimination had occurred where periods of employment in the public service would only be credited if they were carried out in Italy.

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83 Case C-193/94 (1996) ECR I-929

84 See Chapter 4 for a discussion of this

85 Case 186/87 (1989) ECR 195 (1990) 2 CMLR 613

86 Case 152/73 (1974) ECR 153

87 Case 33/88 (1989) ECR 1591

88 Case C-419/92 (1994) ECR I-505

6.4.2 Extending the principle of non-discrimination

The Treaty originally only recognised equal opportunities in relation to pay under Article 141 EC[89] (former Article 119) but Court rulings and secondary legislation extended the principle wider. The role of the Court in extending the principle of equal treatment in case such as *Defrenne*[90], *Barber*[91] and *Marshall*[92] has furthered the campaign for equal rights on grounds of sex.

In recent years, however, a number of commentators have criticised the increasing conservatism of the Court. The precedence of economic rights over social rights has been witnessed and identified as having *"...a suffocating effect on the development of the principle of equality"*[93]. Hepple[94] argues that the Court *"... has not been prepared to treat a breach of the fundamental right to equality as a free-standing basis for legal action by individuals"* and Ellis[95] has observed that *"...a number of the Court's recent decisions have failed to tackle the issue with the robustness of former decisions."*

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89 The Treaty of Amsterdam amendments are discussed in Chapter 8. The Social policy provisions have been incorporated into a restructured Chapter, Articles 136-145. Amsterdam extends the recognition of equal opportunities and equal treatment as it relates to gender as a general principle. Although the TOA also recognises competence in other areas where discrimination can occur, such as religion, age and sexual orientation, the uncertainty surrounding the provisions has caused some concern and is discussed in Chapter 8.

90 Case 80/70 (1971) ECR 345

91 Case C-262/88 (1990) ECR I-1889

92 Case C271/91 (1993) ECR I-4367

93 See comments in Barnard., C., *P&S: Kite Flying or a New Constitutional Approach?* in Dashwood, A. & O'Leary, S., op cit at Note 31 p. 71

94 Hepple, B., *The Principle of Equal Treatment in Article 119EC and the Possibilities for Reform,* in Dashwood, A. & O'Leary, S. op cit at Note 31 p.142

95 Ellis, E., *The Principle of Equality of Opportunity Irrespective of Sex: Some reflections on the present state of European Community law and its future development,* in Dashwood ,A & O'Leary, S. op cit at Note 31 p. 174

As discussed earlier, the Court recognised competence in the area of religion in *Prais v Council* and the general principle of equality of treatment was used to include transsexuals in *P v S and Cornwall County Council*[96] which involved unfair dismissal following an employee informing employer that he was undergoing a sex change operation. Barnard argued that the decision in *P v S* acknowledges that the principle of equality is not only a *"genuine, moral, fundamental principle of Community law but one which takes its place at the very heart of the Community's constitution"* and *"bucked the trend of increasing conservatism"* of the Court in the area of equality. However, the Courts endeavours stopped short of attempts to include sexual orientation in the case of *Grant v South-West Trains*[97]. Despite the Advocate General's supportive opinion the ECJ ruled that discrimination on grounds of sexual orientation did not amount to sex discrimination. Given the ruling in *P v S* and the fact that new Article 13 EC extends the EU's competence in this area the Court's judgement was somewhat surprising but could be the result of its reluctance to interfere in areas where other EU institutions have the power to act. The Court may have to reconsider this judgment in the future given recent European Court of Human Rights decisions such as *Lustig Prean*[98] which extended protection to lesbians and gays, reflecting changing public opinion on the issue.

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96 Case C-13/94 (1996) ECR I-2143

97 Case C-249/93 (1998) ECRI-621

98 *Lustig-Prean & another v UK; Smith & another v UK, European Court of Human Rights,* 31417/96, 32377/96, 33985/96 & 33986/96 relating to sexual orientation and right to privacy

The Court's decision in *Kalanke v Freie Hansestadt Bremen*[99] relating to whether Community law permits positive discrimination also caused quite a stir. The case involved a Mr. Kalanke who felt that he been discriminated against as a woman who was equally qualified for a job in the Bremen Parks Department was given the position under German law which stated that where there was less than 50% of employees of one sex in the relevant group automatic priority should be given to the under-represented sex. The Advocate General concluded that the law infringed Article 2(4) of the Equal Treatment Directive as it should be used to remove obstacles and not intended to allow national legislation to automatically permit positive discrimination at the point of selection and the ECJ agreed. Nielsen and Szyszczak observed that *"The immediate reaction to the ruling was a series of shock waves around the EU, particularly since the Community had been keen to encourage positive action measures "*[100]

The Commission Communication to the Council and European Parliament relating to the *Kalanke* ruling put forward an amendment to Article 2(4) Equal Treatment Directive[101] and provided a list of lawful positive action measures. In *Hellmut Marschall v Land Nordrhein-Westfalen*[102] the ECJ accepted that a rule which did not

99 Case C-450/93 (1995) ECR I-3051

100 Neilsen, R., & Szyszczak, Op Cit at Note 1, p.184, referring to the Council Recommendation on the promotion of positive action for women, 84/635/EEC. OJ 1984 L33 1/34

101 "This Directive shall be without prejudice to measure to promote equal opportunity for men and women, in particular by removing existing inequalities which affect the opportunities of the under-represented sex in the areas referred to in article 1(1). Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case"

102 Case C-409/95 (1997) ECR I-6363

automatically entitle positive discrimination was compatible with the Equal Treatment Directive as long as objective criteria applied which did not discriminate against women. The position on positive action has not yet been clearly answered although the addition to former Article 141 EC (former Article 119) at Amsterdam and the Commission's proposals to combat discrimination presented to social affairs Council in November 1999, discussed in Chapters 8 and 9, allow Member States to *"authorise legislative or administrative measures which are necessary to prevent and correct situations of existing inequalities..... in the light of the current case law on sex discrimination"*[103].

6.5 Human and Fundamental Rights Perspective

The human rights perspective has taken hold of many commentators[104] in recent years and the boundaries and responsiveness of the ECJ have been the subject of much debate. The debate has been fuelled by increasing pressure to recognise the rights of third country nationals. Whether the rights granted to EU workers are of a purely economic nature or have a human/social dimension was discussed in *Mr & Mrs F v Belgian State*[105] where Advocate General Trabucchi proclaimed that migrant workers should be identified *"not as a mere source of labour but as a human being "*

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103 Commission proposal establishing a general framework for equal treatment in employment and occupation , December 1999, p.11

104 Weiler, J.H.H., *Though Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC nationals - A Critique* 3 EJIL ,1992, 65, Coppell,, J. & O.Neil, A., op cit at Note 30, Weiler, J & Lockhart N., *Taking Rights Seriously: The European Court and Fundamental Rights* (1995) Part I 32 CMLRev 51-94 and Part II 32 CMLRev 579-627

105 Case 7/75

The Court has a role in upholding the fundamental rights recognised by the Treaty and is influenced by international law and the constitutions of Member States. The recognition of human rights has gradually been accepted by the Community and latterly the Union[106]. The ECJ has been called upon to apply the general principles of law of the Constitutions of the member States[107], which have been influenced somewhat by international and regional conventions as discussed in Chapter 2.

In *Internationale Handelsgesellschaft*[108] that court pronounced that *"respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice"* and in *Nold v Commission*[109] the ECJ acknowledged that the international law of human rights *"can supply guidelines which should be followed within the framework of Community law."* According to *Nold,* fundamental rights form an integral part of the general principles of law. In safeguarding these rights, the Court draws inspiration from constitutional traditions common to the Member States, and it cannot uphold measures which are incompatible with fundamental rights contained in the Constitutions.

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106 As detailed in Chapter 5, the TEU referred to the ECHR in former Article F2 (new Article 6) "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional principles of Community law". However, the role of the ECJ was questionable as former Article L (now 42) did not refer to former Article F2. The legal adviser to the IGC, in the introductory note of the Irish Presidency to the IGC of 26 July 1996, document CONF/3879/96, suggested therefore an amendment to provide the ECJ with powers to rule on whether the EU conforms with fundamental rights. Refer to Chapters 8 and 9 for a discussion of the human rights position post Amsterdam.

107 All Member States apart from the UK have a written Constitution, the UK recently enacted the Human Rights Act incorporating the ECHR into its law as discussed in Chapter 2.

108 Case 11/70 (1970) ECR 1125

109 Case 4/73 (1974) ECR 491

Similarly, international treaties provide guidelines, which should be followed within the Community law framework.

The first judgment of the ECJ to refer to specific ECHR provisions was *Rutili v Ministre de Interieur*[110] where French authorities had tried to restrict the rights of residence of an Italian worker on grounds of public policy under article 48 (3). The ECJ stated the limitation placed on the powers of Member states to control the movement of citizens of other member states under community law were a manifestation of a more general principle enshrined in various provisions of the Human Rights Convention providing that *"no restriction in the interest of national security or public safety shall be placed on the right secured by those articles other than such as are necessary for the protection of those interests in a democratic society".*

The jurisdiction and decisions of the ECJ in the area of fundamental rights has been the subject of a vigorous debate between some commentators. Coppell and O'Neill[111] argued that the Court saw economic integration as its fundamental priority and that when a conflict between market integration and civil liberties arose the needs of market integration where paramount. Weiler and Lockhart[112], in a lengthy response to Coppell and O'Neil, argued that *"We do not believe the court has a major problem in striking down Community acts when it believes human rights or other rules of law have been violated by the Community legislature"* and opined that Coppell and O'Neill's argument

110 Case 36/75 (1975) ECR 1219

111 op cit at Note 30

112 op cit at Note 104

was more about Member States rights and jurisdiction. Although the Court has protected individual rights on a number of occasions it has also failed to do so in cases such as *Demiral*[113], as detailed below when examining third country national rights.

A Justice Report in 1996 was critical of the ECJ's jurisdiction in the area of fundamental rights and opined that there is "*a substantial judicial deficit*" in the area in particular in relation to justice and home affairs matters under the third pillar of the TEU and that the ECJ "*lacks a clear basis on which to adjudicate on human rights matters in Community law*" calling for an increase in the Court's involvement.[114] The report also recommended accession by the EU to the ECHR.

As detailed in Chapter 2, the EU is not a signatory to the ECHR in its own right, and it has been argued that this creates problems due to the *"risk of parallel but differing decisions between the ECJ and the ECHR in interpretation of the Convention provision"*[115], however, the ECJ is of the opinion that the EU does not have competence to accede[116] as such a change would have constitutional affect and therefore a Treaty amendment is

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113 Case 12/86 (1987) ECR 3719

114 *Justice, Op* Cit at Note 55, p.1

115 Ibid, p 11, cites the case of Grogan and others (1991) ECR I-4685, when the ECJ approached the case on the basis of a provision of services under article 60EC and decided that the injunction restraining the dissemination in Ireland of information on abortions lawfully carried out in the UK was not a restriction on the freedom to supply services and did not consider whether the case raised an issue under Article 10 of the ECHR guaranteeing freedom to impart information. In the Open Door and Dublin Well Woman case (Series A, No 246 (1993) 12 EHRR 244) was decided by the Court of Human Rights an injunction against dissemination of similar information was held to be in breach of Article 10 ECHR

116 Opinion 2/94 (1996) ECR I-1759 on accession of the Community to the ECHR (1996) 2 CMLR 265

required. Although there has been some criticism of the ECJ for adopting this stance[117], it is perhaps not surprising given that it was decided at a time when the IGC was approaching, an opportunity for Treaty amendments, and that there was some hostility towards the increasing power of the ECJ.[118] The result of the judgments however ensures that for the time being it is left to individual Member States to apply the ECHR and as discussed in Chapter 2, this is not without its problems

6.6 The Rights of Non-EU Nationals (Third Country Nationals) to Non-Discrimination and Free Movement

The attitude of the EU towards free movement of third country nationals legally resident in the EU is discriminatory and much more restrictive than that towards the free movement of capital and goods[119]. Different degrees of protection for lawful residents under EU law are afforded depending on nationality, leading one observer to comment that this is contrary to developments at national law[120].

6.6.1 EU's Competence on Migration Policies in relation to third country nationals

117 See for example Szyszczak, E., op cit at Note 65, p.351

118 See for example the UK Governments response to the IGC, *The European Court of Justice, Memorandum by the United Kingdom*, July 1996, which suggests limiting the power of the ECJ

119 For example, the concept of "goods in free circulation" in accordance with Article 1 OEC allows goods from third countries which have completed all the entry formalities relating to customs to freely circulate the EU without any further penalties, and similarly, free movement of capital is encouraged

120 Shaw, J., commenting on the French Conseil Constitutionnel which extended in 1990 the right to equal treatment to all persons lawfully resident in the French Republic and the UK race relations law which does not distinguish on grounds of nationality, *Immigration, the Single Market and European Union, (1992) 5* Journal of Social Welfare and Family Law 454

As detailed in Chapter 5, following a Decision taken by the Commission to set up a communications consultations procedure on migration policies relating to non-member countries, five Member States filed complaints with the ECJ; the *FRG, France,* The *Netherlands, Denmark* and *The UK*[121]. Denmark, the UK and the Netherlands complaints were ruled inadmissible as they had missed the deadline. The ECJ admitted the complaints of FRG and France.

The ruling on 9th July 1987 annulled part of the commission's Decision as it did not have the power to include the cultural integration of third country migrants and their families among the aims of the consultation procedure as it employment link was too tenuous, nor could the procedure have the aim of ensuring that measures adopted by Member States in the areas of entry, residence and employment of third country migrants, conform with Community policies. However, the ECJ rejected the argument that migration policies concerning non-member countries are outside the scope of former Article 118EC and adopted a broad interpretation. The principle of the ruling is important but in practice, although the Commission Decision was amended to include co-operation between Member states in the social field and migration policies in relation to non-member states, it was reported that some Member States have adopted controversial migration policies vis-a-vis third countries and ignored requests from the Commission for more information. Although rules of "*Community preference*", as discussed in Chapter 5, have attempted to penalise workers from outside the EU third country nationals may acquire rights either directly or indirectly as discussed below.

[121] *Germany and others v EC Commission,* Joined Cases 281, 283/85 and 287/85 (1987) ECR 3202

6.6.2 Direct rights via Association and Co-operation Agreements

Direct rights for non-EU Nationals can be acquired by way of Agreements with third countries under Article 300 and 310 EC (formerly Articles 228 and 238). Such agreements include Association and Co-operation Agreements with countries such as Turkey, Morocco, Poland and Algeria. The Turkish Agreement appears to have bestowed the greatest rights. It grants rights in relation to residence, working conditions, social security and states " ... *the contracting parties agree to be guided by (former) Articles 48, 49 and 50 of the EEC Treaty for the purpose of progressively securing the free movement for workers between them* ".

The role of the ECJ has been crucial to the status of third country agreements and the Court's interpretation of the effect of such provisions has eventually culminated in establishing a level of rights beyond those granted to other third country nationals, see *Kus* below. The Court's earlier interpretations were not as liberal however. Alexander[122] observed that although the ECJ, in principle, regarded provisions in international agreements as being directly applicable, in practice the Court was reluctant to deliver a verdict depriving the Community of the possibility for further negotiations with the contracting partner. It avoided the decision by denying direct effect as in the *Demirel* case, or by adopting a narrow interpretation of the scope of the provision as in *Razanatsimba*.

122 Alexander, W. *Free Movement of Non-EC Nationals, a Review of the Case-Law of theCourt of Justice, (1992) 3* EJIL *53*

In *Sevince v Staatsecretaris van Justie*[125], a Turkish national working in the Netherlands appealed against a 1980 refusal to grant an extension of his residence permit granted to him in 1979. Netherlands sought a preliminary ruling from the ECJ on three questions concerning the provisions of Decisions 2/76 and 1/80 of the Association Council. The court held that provisions of the Decision of 1980 relating to free movement did have direct effect in the Member States of the EC, but Mr Sevince could not benefit from them as "*legal employment*" did not include time employed whilst registering an appeal

In *Kazim Kus v Landeshauptstadt Wiesbaden*[126] the Court held that although national law laid down the conditions of entry, once a Turkish worker lawfully entered an EU Member State and had worked for a year he had the right to have his work permit extended and subsequently the right to a residence permit. The ruling in Kus is an important one as it establishes that Turkish workers have a special status in the EU. Although they do not have the same rights as EU or EEA nationals their rights are superior to nationals from third country nationals without Agreements.

Burrows[127] observed that the special status of Turkish workers was recognised in the case of the Turkish drug pedlar. In *Re a Turkish Drugs Pedlar (Administrative Court*

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125 Case C-192/89 (1990) ECR I-3461 (1992) 2CMLR,

126 Case C-237/91 (1992) ECR I-6781 (1993) 2CMLR 887,

127 Burrows, *The Rights of Turkish Workers in the Member States (1993)* 19 ELRev 305

In *Demirel v Stadt Schwabisch Smund*[123], Article 12 of the Association Agreement with Turkey stated that the contracting parties agreed to be guided by Articles 39, 40, 41 EC (formerly Articles 48, 49 and 50) for the purpose of progressively securing freedom of movement for workers between them. The ECJ did not, however, allow the Turkish citizen in question to rely on the Association Agreement to prevent his deportation.

Razanatsimba[124] *concerned* the interpretation of Article 62 of the Lone Convention 1975 which provided that in matters of establishment and provision of services members of ACP states should be treated in a non-discriminatory manner. Razanatsimba had qualifications which allowed him to be admitted to the French bar but he was not French. He relied on the Lome Convention but the ECJ held that it did not contravene the principle of non-discrimination in Article 62.

Other rulings have served to demonstrate, however, that workers can accrue greater rights under the Association Agreement. Following a Decision in 1980 by the Association Council, Turkish workers who are *"duly registered as belonging to the labour force of one of the member states of the Community"* have a right of renewal of their work permit after one year's legal employment where they are employed by the same employer and after four years of legal employment the right to take up any paid employment.

123 *Case 12/86 (1987) ECR 3719*

124 *Case 65/77 (1978) ECR 2229*

of Appeal North Rhine Westphalia)[128] a Turkish drug pedlar who worked in Germany for several years and had a number of short periods in jail in Germany was convicted of drug dealing and a deportation order was granted. He appealed and the German court opined that Turkish workers had fundamental rights from Article 14(l) of Decision 1/80 which could be compared to 39 (3) EC (former Article 48(3)). Turkish workers legally established in a Member State should therefore be treated as Community nationals not aliens. German policy before Kus was to expel aliens convicted of a criminal offence.

The motives for the Court's rulings in these case was questioned by Burrows[129], who opined that the Court may be seeking to assist the Commission in its quest to grant competence in the field of migration rather than being influenced by human rights issues such as the rise of racist attacks on Turkish workers in Germany and other Member States. Whatever the motive, the liberal interpretation continued in ECJ cases such as *Tetik v Land Berlin*[130] where the effect of Article 6 of Decision 1/80 of the Council EEC/Turkey Association Agreement was considered. The ECJ held that it had direct effect and that it gave Turkish workers the right to take up employment not withstanding the Community preference rule. A Turkish worker who has at least four years lawful employment in a Member State is entitled to reside in a Member State for a reasonable period of time to seek further employment in accordance with the principle established in *Antonissen* outlined in Section 6.3.2 above.

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128 (1993) 3 CMLR 276

129 Op cit at Note 127 p. 310

The granting of social security rights has been problematic however as the ECJ has been reluctant to extend social security rights to third country nationals. Although social security provisions are generally restricted from the scope of this Chapter the recent *Surul* judgment is worth a mention as it demonstrates a change of attitude on the part of the ECJ. Earlier judgments relating to Turkish workers were distinguished and it was held that Turkish workers and their families are entitled to equal treatment in social security. As Peers highlights, however, the judgment leaves a number of important issues to be decided. Peers is critical of the Court's failure to allow retrospective effect and argues that *"This sorry tale of bureaucratic inertia, political evasion and judicial confusion does not augur well for the development of the new Title IV of the EC Treaty.* [131]

There have been a number of ECJ rulings concerning nationals from other countries, for example, the EU-Morocco Agreement was relied on in *Yousfi v Belgian State*[132] where a Moroccan workers' son refused a disability allowance was found to have been discriminated against and the Algeria Co-operation Agreement was relied on in *Krid v CNVATS*[133] to prevent discriminatory treatment. These cases continue to demonstrate a more liberal attitude towards rights stemming from Association Agreements.[134]

130 *Case C-171/95 (1997) ECRI-329*

131 Peers, S., *Social Security Equality for Turkish Nationals* (1999) 24 ELR 627-637

132 *Case C-58/93 (1994) ECR I-1353*

133 Case C-103/94 (1995) ECR I-719

134 See, Case C-416/96, *Nour El-Yassini v Secretary of State for the Home Department*, (1997) ECR I-1209, See Meris, B, (1999) Case note 36 CMLRev, 1357-1364

6.6.3 Indirect rights acquired by Third County Nationals

Indirect rights can be acquired via relationships with EU Nationals and secondary legislation (e.g. Regulation 1612/68 on freedom of movement of workers within the Community, Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Members States and their families as detailed in Chapter 4), or as an employee of an EU firm exercising the freedom to provide services in another member state. These rights have been tested in the ECJ in cases such as *Cristini*[135], *Castelli*[136], *Deak*[137], *Diatta*[138], *Seco*[139], *Rush Portuguesa*[140] *and Van der Elst*[141]

6.6.3.1 Rights granted under secondary legislation - Regulation 1612/68EC

Respecting the right to family reunion, rights of equal treatment are granted to third country nationals under Regulation 1612/68, while Regulation 1408/71 covers social security rights. The ECJ has taken a liberal approach and given fairly wide interpretations of the provisions, as illustrated in Section 6.3.2, in cases such as *Commission v Belgium* and *Reed,* with a view to ensuring the full integration of migrants and their families in accordance with the preamble of the Regulation that "...

135 Case 32/75 (1975) ECR 1585

136 Case 261/83 (1984) ECR 3199

137 Case 94/84 (1985) ECR 1873

138 Case 267/83 (1985) ECR 567

139 Joined Cases 62 and 63/81 (1982) ECR 223

140 Case C-113/89 (1990) ECR I-14127

141 Case C-43/93 (1994) ECR I-3803.

obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family in the host country".

Article 9 grants migrants the same rights as Member States nationals re ownership of housing, for example, *Commission v Greece*[142] where National laws restricting the right to own property to Greek nationals were found to be contrary to Article 9 and also Article 39EC (formerly 48). Article 10, 11 and 12 grant rights to workers' families. Article 10 grants rights to a spouse and dependants under 21 years or dependent relatives in the ascending line of the worker and his spouse in relation to the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member. Article 11 grants rights to spouses and dependent children under the age of 21 to *"take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State".* Article 12 grants rights to the children of migrant workers to receive education in the host state under the same conditions to nationals.

Case law confirmed the rights of third country nationals. In *Cristini v SNCF*[143] the ECJ held that the principle of equal treatment also prevents discrimination against the workers widow and dependent relatives. In *Deak*[144] the court held that the principle

142 Case 305/87 (1989) ECR 1461

143 Case 32/75, (1975) ECR 1085

144 Case 94/84 (1985) ECR 1973

was not concerned with the nationality of the family members and in *Diatta*[145] it was decided that a migrant worker's family is not expected to reside permanently with him/her to qualify for a right of residence under Article 10 of Regulation 1612/68.

The case *Belgian State v Taghavi Case*[146] contrasts with the earlier rulings detailed above. The case related to Belgian legislation preventing spouses of migrant workers resident in Belgium claiming disability allowance. Advocate General Van Gerven was of the opinion that the benefit in question should be more widely interpreted and considered as a social advantage within Article 7(2) as a "*failure to extend the benefit to the applicant could incite her husband, the migrant worker, to decide to leave the host State*". However, the Court decided that the benefit was not a social advantage under Article (7)2 of Regulation 1612/46. The decision in *Taghavi* has been described as '*surprising*'[147] but could have been guided by the links with social security and the precedents it could set. The Court classification of benefits as a social advantage is useful for future rulings even though it did not apply in this case. A more liberal interpretation of Article 7(2) was given in *Commission Belgium* [148] where the Courts held that income support, old age benefits and disability allowance all fell within the remit of Regulations 1408/71 and Article 7(2) of Regulation 1612/68.

145 Case 267/83 (1985) ECR 567 (1989 2 CMLR 164

146 Case C-243/91 (1992) ECR I-4401. The case centred on Belgian legislation which did not allow spouses of migrants workers resident in Belgium to claim disability allowance. The ECJ held that they had derived rights only under Regulation 1408/71 and the benefit could not be classed as a social advantage for migrant workers under Article 7(2) of Regulation 1612/68

147 Johnson, E. & O'Keeffe, D. op cit at note 28

Article 12 of the Regulation has also been broadly interpreted as in *Echternach and Moritz v Netherlands Minister for Education*[149] where the court held that where a child return to his state of origin with his parents after living and studying in another Member State, he may still be entitled to return to the host state without his parents and rely on Article 12 there, if educational institutions in his state of origin refuse to recognise qualifications obtained in the host state.

Rights to claim maintenance grants under Article 7(2) of the regulation for vocational training undertaken in the host state have been interpreted in *Di Leo v Land Berlin*[150] *where* the child of a migrant worker resident in Germany sought to return to her State of origin to undertake vocational training. The court held that the nationality requirement in German legislation was contrary to Article 12 of Regulation 1612/68 and that the effective integration of the migrant family into the local community could only be achieved if the child of the migrant worker was entitled to choose his/her course under the same conditions as nationals of that state.

In *Raulin v Minister van Onderwijs en Wetenschappen*[151] the court confirmed that migrant workers are entitled to claim maintenance grants under Article 7(2) provided that is a link between the course and *"previous occupational activities"*. The Court further ruled that a migrant worker is entitled to rely on Article 7(2) to obtain study

148 *Case C-326/9O (1992) ECR I-5517*

149 *Joined Cases 389-390/87 (1989) ECR 723,*

150 *Case C- 308/89 (1990) ECR I-4815*

151 *Case C-357/89 (1992) ECR I-1027*

finance even where he has become voluntarily unemployed, provide all occupations previously pursued in the host state *"disclose a relationship with the subject matter of the studies in question"* in *Bernini v Minister van Onderwijs en Wetenschappen*[152]. Johnson and O'Keeffe[153] observed that the ECJ appears to recognise the importance of vocational training in improving the position of migrant workers in the labour market of the host state whilst also ensuring that students seeking to carry out studies in the host state are prevented from relying on Article 7(2) by undertaking casual work there

6.6.4 Rights acquired via Article 43 and 49 EC (formerly Articles 52 and 59)

Articles 43 and 49 EC (formerly Articles 59 and 60) permit firms established in a Member State to provide services in another Member State under the same conditions as are imposed by that State on its own nationals. Rulings in the ECJ have established the firm's right to use its staff whatever their nationality

In *Seco*[154] it was held that a Member State's power to control the employment of nationals of non-member countries may not be used for discriminatory purposes by for example imposing burdens on firms from another Member State. The Court held that Community law of freedom to provide services included any indirect form of discrimination.

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152 *Case C-3/90 (1992) ECR I-1071*

153 Op cit *at Note 23, p.1325*

154 *Joined cases 62 and 63/81 (1982) ECR 223*

In *Rush Portuguesa Limitad v Office National d 'Immigration*[155] a company governed by Portuguese law sub-contracted to carry out works in France brought its Portuguese workforce from Portugal.[156] The French Labour Inspectorate reported that workers did not have the work permits required. Rush argued that the sub contract work was a service within Articles 49-50 EC (formerly Articles 59 to 60) which were in force in Portugal. and did not require application of the Code du Travail to its employees. The Court held that a company from another member State may move with its own labour force and that the authorities of the Member State in whose territory the works are to be carried out may not impose discriminatory conditions relating to recruitment.

The case of *Van der Elst v Office des Migrations Internationales*[157] further confirmed the principle. An employer of Belgian nationality engaged Moroccan workers resident in Belgium holding Belgian work permits and covered by the Belgian social security scheme, to work on a project the company was carrying out in France. The French authorities claimed that they could insist on work permits for the Moroccan workers. Mr. Van der Elst claimed that this was a barrier to the freedom to provide services and incompatible with Article 49 EC (formerly Article 59) as the fees involved could constitute a considerable financial burden on employers. The Court held that

155 Case C-113/89 (1990) ECRI-1417

156 At that time Portugal was governed by the principles of the Act of Iberian Accession during its transitional period of entry into the Community which included a derogation from the freedom of movement laid down in Article 48 to prevent Portuguese workers 'flooding' the labour market although freedom to supply services came into effect immediately on accession.

157 Case C-43/93 (1994) ECR I-3803

companies legally employing non-EU workers in one member state had a right to take them with it to work on contracts elsewhere in the EU.

While these judgments are to be welcomed, as they have given yet further freedom of movement to third country nationals, the Court may have been motivated by the fact that the decisions also assist the economic viability of companies.

6.7 Impact of Nationality: State discrimination against its own nationals (Reverse Discrimination)

Reverse Discrimination, whereby a State discriminates against its own nationals as they cannot rely on protective Community law provisions providing greater rights than national laws, has been examined by the ECJ. The significance of reverse discrimination must not be underestimated[158], Szyszczak[159], when commenting on the EU's competence in the area of race discrimination observed that it leaves black and ethnic minorities outside the protection of Community law and where Member States have no effective race discrimination law these groups may be without any legal protection.

Cases such as *Surinder Singh*[160], discussed below, have highlighted the potential of the ECJ to assist third country nationals in resisting restrictive immigration controls and facilitating family re-unification. The cases have consistently demonstrated that a Community national must move to another Member state in order to rely on Articles

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158 See for example Pickup, D., *Reverse Discrimination and Freedom of Movement for Workers (1986) 23 CMLRev 135*

159 Szyszczak, E., *Race Discrimination: The Limits of Market Equality?* in *Discrimination: The Limits of Law*, Hepple, B. and Szyszczak, E. (eds.), 1992, p.134

160 Case C-370/90 (1992) ECR I-4265

39-55EC (formerly Articles 48-66) of the TOR. In *R v Saunders*[161] a person convicted of theft was conditionally bound over and had to return to Northern Ireland. On breaking the condition she claimed that the ruling was contrary to Article 39 EC (formerly Article 48) as it restricted her right to move. The ECJ held that Article 39 (formerly Article 48) did not apply to domestic situations which were wholly internal to a Member State. Similarly, in *Dzodzi*[162], it was held that third country nationals cannot rely on EU law to claim a right to remain on the death of the spouse if the spouse did not exercise free movement rights.

In *Moser v Land Baden Wurttenberg*[163] a German trainee teacher was prevented from completing his training because he had been a member of the Communist party and German legislation required that teachers must be loyal to the German state. He claimed that this was contrary to Article 39 EC (formerly Article 48) but the ECJ held that the Article "*..does not apply to situations which are wholly internal to a Member State.*

The principle of reverse discrimination was applied once again in recent joined cases of *Land Nordrhein-Westfalen v Uecker & Jacquet*[164]. The cases involved Norwegian and Russian nationals living and working in Germany and married to German nationals. They attempted to challenge discriminatory terms and conditions of

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161 *Case 175/78 (1979) ECR 1129*

162 *Cases* C-297/88 and C-197(1990)

163 Case 180/83 (1984) ECR 2539

164 Cases C-64 and C-65/96 (1997) ECR I-371

employment as contrary to Article 39 (2 (former 48(2)) and Article 11 of Regulation 1612/68 but the Court ruled once again that situations wholly internal to a Member State were not actionable. This attracted criticism as the Court also commented that rights under the EU Citizenship provisions could not be invoked in purely internal situations having no link with Community law. The ECJ has suggested that Article 12 EC (Formerly Article 6, ex Article 7) may have a wide application in *Commission v France*[165].

Reverse discrimination has also been addressed in a number of cases relating to freedom to provide services and establishment.[166] The most significant ruling in the matter of reverse discrimination is *R v Immigration Appeal Tribunal and Surinder Singh, exparte Secretary of State of the Home Department*[167]. The case concerned Surinder Singh an Indian national who married a British national in 1982 . Mr and Mrs Singh worked as employed persons in the Federal Republic of Germany and then returned to the United Kingdom to open a business which they purchased in February 1986. Surinder Singh was granted limited leave to remain in the UK on the basis of his marriage to a British national. The Singhs marriage came to an end and following the decree nisi the British authorities refused to grant Mr. Singh leave to remain and proceed to take deportation proceedings against him.. Mr. Singh appealed to an immigration adjudicator but was unsuccessful. A subsequent appeal to the Immigration

165 Case 167/73 (1974) ECR 359

166 See Nielsen & Szyszczak, op cit at note 1, p. 109, for a discussion of some of the cases

167 Case C-370/90 (1992) ECRI-4265.

Appeal Tribunal was successful however as it was held that Mrs. Singh had exercised her right to freedom of movement and had a right to set up a business in the UK under Article 43 EC (formerly Article 52) and to be accompanied by her non-EC spouse on the same terms as any other community migrant worker. It was noted that the Singhs marriage was still in existence at the time of the deportation proceedings as a marriage is not dissolved under English law until a decree absolute is granted.

The Home Secretary applied for judicial review in the High Court arguing that Mrs. Singh was exercising her rights under UK immigration legislation to return to the UK and not rights stemming from Community law. The High Court referred the case to the ECJ under Article 234 (formerly Article 177 reference). The court held that a *" spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or spouse entered and resided in another Member State".* White[168] comments *"The reasoning in the case suggests some mitigation to the harshness of the so-called rules of reverse discrimination" and* argued that a public policy approach is preferable to *"the blanket refusal to apply Community rules to matters wholly internal to a Member State "*

Some protection from the impact of reverse discrimination may be provided by the Commission's proposed migration convention[169]. Peers[170] opines that, if adopted, the *"ambitious"* proposal would remove some of the distinctions between third country

168 White, R. *A fresh look at reverse discrimination (1993)* 18 CMLRev 527-532.

169 *Convention on Member States migration policies,* COM (97) 387, 30 July 1997, OJ 1997,C337/9. Refer to Chapters 5 and 8 for comments on its prospects for success

nationals based on nationality, and would also abolish the impact of the *'reverse discrimination'* rule affecting many third country national family members of EU citizens.

6. 8 Summary

The role of the ECJ and its success and failures in the areas connected with this thesis have been vigorously debated by numerous commentators. Prior to the Treaty of Amsterdam its powers were restricted largely to the first pillar. Some Member States have accused the Court of being over-active and exceeding its role by assuming a legislative function. There have been moves therefore to curb its powers as witnessed at Maastricht when the Court was excluded from the majority of the justice and home affairs third pillar. This resulted in increasing the "*judicial deficit*" and caused outcry amongst civil liberties supporters as the Court could not pronounce on areas connected with immigration.

As the Council has demonstrated reluctance to extend free movement rights to third country nationals and has been engaged in introducing restrictive immigration policies the Court's involvement prior to the Treaty of Amsterdam was an important one. The growing awareness of lack of fundamental rights within the EU led commentators to argue that the Court's role in shaping EU policy in this area was vital. There is a substantial judicial deficit in the area of fundamental rights and unless the EU accedes

[170] Peers, S., *Raising Minimum Standards, or Racing to the Bottom?: The Commission's Proposed Migration Convention,* in Guild, E., *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union 1999, Kluwer*

to the ECHR in its own right[171] there is a risk of parallel but different decisions being reached as demonstrated in the case of *Grogan.* The Court has demonstrated some willingness to protect the fundamental rights of individuals where it believes those rights have been violated but cases such as *Demiral* are illustrative of conflicting priorities and the Court's failure to protect individual rights on occasion. An overview of the cases illustrated in the Chapter highlight some reluctance to extend rights to third country nationals, influenced somewhat by the debates amongst Member States relating to Community competence in this area.

The Court's input has been limited somewhat by lack of Treaty competence and its exclusion from the Justice and Home Affairs pillar but the wealth of case law and decisions reached by the ECJ goes some way to demonstrating its significance in the fight to establish rights for all legally resident within the EU. The ECJ's judgements have certainly clarified and extended a number of areas relevant to this thesis, for example, the Court has adopted a liberal approach to rights granted to third country nationals under secondary legislation and extended rights in cases such as *Rush Portugesa.* Although the decision in the latter no doubt also assists companies attempting to offer services in other Member States and prevents Member States pay levels being undermined by cheap migrant labour.

Despite the ECJ's clear acceptance of the fundamental importance of free movement provisions the Court has tread carefully on occasion, perhaps due to the cries from

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171 See note 116 for associated problems

some Member States to curtail its power, and it would appear that some are (still) more equal than others in the EU. The complex web of rules for different groups of people is cause for concern in a single market. EU law relating to equal treatment and discrimination on grounds of nationality and freedom of movement presently legitimises discriminatory treatment between EU Nationals and third country nationals and effectively amounts to indirect discrimination. The ECJ's role in dismantling the inequitable, messy hierarchy of workers is crucial.

The Court has made a valuable contribution to the area of equal treatment by extending the principle as it relates to gender and has assisted in establishing fundamental rights and developing general principles of law but its approach *"is slow and piecemeal"*. The role of individuals within Member States has been crucial in this regard as Szyzsczak[172] commenting on social rights as general principles of community law observed. Its increasingly conservative approach in recent years, apart from the ruling in *P v S*, has been the subject of much criticism. A higher priority has been given by the Court to the economic market rationale and this has resulted in the principle of equal treatment being somewhat *"suffocated"*.

The ruling in *P v S* was welcomed as it granted a broad approach to the equality principle and at least one commentator opined that the Court may be taking a *"tentative step"* in recognising that *"...the Union is not only about securing market freedoms but also about achieving social justice"*. It has been argued that the case introduced a moral

172 *Szyzcszak E., Social Rights as General Principles of Community Law*, in Newahl and Rosas, A (eds.) *The European Union and Human Rights,)*, Martinus Nijhoff, 1995, p220

dimension and recognises Union citizens, as opposed to market citizens, rights and is a marked departure *"from the culture of the market to the culture of the Union".*[173] However, somewhat disappointingly the Court did not extend the principle to include sexual orientation in the case of *Grant v South Western Trains*, perhaps due to the Court's awareness of the impending non-discrimination clause which could grant powers to other EU institutions in this area[174]. Ellis[175], comments that the Court in recent years seems *".....to have lost sight of the objectives of the legislation and to be operating as a drag on the system."* This has led to individuals in some States seeking justice from the European Court of Human Rights.[176]

The Citizenship provisions granted at Maastricht enhanced the rights of EU nationals and could present opportunities or threats to *"visible minorities"* and third country nationals. A number of commentators predicted that the courts *"may fashion constitutional guarantees from the Citizenship provisions through its case law"*[177]. The ECJ has been slow to develop these rights although the *Martinez Sala* case goes some way to determining EU Citizens rights of residence. If EU Citizens are to assume a sense of identity with the Union the accountability of EU institutions is paramount. The

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173 Barnard, C., op cit at Note 93, page 72

174 See, for example Cabral, P, *A step Closer to Substantive Equality (1998)* 23 ELRev 481-487, who argues in the context of the Marschall Case (C-409/95 (1997) ECR I-6363) that "*a moderate*" approach by the Court was justified in the context of the Amsterdam Treaty and a new legal basis for equality measures

175 Ellis, E., *Recent Developments in European Commmunity Sex Equality Law (1998)* 35 CMLRev 379-408

176 See, for example, *Lustig Prean & anor v UK* op cit at Note 98

177 O'Keeffe, D., op cit at Note 36 1994, p.109-119

Court contributed to the debate in this area in the *Carvel*[178] decision where the Court decided that the interests of citizens had to be balanced against the desire for confidentiality and that access to "*confidential*" documents had been wrongly denied. The EU Citizenship provisions are examined in Chapter 7

The Treaty of Amsterdam has made amendments to the EC Treaty and Treaty on European Union which extends the jurisdiction of the Court. The implications of extending jurisdiction to the Third Pillar, new provisions on visa, asylum and immigration policies incorporated into the First Pillar, power to review the compliance of the institutions with the general principles of fundamental human rights and the new non-discrimination provisions are examined in Chapter 8. [179]

178 *Carvel & Guardian newspapers* , Case T-194/94 (1995) ECR II-2763

179 See Lloren A., *Changes in the Jurisdiction of the European Court of Justice Under the Treaty of Amsterdam (1998)* 35 CMLRev 1273-1294

PART TWO: FREE MOVEMENT PROVISIONS AND THE IMPACT OF EU POLICY ON RACE DISCRIMINATION AND MIGRATION CONTROLS, WITH PARTICULAR REFERENCE TO EMPLOYMENT ISSUES AND THE UK'S RESPONSE

CHAPTER 7

CITIZENSHIP AND NATIONALITY IN THE EU

7.1 The Impact Of Citizenship And Nationality

The status of being a Member State national is important to this thesis in that rights of free movement are granted to EU nationals[1]. It is necessary therefore to identify who qualifies for Member State nationality. There is a view that the right to nationality is a key issue in the integration of third country nationals[2]. Citizenship of the Union was introduced at Maastricht, as discussed in section 7.2 below, and is supposed to increase citizens participation, promote the notion of a European identity and strengthen citizens rights. The rights granted by citizenship are bestowed on all EU nationals[3] regardless of colour or race. Consequently, it has resulted in third country nationals legally resident in a Member State having fewer rights than migrant EU nationals.

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1 Third country nationals have a number of free movement rights stemming from their rights as family members of Community workers and Agreements such as the EEA with Norway and Iceland. More limited rights are granted under Association Agreements with countries such as Turkey, as detailed in Chapter 4 and 6. Third Country nationals may also be allowed entry if they are working for an undertaking established in one of the Member States, *Rush Portugesa*, Case C 113/89 (199) ECRI-1417 and *Van der Elst* Case C-43/93 (1994) ECRI-3803, see case law in Chapter 6

2 See for example RIMET report for the Commission, *The Member States of the EU and Immigration in 1994:Less tolerance and tighter control policies,* published 1997. It is reported that some are of the view that easier access to nationality should be the focus of integration policy

3 Refer to Section 7.1.1 for a discussion of the definition and who determines nationality

Although, in its present form, EU Citizenship has been seen by at least one commentator to have "..... *failed, or been prevented from, achieving the objectives assigned to it in 1992*"[4], it remains to be seen whether EU citizenship will pose a threat or an opportunity for "*visible minorities*" in the EU. The absence of EU wide legislation on race discrimination[5], and increasingly draconian immigration measures, have resulted in discriminatory treatment for millions of people working and residing within the EU. The development of EU Citizenship, including the Commission's latest assessment of the application of citizenship[6], will be examined in this Chapter together with the potential for extending any fundamental rights granted to EU citizens to third country nationals.

The significance of the debate has to be seen within the context of the number of different nationalities and citizens living and working in the EU. A Eurostat survey in 1993[7] examined the population by citizenship in the EU for the first time and found that Germany, France and the UK together hosted three-quarters of other EU citizens and non-EU citizens. Germany (29%) France (26%) and the UK (11%) had the highest percentage of non-EU citizens. Interestingly, the Germans (0.4%), French (0.6%) and British (0.8%) are also less mobile within the EU. The survey revealed that the EU had a

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4 O'Leary, S., *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship*, Kluwer, 1996,p 309

5 The impact of new Article 13 EC and the Commission's proposals to combat discrimination are discussed in Chapters 8 and 9

6 COM (97) 230 final. *Second Report of the European Commission on Citizenship of the Union*, June 1997, http://europa.eu.int/comm/dgl5/en/Update/report/citen.htm

7 Eurostat 1993-6 *Population by Citizenship in the EC* 1.1. 1991

documented population of 344 million on 1 January 1991 and that of these 334 million (97%) were citizens of one of the then 12 member states and around 10 million (3%) had citizenship of a non-EU state. The 1995 and 1996 Eurostat surveys [8] revealed that the EU had 11.6 m residents in 1993 who did not possess citizenship of any of the 15 member states, the 1996 survey reported that 4.8% of the population (approximately 18m) did not have the citizenship of the country in which they lived (one-third were nationals of another EU country and Turks were the largest single group of non-nationals)

The use of the terms *"nationals"* and *"citizens"* are not universally applied and there is not a single definition[9]. The expression *"citizen"* to describe individual national rights, has grown since the eighteenth century revolutions in France and the US to replace the term *"subject"*. However, the term citizen can cause confusion as some States do not use the term citizen and national synonymously e.g. India and the USA. In France it is possible to qualify as a citizen without acquiring French nationality.

Nationality has been described as *"The legal tie which binds individuals to the State and entitles them to its protection in international relations, and also renders them subject to the personal jurisdiction of the State "*[10]. O'Keeffe[11] differentiates nationality as the external

8 Eurostat 1995-11 *Acquisition of citizenship by naturalisation in the EU in 1993* and 1996-2 *Non Nationals make up less than 5% of the population of the EU on 1.1.93.* Statewatch estimated 12.5 million in 1997 long settled non-EU citizens, Statewatch Vol 7 No 6, November/December 1997 p.20-21

9 See O'Leary, S., op cit at Note 4, p 9, for an account of the legal differences between citizenship and nationality.

10 Jones, M., *British Nationality Law and Practice*, Oxford University Press 1947

relationship between the state and an individual and citizenship as the internal relationship of rights and duties , which very often stem from nationality. O'Leary[12] contends that nationality can be regarded *"as an undetermined attribute which is used as a tool by municipal, international and even Community law to determine who belongs to what state"* and that citizenship determines which legal consequences citizens enjoy. She confirms that opinions in the field are divided, some regard nationality as a formal legal concept defining membership of a state, which entails no rights and duties while others regard it as a substantive legal status in itself, with a number of rights and entitlements.

The acquisition of nationality and citizenship, rights and duties of citizens and the implications for people living and working in the EU are examined below.

7.1.1 Acquisition of Nationality/citizenship

In accordance with public international law, each State is allowed to determine who its nationals are. The Hague Convention 1930, Article 1, subjects any laws to few constraints, namely, *"international convention, international custom and the principles of law generally recognised with regard to nationality "*

As detailed in Chapter 3, ways of acquiring nationality of a given State vary. In some States a relatively *"open"* test applies of being born in that State (Jus soli) whilst in others a more *"closed"* stringent test is applied (Jus sanguinis) determined by the

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11 O'Keeffe, D., *Union Citizenship,* in O'Keeffe, D. & Twomey, P. (eds.) *Legal Issues of the Maastricht Treaty,* , London Chancery Press 1994, P 109-119

12 O'Leary, S., op cit at Note 4 p. 9

principle of descent i.e. the nationality of the parent(s). States do not rely solely on one principle but tend to emphasise one more than the other. Some states, e.g. Israel and Germany, also bestow nationality on the grounds of ethnic or religious background. The extension of nationality to groups who are descended from original members of the nation extends the idea of *"nationhood"* while the purely technical or civic definition of nationality which grants it automatically on being born in that state emphasises the notion of *"belonging"* to that State. Other ways of acquiring nationality include marrying a national or naturalisation.

The criteria for acquiring nationality/citizenship by way of naturalisation varies throughout the community and is detailed in Chapter 3. EU Member States immigration laws also differ. There has been an increasing trend to link nationality laws to those on immigration, usually justified by the desire for *"good race relations"*. The UK, for example, in the 1970s experienced a growing fear of increased immigration. The Government reacted with a White Paper[13] and in the 1979 manifesto announced that it would pass a new British Nationality Act in order *"to reduce future sources of primary immigration "*.

Difference in naturalisation procedures are highlighted in Chapter 3. There has been a tendency in the EU recently to tighten the criteria for naturalisation. New Portuguese legislation in 1994 for example, was amended to set the minimum residence period at 6 years for nationals of countries who official language is Portuguese and 10 years for

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13 Cmmnd. 7287, HMSO 1978

others, previously it was 6 years in all cases. In Denmark its laws were amended to impose a fee for every application.

Eurostat surveys in 1995 and 1996[14], revealed that the number of naturalisations in the EU increased sharply between 1990-1993 when 1 million acquired nationality, mostly Moroccans, Turkish and former Yugoslavian origin. Whether this trend will continue now that laws are being tightened up is yet to be tested. Between 1990-1993 France witnessed the highest number of naturalisations (233,000), with the UK (218,000), the Benelux countries (204,000), Germany (129,000) and Sweden (116,00) also receiving high numbers. However, these figures need to be compared to the number of third country nationals resident in the population to comment on how accessible member state nationality really is.

Two-thirds of non-nationals live in Germany, France or the UK but the Netherlands and Sweden actually witnessed the highest ratio of naturalisations to their resident non-national population. Despite Germany being fairly high on the list of naturalisations analysis of the figures demonstrate the difficulties in the German process. For example, of the Turkish citizens in the EU three-quarters are resident in Germany but more have acquired Dutch citizenship (42%) than German (28%). One of the reasons Turkish citizens are reluctant to acquire German citizenship, even when they meet the stringent qualifying criteria, is that Germany does not recognise dual citizenship. Since 1992 it is possible however to retain the nationality of origin when becoming a Dutch citizen.

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14 Eurostat, op cit at note 8

Whether Member States will continue to be prepared to accept differing criteria for acquisition of nationality will certainly be put to the test in the future, particularly since the Treaty of Amsterdam 1997 has accepted the power to legislate in immigration issues.

7.1.2 Rights and duties of Citizens

The nature of citizenship, and the privileges attached, is somewhat contentious. Whether it rests on the possession of political rights, and consequently the ability to influence government policy, or wider social rights, has been debated both within the EU and beyond. Early philosophers and academics took a narrow constitutional perspective of sharing in *"both the ruling and being ruled"*, Aristotle, and Dicey in 1912 took a similar view in his book *"Rights of Citizenship"*.

Marshall[15] developed the rights based approach of civil, political and social rights, whereby social rights were identified as the ultimate stage of citizenship and was a source of social cohesion. Tilly[16] focused on the notion of identity and rights and identifies *"citizenship as a set of mutual, contested claims between agents of states and members of socially-constructed categories: genders, races, nationalities and others"*. Evans[17] commented that the content of citizenship is likely to vary depending on the nature of

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15 Marshall, T.H., *Citizenship and Social Class* (1950), Cambridge University Press

16 Tilly, C., *Citizenship, Identity and Social History* in C. Tilly (ed) *Identity and Social History* (1996) p. 4-6

17 Evans, A., *Nationality Law and the European Integration (1990)* 16 ELRev 190-213

the State and ideology on which it is based. However, Closa[18] asserted, that with the growth of the welfare state there has been a trend towards a wider definition. Indeed, Yuval-Davis[19], commenting on the work of T.H. Marshall, states that there is general acceptance of his notion of citizenship as *"full membership in a community"*, which encompasses civil, political and social rights and responsibilities and the definition has been accepted by a variety of people with different theoretical perspectives.

Hepple[20], commenting on social rights and democratic citizenship and the future of labour law acknowledges the work of Marshall but contends that his theory of social rights is out of place in today's society. Marshall's theory was put forward at a time of economic growth and increased social welfare. Today social welfare is decreasing and identified as a burden on economic growth. Hepple argues that a *"more satisfactory basis for social rights is human rights"* but accepts the political reality of social rights being a widely accepted term.

Shaw[21] documents much of the work on citizenship and critiques available models asking whether citizenship constitutes communities or the reverse. Schnapper[22] commenting on a *"new citizenship"*, economic and social in nature, refers to Meeehan's

18 Closa, C., *The Concept of Citizenship in the TEU (1992) 29* CMLRev 1137-1169

19 Yuvall-Davies, N., *The Citizenship Debate: Women Ethnic Processes and the State, Feminist Review 39*, Winter 1991, p.59-68

20 Hepple, B, *The Future of Labour Law (1995) 24* ILJ 316

21 Shaw, L, *The Many Pasts and Futures of Citizenship of the EU (1997)* 22 ELRev 563

22 Schnapper,D., *The European Debate on Citizenship* (1997) 126 Daedalus 199,203-205, as cited in Chalmers, D., *European Union Law Volume One*, Ashgate 1998, P. 50

work claiming that *"true membership"* in the community is often defined by economic activity rather than political participation. Regardless of whatever model one adopts, there is no doubt that citizenship can create a level of superiority and inequality between citizens and *"mere"* residents and leads to *"insiders"* and *"outsiders"*, widening existing gaps. Although the benefits of citizenship vary according to who is doing the bestowing and what has been bestowed by a given state, some benefits usually follow. Not surprisingly, Schauer[23] commented that the more economic and social advantages attached to citizenship the more disadvantaged non-citizens will become.

In the EU people comprising the *"Sixteenth State"* presently suffer legal disadvantage and the creation of a higher level EU citizen is viewed with suspicion amongst many black and ethnic minority communities. Third country nationals resident in the EU cannot claim EU citizenship and any increased rights attached to it.

7.2 Development and Acquisition of EU Citizenship

The Treaty of Rome referred to the *"peoples of Europe"* not *"citizens"* and Mancini argued that this challenged the notion of a single people or citizen of Europe[24]. Citizenship was acknowledged during the 1970s[25] and in 1975 the Commission's

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23 Schauer, R, *Community Citizenship and the Search for National Identity*, 84 Michigan Law Review (1985-86), p. 1516

24 Mancini G., *The Making of a Constitution for Europe (1989) 26* CMLRev 595-614

25 'See for example Commission President Mansholt speech the EP Debates 1972-73, no 149, at 107, 19/4/1972 and the Belgian and Italian Prime Minsters in 1972 who spoke of bringing the European Citizen into the construction and Europe and suggested that "we could as of now decide to establish a European Citizenship which would be in addition to the citizenship which the inhabitants of our countries now possess", EC Bulletin 11-1972, Vol. 5 at 37,39 and 43

Tindemans Report *"Towards European Citizenship"* presented to the Council, focused on a *"Passport Union"* (a uniform passport and abolition of passport controls in the EC) and political rights to vote, stand for election and become a public official in the member states. The Report confined itself to civil and political rights. A uniform passport subject to national administration procedures was authorised by a Resolution on 23 June 1981. Plender[26] contended that *"an incipient form of European citizenship"* with a legal base in the Treaty could be developed including privileges such as the right of movement throughout the common territories and the abolition of discrimination on grounds of nationality.

The Commission Report of 1985 *"A Peoples Europe"* chaired by Adonnino clearly raised the inclusion of social issues and tackled the issue of political rights recommending a uniform election procedure and voting rights in local elections[27]. Proposals were also put forward allowing EU nationals to seek assistance from any Member State Consulate in a third country where their nation was not represented.

Voting rights for migrant workers and their families in local elections of the State of residence was considered in the Community Action Programme of 1978 but a proposed

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26 Plender, R., *An Incipient Form of European Citizenship* in *European Law and the Individual*, Editor F.G. Jacobs, North Holland 1976

27 The only procedure within the EU which allowed nationals from other Member States to vote in another Member State was that adopted by some countries (Belgium, Netherlands and Ireland) in EP election. The right of a non-national to stand for election was only permitted in Italy and the UK (Irish nationals only). This was contrary to the Council's recommendation in May 1983 "to make every effort, as far as possible, to fulfil the objective that all nationals of Member States should have the right to vote in the elections of MEPs, either in their country of origin or in their country of residence", EC Bulletin 5 –1993

Directive[28] met with opposition due to arguments relating to sovereignty and competence, particularly from the UK. In a ruling on 31 October 1990, the German constitutional court held that it was contrary to the German constitution to allow foreigners to vote in local elections. The legal base for the extension of voting rights in local elections on grounds of residency was somewhat controversial. Arguments largely centred on general powers under Articles 308 EC (formerly 235) and former Article 236 of the EC Treaty which allow increased powers and amendments to the Treaty but the adoption of Article 19 EC (former Article 8b) at Maastricht as detailed below overtook the debate.

Rights to individually petition the European Parliament on any matter within its power were granted in 1987. The Committee investigates, asks questions of other institutions, prepares a reports for Parliament and has the power to ask the Commission to bring an action against a member state under former Article 169 EC. The establishment of the Ombudsmen as outlined below in 7.3.2 under Article 21 (former Article 8d) has however resulted in some overlaps and confusion with the work of the Committee.

EU Citizenship was formally recognised in the Treaty on European Union 1993[29] following lengthy debates as Britain and Denmark identified EU citizenship as a threat

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28 COM 88 371 final 11.7.1988 OJ 1988 C246/3

29 Article 17 (1) EC (former Article 8 (1)) was established by the TEU. However, a number of commentators have argued, that the rights granted to Member State nationals refer to the Community and not the Union, for example O'Leary, op cit at Note 4, contends "..apart from the Committee on Petition's disputable competence to investigate the Union's field of activity the rights which Member State nationals enjoy on the basis of the status of citizenship have nothing to do with the remaining pillars of the TEU" p.21

to national identity and national citizenship. Only nationals[30], or citizens, of member States are presently entitled to EU Citizenship according to Article 17 (1) (former Article 8 (1)) EC. EU Citizenship does not replace national citizenship, it supplements it[31]. Individuals entitled to EU citizenship will have a dual citizenship. A Declaration attached to the Treaty on European Union 1992 stated that each Member State will retain the right to determine who qualifies as a national in accordance with National law and that Member States can still decide who is a national for EU purposes[32].

While this is in line with public international law this is at odds with the principle of free movement of people and rulings of the ECJ whereby it has been decided that the concept of *"worker"* cannot be determined by national law as this would result in different interpretations[33]. To allow the EU to determine the criteria for EU national status could however conflict with the principles of subsidiarity and be a real challenge to national sovereignty which has been vigorously protected by the Member States[34].

30 The exclusive nature of EU citizenship has caused much debate as detailed in Section 7.5

31 Article 17 (1) (revised former Article 8(1)) in the Treaty of Amsterdam to expressly recognise this

32 The denial of a Community role in determining nationality for EU purposes has caused much debate. The *Michelliti* case C-369-90 (1992) ECR I-4329, discussed in Chapter 6, does not recognise Community competence in this respect. O'Leary, S., op cit at Note 4, p. 34 , refers to the "legal paradox" in nationality being determined by Member States rather than the Community as it determines the scope of free movement and citizenship.

33 *Unger v Bestuur,* Case 75/63 (1964) ECR 177, for discussion of this case refer to chapter 6

34 For example, the UK made a declaration as to who qualifies for nationality for EU purposes when it joined the EU in 1972, but subsequently changed this in 1983 to reflect the British Nationality Act 1981 amendments. Presently, the UK definition includes. British citizens, British subjects (as defined in the 1981 Act) with the right of abode in the UK and British Dependent Territories' citizens who acquire that citizenship through their connection with Gibraltar. The UK therefore withdrew existing Community rights from certain groups i.e. those registered under the BNA (No 2) 1964. The legality of this withdrawal of Community status is open to challenge as it did not receive the approval of other Member States nor receive the proper scrutiny by the UK

O'Keeffe[35] observed that the nationality provision concerning union citizenship may produce anomalies but because of the attitude of the Member States reinforced by the *Micheletti* judgment it is unlikely that Community legislation or the case law of the court will alter the competence of the Member States in this area. However, O'Leary argued that *Michelletti* is *"somewhat ambiguous"*[36] and that the court inferred that all Member States determination of nationality might not be consistent with Community law and therefore subject to review in the court.

In some member States they do not differentiate on definitions of nationality for municipal, international or Community law purposes. Some national definitions are more generous than others but so far there have not been any official objections to any national definitions by a community institution or other Member State. A number of civil rights groups have however questioned the restrictive nature of naturalisation processes and singled out certain States for criticism. For example, the recent changes in France which specify that applicants must demonstrate signs of integration into the French community. The debate as to who qualifies for member state citizenship, and subsequent EU citizenship, continues to be controversial.

This and other calls to expand the categories of people entitled to claim EU Citizenship and the rights and duties bestowed are discussed below.

Parliament. Its legality was never tested in either the British courts, the ECJ or ECHR.

35 O'Keeffe, D., op cit at note 11, p. 120

7.3 EU Citizenship Issues in the TEU: Success and Failures

The rights of EU citizens were constitutionalised by Articles 17-22 EC (the former Article 8-8e) and include freedom of movement Article 18 (former Art 8a), voting and standing in local elections Article 19 (1) EC (former Art 8b (1)) and EP elections Article 19 (2) EC (former Art 8 b (2)) extended Consular protection in third countries Article 20 EC (former Art. 8c) and rights to petition the EP and Ombudsman Article 21 EC (former Articles 8d). Citizens rights are not limited to Article 17 (former Article 8) as Article 17(2) (former Article 8(2)) states that "*Citizens of the union shall enjoy the rights conferred by this Treaty*". This clearly entitles Citizens to broader rights than those contained in Article 17 (former Article 8) alone.

Article 22 EC (former Article 8e) EC instructs the Commission to report to the EP, the Council and to the ESC before 31st December 1993 and then every three years taking into account the "*development of the Union*". As Article 22 EC (former Article 8e) states that provisions may be adopted "*..to strengthen or to add to the rights laid down*" it was anticipated by a number of commentators that amendments were likely to increase the rights of Citizens[37].

The concept of EU Citizenship has been the subject of much comment. Weiler opines it provides a foundation for *"shared values, a shared understanding of rights and societal*

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36 O'Leary, S., op cit at note 4, p. 34

37 O'Keeffe, D., op cit at Note 11 p. 109-119

duties and shared rational, intellectual culture which transcend organic-national differences"[38]. The Commission expressed the opinion that the Citizenship provisions have *"fundamentally altered"* Citizens rights and that they have been granted *"constitutional status"* by freeing the rights from the economic constraints of previous Treaties[39]. Implementation of the provisions contained in the former Articles 17-21 EC (former Articles 8a-d) is examined below. The *"dynamic"* nature predicted by some commentators has not yet been fully realised and dissatisfaction hass been expressed[40]. As discussed in Chapter 6, the ECJ has been slow to develop the rights contained therein.

7.3.1 Article 22 (Former Article 8(e)) and Commission Reports on Citizenship, 1993 and 1997

Article 22 (former Article 8(e)) states:

> "The Commission shall report to the European Parliament to the Council and the Economic and Social Committee before 31 December 1993 and then every three years in the application of the provisions of this Part. This report shall take account of the development of the Union. On this basis, and without prejudice to the other provisions of this Treaty, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may adopt provisions to strengthen or to add to the rights laid down in this Part, which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements"

The first report from the Commission on *'Citizenship of the Union'* in accordance with the requirement of Article 20 EC (former Article 8(c)) was published on 21st

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38 Weiler, J., *Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision* (1995) 1 ELJ 219

39 COM (93) 702 lst Report on Citizenship of the Union

40 See for example, O'Leary, op cit at Note 4, J. Weiler *European Citizenship and Human Right* in Winter, J., Curtin, D, Kellermann A, and de Witte, B (eds) *Reforming the Treaty on European Union: The Legal Debate* (1996) and the *Commission's Second Report on Citizenship* op cit at No. 6

December 1993[41]. The Union's aim of establishing a political link through voting rights to foster *"....a sense of identity with the Union"* is clearly stated. However, as Member States can unilaterally determine who can obtain nationality for EU citizenship purposes, claims of a direct political link are undermined. O'Leary opines *".....the survival of Member State nationality as the basis for the enjoyment of Union citizenship suggests that Member State sovereignty rather than individual rights are central to the determination of the scope and content of Union citizenship"*[42]. The Commission stressed the constitutional significance and importance of Citizenship and claims *"..as testimony to their importance, the intergovernmental conference placed them immediately after the introductory provisions of the Treaty of Rome "*. The "*dynamic*" nature of Part II of the Treaty is emphasised in that the provisions are not static as they can be *"strengthened and supplemented in future"*.

The second report from the Commission in 1997[43] acknowledged that *".....in practice some of the rights are not yet fully applied"*. It warned that citizens expectations had been raised and should be honoured otherwise citizenship will be identified as a *" vague and distant concept"*. The Commission recommended improved access to information and also recommended a revision of Article 18 EC (former Article 8a) to simplify and clarify the law relating to free movement following the Veil Report[44].

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41 op cit at Note 6

42 O'Leary, p.308, op cit at Note 4

43 op cit at Note 6

44 The Veil Report was commissioned by the European Commission in 1996 to investigate the obstacles to free movement rights, as detailed in Chapter 5

7.3.2 New Rights granted under Articles 19-21 EC (Former Articles 8 b, c, d) Article 19 (Former Article 8b)

> "1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member state in which he resides, under the same conditions as nationals of that State .
>
> 2. Without prejudice to Article 190 (3) (former 138(3)) and the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State"

This article established an important right for EU Citizens as voting rights are generally reserved for nationals or citizens of a particular State. Prior to Article 19 EC (former Article 8b) there were broadly three categories of non-national participation in the Member States. Some countries extended electoral rights at local level on the basis of residence (Denmark, Ireland, the Netherlands, Sweden and Finland), some extended electoral rights to nationals of countries where they had a historical relationship (Portugal and the UK) and others reserve electoral rights to their own nationals. Changes were required in a number of Member States Constitutions[45] to accommodate the new voting rights which create a direct political link between the European Union and nationals/citizens of the member states. Rights to vote in national elections are not recognised.

Directive 93/109EC relating to EP elections was adopted in December 1993 and required Member States to introduce the laws necessary for implementation of the Directive by 1st February 1994. The political dynamic was tested in the first EP elections

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45 Germany for example had to make amendments to its laws to accommodate voting rights for non-nationals

in June 1994 when Member State nationals were allowed to vote where they were resident regardless of member State nationality. Relatively small numbers registered to vote and even fewer emerged as candidates for political parties[46]. The reasons for this are somewhat complex but no doubt including difficulties of publicising these new rights together with issues such as apathy towards EP elections, avoidance of double voting and the administrative difficulties posed by some Member States, all exacerbated by the short time scale involved. The greatest problems were *"somewhat paradoxically"*[47] experienced by the most pro-European Member States (Belgium, France, Germany and Luxembourg). Information campaigns such as *"Citizens First"*[48] were launched to publicise and increase awareness of the right to vote.

Directive 94/80/EC was adopted in December 1994 allowing Member States up to two years to introduce laws for participation in local elections. Only eight Member States had implemented the Directive fully by the January 1997 deadline. Proceedings were issued by the Commission against Member States failing to adopt the appropriate

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46 See for example, O'Leary, S., op cit at note 4, p. 217 for an account of the disparity between the number of non national EU voters and the percentage actually enrolled. The average turnout of non-national Union citizens was 11.8%, ranging from 1.57% in Greece to 24.85% in Denmark, with the UK at 1.94%. Ireland had the highest turnout at 44.11% but the right had been available since 1979. Only one non-national EU candidate was elected, a Dutch citizen resident in Germany.

47 Chalmers, D., & Szyszczak, E., *European Union Law, Volume Two, 1998*, Ashgate, P. 72

48 This campaign was launched on 26th November 1996 to raise awareness about citizens rights in the EU and is the most comprehensive information exercise by the Commission and EP so far, working in conjunction with member states and non-governmental agencies. People are encouraged to call a free or low cost telephone number of consult an internet site to obtain information. Over 450,000 contacts were made, 200,000 phone calls and 250,000 downloaded documents from the Internet. The highest response in 1997 was from Italy, Spain, France and Germany. Ireland and Spain had the highest response in terms of percentage of households. The campaign was not effectively introduced in Britain partly due to the previous Conservative government's anxiety about inflaming party splits shortly before the general election.

national laws.[49] In its Second Report on Citizenship the Commission reported on the only available figures on participation. Non-national voters in Bavaria, Germany, were between 21-25% and in Vienna 35.5% with both districts reporting lower participation of non nationals than nationals. The Commission is due to report on the application of the Directive in all Member States by 2001,

Both Article 19 (1) and 19 (2) (former Article 8(b) (1) and (2) allowed for derogations *"where warranted by problems specific to a Member State"*. This allowed Luxembourg to prevent Union citizens participating in European Parliament or municipal elections as Member States can opt out of the provisions of the Directive where 20 % of the total electorate are Union Citizens. This has been criticised in a number of quarters, including the Parliament, as no time limit has been attached to this derogation. O'Leary[50] points out that although the rationale behind the principle was to ensure that there was not a significant alteration in the electoral balance *"the fact of the matter is that their electoral balance should change in line with their resident population and their membership of the Union is precisely one of the forces behind this change"*.

Implementation problems persist as evidenced by a Commission announcement in July 1999 that it intends to take action against Germany and Greece. Germany presently discriminates against non-German EU nationals as it requires them to re-register for each election, whereas German citizens are automatically re-registered. Greece is also

[49] France, Greece, Belgium, Spain, Sweden, Austria and Finland had not fully implemented the Directive by the due date although Sweden has allowed foreign residents to vote subject to a period of residence since the 1970s

[50] O'Leary, op cit at Note 4 , p.305

discriminating against non-nationals by refusing them the right to vote or stand in municipal elections unless they have lived in the area for a least two years. Greek nationals do not have to satisfy this requirement.

Article 20EC (Former Article 8 c)

> "Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Before 31 December 1993, Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection"

Guidelines for the protection of unrepresented Union citizens in third countries were adopted in May 1993. The Commission reported[51] that there were only five non-EU countries where all Member States are represented and seventeen countries where only two Member States are represented. Two Decisions were adopted regarding protection for citizens of the Union by diplomatic and consular representations and the measures to adopted for implementation. Not all Member States have fully implemented the Decisions and a review of these is due after 5 years.

Rules for an emergency travel document were set out in a Council meeting on 25th June 1996. The document may be issued to EU nationals for a return journey where they have lost their travel documents in a third country. However, the procedures for adoption of this revision have not been adopted by all the Member States and therefore no comment can be made on its effectiveness.

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[51] Second Report on Citizenship, op cit at no.6, p. 15

Article 21 EC (Former Article 8 d)

> "Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 194 (former 138(d)). Every Citizen of the Union may apply to the Ombudsman established in accordance with Article 195 (former 138e)
>
> Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 7 in one of the languages mentioned in Article 314 and have an answer in the same language"[52]

The right to petition the Parliament is not a new entitlement as it already existed as part of its internal rules of procedure but was not well publicised. Article 194 (former 138d) states that any citizen of the Union and any natural or legal person residing or having its registered office in a Member shall have the right to address a petition to the EP on *"a matter which comes within the Community's field of activity and which affects him, her or it directly".*

Article 195 (former Article 138e) states that citizens of the Union or any natural or legal person who resides or has their registered office in a Member State may complain to the Ombudsman concerning instances of *"maladministration"* in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in the judicial role. As the rights in Article 8d are extended to all natural or legal person residing or having their registered office in a Member State they are not available to EU citizens alone but to all legal residents.

The Ombudsman cannot investigate institutions which belong to the Union, as opposed to the Community. This had led to criticisms as it excludes police co-operation, judicial co-operation, combating fraud and drug addition, family reunion and access to

[52] the last sentence was added at Amsterdam

employment for third country nationals, which may threaten the rights of Union citizens. D'Oliveria[53] pointed out, this effectively results in Community, not Union citizenship being addressed by the article. It does not allow complaints about Union or third pillar activities. Given that the ECJ and EP were previously excluded from third pillar issues[54], the inclusion of the Ombudsman in this area was deemed important by civil rights campaigners and its omission a blow for civil liberties[55].

The right to petition and right to apply to the Ombudsman do not result in binding legal decisions but can led to a request to the Commission to bring action against a member state under Article 226 EC (former Article 169). However, the right to petition is potentially an important political link for citizens in the EU and, as it is *"free"*, will not present a financial burden or provide a financial barrier. Criticism has been levelled at the limited powers of the Ombudsman and it has been argued that these should be strengthened too allow him/her to take EU institutions to the ECJ[56]. The lack of enforcement powers is a severe constraint.

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53 D'Olivereira H.J, *European Citizenship Its Meaning, Its Potential* in Monar J, Unger, W., and Wessels, W., (eds) *The Maastricht Treaty on European Union: Legal Complexity and Political Dynamic* (1993) Brussels, European Interuniversity Press p 99

54 The Third Pillar has undergone a great deal of amendment under the Treaty of Amsterdam 1997 as discussed in chapter 8 and much of it moves to the First Pillar

55 Statewatch, an independent group of journalist, researchers, lawyers, lecturers and community activists, campaigned for the inclusion of Title VI TEU within the remit of the ombudsman and reported that "a small but significant change to Title VI" will give citizens the right to send complaints to the Ombudsman on Title VI matters and a change of heart of heart during the Treaty negotiations following an initiative from the new UK government, Statewatch Volume 7 No 3,May-June 1997 p.20

56 *Justice and Fair Play, The Intergovernmental Conference of the EU,* Federal Trust Paper

The Commission reported in 1997 that the "*citizens perception of the (EP petition and Ombudsmen) competence is not as yet firmly established as is shown by the number* of *inadmissible petitions and complaints* "[57] and efforts are being established to co-ordinate the two procedures. These include the two bodies exchanging complaints and petitions as appropriate with the consent of the complainant. A total of 4,131 petitions were sent to the EP from the end of the 1993/94 to the first half of the 1996/97 parliamentary year. Petitions increased approximately 20% but reversed in the last two year to approximately 14%. Out of the 2,239 admissible petitions 899 were reported to concern citizens rights and 14 cases of suspected infringement were discovered following petitions. In some cases the EP and Commission's intervention resulted in amended national laws international agreements signed and illegal practices being reviewed.[58]

The Ombudsman took office in September 1995. The first Annual Report in 1996 referred to the high level of inadmissible complaints, some 80%, whilst the second shows that this is slowly declining. 1, 140 complaints were received up to the end of December 1996 and 921 had been examined for admissibility. Relatively few, some 34%, were deemed to be within the remit of the Ombudsman. Most of the admissible complaints deal with transparency and access to information, fraud, environmental issues, contracts between the Commission and private enterprises and recruitment procedures. Three investigations were stated on the Ombudsman's own initiative relating to information and transparency. These include rules of access to documents,

6,1996,p,18

57 op cit at note 6, p.17

58 op cit at note 6, p. 19

information in the recruitment procedure and information provided to citizens complaining about an alleged breach of Community law.

It is still too early to adequately assess the work of the Ombudsman but Statewatch, at least, is certainly having some success using the Ombudsman.. The editor of Statewatch, Tony Bunyan, lodged six complaints against the EU Council regarding access to documents. Initially, in March 1997, the Council rejected a request by the Ombudsman stating that they were *"inadmissible"* and *"their substance cannot be considered"* as they related to *"documents relating to justice and home affairs co-operation"*. However, in June 1997 the Council did a U-turn and responded, although not conceding a general right to justice and home affairs documents. Later that year the Ombudsman declared that Statewatch had won the first complaint and that as a result the Council would now change the practice of destroying agendas of meeting of steering groups and working parties of the Council of Justice and Home Affairs. Statewatch won its second complaint in January 1998.

7.4. Rights of free movement in Article 18 EC (Former Article 8a) and the relationship with Article 14 (former Article 7a)

The right of freedom of movement, one of the founding freedoms, was restated and given more prominence in Article 18 EC [59] (former Article 8(a) (1)).

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member states subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect"

[59] The Treaty of Amsterdam extends the co-decision procedures to Article 18

Citizens right of entry and residence in the EU is somewhat complex. It is governed by two different parts of the EC Treaty, namely Article 14 (former Article 7a) in Part One of the Treaty which provides for free movement without controls at internal Community frontiers within the scope of the internal market, as discussed in Chapters 4 and 5, and Article 18 (1) EC (former Article 8a in Part Two relating to Citizens). Two Regulations and nine Directives, deriving from a number of legal bases within the EC Treaty, are also relevant[60] together with co-ordinating social security schemes. Chalmers and Szyszczak opine that Article 18 (1) EC (former Article 8a) *"appears to have created more problems than it has solved"*[61]. The question of whether Article 18 (1) EC (former Article 8a) provides free movement rights in addition to those existing under the existing Treaty provisions was put to the ECJ in the *Gerard Adams* case as detailed in Chapter 6. The reference was withdrawn before the Court had the opportunity to pronounce on the issue.

Attempts to extend free movement rights to the economically inactive[62] resulted in vigorous debates in the 1980s regarding the need to prove that Member States nationals seeking residence in another Member State had sufficient resources to subsist. The European Parliament were of the opinion that the sufficient resources requirement should be removed[63]. Problems also related to the definition of "*members of the family*".

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60 Reg 1612/68, Reg 1251/170, Directive 68/360, Directive 75/34, Directive 90/364, Directive 90/365, Directive 93/96, Directive 64/221, Directive 72/194,Directive 75/35, Directive 73/148

61 Chalmers, D. and Szyszczak, E. *European Law Volume Two*, Ashgate, p. 64

62 A draft Directive on right of residence for nationals of Member States in the territory of another Member State was presented in 1979 and was an important proposal as it attempted to separate the rights of free movement from the exercise of economic activity

Garth[64] commenting on the difficulties and reluctance to enact legislation observed that the problems in extending the rights of Community workers beyond economic rights towards political and social ones, suggested *"difficulties in the incremental approach towards European Citizenship and what might be termed a European Welfare State".*

As discussed in Chapters 4 and 5, the Commission eventually withdrew the earlier proposals and in 1989 put forward three new proposals which relied on a different legal base for the general right of residence, i.e. completion of the internal market and Article 14 (former Article 7(a)), and strengthened the role of the Parliament[65]. Although the three residence Directives were enacted before the adoption of Citizenship provisions, as they are subject to *"the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect"* the existing community acquis and the Directives are therefore included within this definition. This resulted in a conflict between the constitutional right of residence under the Citizenship provisions and the residence Directives.

It has been argued that some of the provisions of the residence Directives, which imposed conditions on medical insurance and sufficient resources, are *"incompatible"* with the rights under Article 18 (former Article 8(a)) as it is effectively a constitutional

63 OJ 1980 C 188/7 Article 4

64 Garth, B., *Migrant Workers and Rights of Mobility in the European Communities and the United States: A Study of Law, Community and Citizenship in the Welfare State* in Cappelletti, M, Seccombe, M., Weiler, J. et al, *Integration Through Law, Vol 1* Book 3 (1986) Berlin EUI/Walter de Gruyter, p 108

65 COM(89) 275 final at 2, OJ 1989 C191/2

right and secondary legislation should not contradict this right[66]. If citizenship rights were deemed to be directly effective[67] they would grants rights to individuals to seek legal challenges. The ECJ's interpretation of this Article was therefore eagerly awaited to clarify the tensions between enforcing rights of Citizenship and enforcing the market integration economic rights. The *Martinez Sala* case[68] discussed in Chapter 6 failed to examine whether Article 18 (former 8aEC) is directly effective but confirmed that the Citizenship rights were not dependent on rights of economic activity.

The Commission agreed three proposals for directives on the completion of the free movement of persons in July 1995 (requiring the abolition of border controls, and allowing all third country nationals 3 months free circulation) but as they were controversially received and required unanimity they did not progress. The Commission's legislative programme for 1995-96 included the proposal to have one single legal document on entry and residence for Community citizens. Despite Article 18 (1) EC (former Article 8a), problems relating to border controls and free movement continue, see case law in Chapter 6.3.4 The Veil Report presented to the Commission in March 1997 found numerous obstacles to free movement, as detailed in Chapter 5.4.

The potential to use Article 18 (1) (former Article 8 (a)) as a base for future proposals exists under Article 18 (2) (former Article 8 (a) (2)) which granted a new legal base for

66 O'Leary , op cit at no.4, p. 141

67 A directly effective provision imposes obligations which are unconditional, sufficiently clear and does not require additional action on the part of Member States, see for example Case 26/62 (1963) ECR 1, *Van Gend en Los.*

68 Case C-85/96 (1998) ECR I-2691

legislation on free movement and residence. However as it requires a unanimous vote the likelihood of measures being adopted are slim. If the base was used for future proposals any measures adopted under that article could firmly establish free movement rights for *citizens* rather than having to rely on economic activity.

The Commission recognised the necessity to simplify the legal provision relating to free movement and right of residence but stated that

> "The drawing up of a single instrument grouping together in a coherent manner all the secondary legislation applicable to citizens of the Union and their families comes up against major legal obstacles in the existing context of the EC Treaty, The obstacles stem from the diverse nature of the legal bases of the existing instruments, for which (former) Article 8a of the EC Treaty cannot be substituted as a single, comprehensive legal basis. Differences also exist in the procedures for adopting these texts."[69]

The Commission recommended that Article 18 (1) EC (former Article 8a) should be revised by the Intergovernmental Conference to allow *"one single base failing within the context of citizenship of the Union which opens the way to a genuine revision of the right of entry and residence"* but this was not taken up at Amsterdam.

7.5 EU Citizenship and its impact on third country nationals resident in the EU

As outlined above, EU Citizenship has resulted in enhanced rights for EU Citizens but this has inevitably led to non-EU Citizens (third country nationals) legally resident, who number between 11.6/12.5 million[70], experiencing inferior treatment. Although third country nationals have to contribute taxes and national insurance in the same way as EU

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69 Second Commission Report on Citizenship, op cit at Note 6

70 Eurostat 1995-11 reported that the EU had 11.6m residents who did not possess citizenship of any of the 15 Member States. Statewatch reported in 1997 that there were some 12.5 m in this category, op cit at Note 8

citizens, they do not generally have rights on a par[71].

Third country nationals legally resident in the EU have less social and economic rights, although the right of free movement to visit, but not work in, EU countries, other than the one they are resident in, has been recognised by the Schengen group.[72] This is due to the fact that restricting such rights would have made it impossible to abolish internal frontier controls. Rights to family reunion are also inferior. This difference in treatment creates a lower group of people, exaggerate difference and impedes the integration of workers.

The need for integration has been recognised by both the European Parliament and Commission and a number of measure have been proposed, although not all successful, as discussed in Chapters 4 and 5.[73] The *"campaign"* for wider acquisition of

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71 Exceptions are derived rights granted via EU migrant workers to third country nationals claiming family reunion, Association and co-operation agreement rights

72 Uniform visas valid for three months are issued by the Schengen countries for visiting purposes only. The Commission put forward a Directive on Frontier control which would extend this right to all EU States but this has been blocked by the UK due to arguments concerning Gibraltar. See chapter 8 for discussion on position of border controls.

73 See for example *Action Programme in Favour of Migrant Workers and Their Families* COM (74) 2250 Bulletin of the European Communities, Supplement 3/76 14, *Guidelines for a Community Policy on Migration COM* (85) final 7 March 1985, Bulletin of the European Communities, Supplement 9/85, *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies COM (94) 23 final 23 February 1994.* Debates in the European Parliament include the 1991 EP *interim report on Union Citizenship* in which rapporteur Rosaria Bindi argued that the nature of citizenship within the Community as being one of exclusivity and applying to citizens of the same State was "unacceptable in the European context". An EP *Resolution on fundamental rights in the Community* calling for the replacement of jus sanguinis by jus soli as a basis for nationality arguing that the obstacles of naturalisation in the EU were a source of discrimination. Parliament's Resolution on 21st April 1993 called on the Commission to present a four-year action programme to combat racism, xenophobia and anti semetic behaviour. It also urged the Member States, in certain cases to grant voting rights in local elections to persons legally resident

fundamental rights was also taken up in a report compiled by the UK's House of Lords Select Committee on the European Communities in 1992 which opined that the UK Government should give priority to a number of areas in their intergovernmental immigration group including fair treatment for long stay immigrants who have not acquired nationality of Member State *"with the possibility of acquiring rights of free movement and employment after ten years residence"* [74].

A growing number of commentators are calling for citizenship rights to be based on residence rather than nationality. Cholewinski[75] put forward a case for integration of third country nationals for three reasons, namely, the realisation of social justice, the goal of economic efficiency and as a *"vital precursor in the struggle, to eradicate ethnic and racial discrimination."* He argues that it is not equitable to discriminate between two groups of residents living alongside each other on the justification of one group not being citizens of the State in question and that soft laws to counteract racism and xenophobia are useless if some of the people within the groups these measures aim to protect are *"officially marginalised"*.

in a Member State for five years, subject to certain conditions, and to bestow national citizenship on the children of immigrants and refugees born in the EU. Two reports in November 1993 from Maria Magnani Noya (A3-338/93) and Djida Tazdait (A3-0127/93) together with a report on the *Constitution of the European Union* considered by the EP in February 1994 also called for increased rights for residents.

74 House of Lords Select Committee on the European Communities Session 1992/93, *Report on Community Policy on Migration*, 1995, HMSO para 86

75 Cholewinski, R, *The rights of non-EC immigrant workers and their families in EC countries of employment: a case for integration* p. 136 in Dine, J. & Watts, B. (eds.) *Discrimination Law Concepts, Limitation, and Justifications*, Longman 1996

D'Oliveira,[76] has argued that it is unreasonable to exclude residents from the Citizenship provisions, Garot[77] presented *"two good reasons for using residence as the basis for European Citizenship"* and Oliveira, A.C.[78], opines that *"it would be an appropriate move for the EU to grant Union Citizenship to long term resident third country nationals"* due to issues related to social integration and social harmony which can no longer be delayed. Evans[79] argues that concepts of nationality are *"too limited"* in relation to the development of Union Citizenship and Marin[80] concludes that *"old assumptions of the nation-state should be abandoned in order to face the new social and political realities"* and those residing permanently should be recognised as *"equal citizens"*. The Veil Report 1997 also recommend that third country nationals should have a right to travel freely in the EU and rights such as family reunion should be equalised.

Despite the calls for integration of legally resident third country nationals, there is still resistance to full recognition rights in line with EU Citizens. This is demonstrated by the tightening of the criteria for naturalisation in the Member States as detailed in Chapter 3 and the failure of EU institutions to effectively challenge these changes. Some of the Resolutions adopted by the Council between 1993-1997 as outlined in

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76 D'Oliveira, *Union Citizenship: Pie in the Sky?* in Rosas, A. & Antola, E. (eds.) *A Citizen's Europe: In Search of a New Order,* Sage Publications (1995) p. 58

77 Garot, M.J., *A New Basis for European Citizenship: Residence* in La Tore, M. (ed.) *European Citizenship: An institutional Challenge,* Kluwer 1998, p229

78 Oliveira, A.C. *The Position of Resident Third Country Nationals; Is It Too Early to Grant Them Union Citizenship?,* in La Tore ibid p.198

79 Evans, A., *Union Citizenship and the Constitutionalization of Equality in EU Law,* in La Tore ibid, p.290

80 Marin, R., *Equal Citizenship and The Difference That Residence Makes,* in La Tore, ibid, p.226

Chapter 5 also undermine the integration process. This has led at least one commentator to opine that *"there is no prospect of the Community agreeing to the grant of Union citizenship to resident third-country nationals or addressing national citizenship law".*[81] Peers points out that neither of these areas were placed on the agenda of the third pillar or the Amsterdam Treaty until the controversial Austrian Presidency proposal in 1998 discussed in Chapter 9. An alternative *"ambitious but achievable goal"* of *"denizenship"* is proposed by Peers recognising the rights of long term residents but falls short of citizenship. It would grant rights of free movement but exclude voting rights.

7.6 Summary: The Opportunities and Threats posed by Union Citizenship

The future of EU Citizenship has been thoroughly debated in academic circles. Despite the fact that the Citizenship provisions did not make any reference to fundamental human rights, they were potentially the best vehicle for development of such rights in the early days post Maastricht. However, Citizenship of the EU has not yet lived up to its anticipated *"dynamic"*. Although the ECJ has often taken the lead in developing individual rights, it has not fully grasped the opportunity to clarify, develop and maximise citizens rights[82] as anticipated by some commentators[83]. Shaw [84], commenting on the judgement in *Uecker and Jacquet*[85], where it was held that free

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81 Peers, S., *Fortress Europe: The Development of EU Immigration Law (1998)* 35 CMLRev 1271

82 See for example Szyszczak, E. , *Making Europe more relevant to its citizens: Effective judicial process*, (1996) 21 ELRev 351-364

83 For example O'Keeffe, op cit at note 11

84 Shaw, J., op cit at Note 21 p. 559

85 Cases C-64 & C-65 (1977) ECR I-171

movement is not covered if purely within a Member State, asserts that *"a narrow formal concept of Union citizenship is becoming increasingly solidified within the Union legal order"* and that such an approach "*.....tends to limit its developmental and constitutional potential within the emerging Union polity"*

Thus far, EU Citizenship has not adopted a rights-based approach. The Citizenship provisions have the potential for laying the foundations of a "Constitution" or "Charter" of fundamental rights in accordance with Article 17 (2) EC (former Article 8(2)) *"Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby"* expressly stating that rights are not limited to Articles 17-22EC (formerly Article 8-8e). Despite this non-economic right and the provisions of Article 6 TEU (former Article F(2)[86]) which states that *"The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they results from the constitutional traditions common to the Member States"*, it appears that once again the economic rights of free movement have dominated and overwhelmed the Union citizenship potential. The acceptance of fundamental rights for its Citizens is an integral part of the relationship with government and should play a central role. It would appear that the citizenship provisions pay "*lip service*" to any goal of social legitimacy and that the rights of individual members of the EU would be better protected if they were identified as fundamental rights and an objective of the EU[87].

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[86] Refer to note 38 for Amsterdam amendments

[87] The *Martinez Sala* judgment Case C-85/96 (1998) ECRI-2691, as discussed in Chapter 6, is a step in the right direction as it recognised that rights of EU citizens are not attached purely to

The Union has been somewhat reluctant to take on board the notion of involving its citizens and it is argued that the time has come to consider mechanisms for promoting allegiance between citizens and the Union[88]. Openness and accountability of the EU needs to be addressed if its citizens are to assume a sense of Union identity. Citizens need to be informed of the decision making processes. Member States declared in 1992 that *"The Conference considers that the transparency of the decision making process strengthens the democratic nature of the institutions and the public's confidence in the administration"*[89] but limited action resulted[90]. Legal challenges such as that mounted by the Guardian newspaper[91] against the Council for refusing access to the minutes of Council meetings have heightened the debate and forced the EU to open up. As part of its submission the Guardian's Counsel argued that in a democracy the public should have the right to be informed of the circumstances in which decisions are being taken in their name and they should at least have an opportunity to express their views. Challenges have also been successfully mounted by Statewatch, Steve Peers and Heidi Hautala MEP[92].

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economic rights but it failed to pronounce on whether the citizenship provisions have direct effect

88 Everson, M. *The Legacy of the Market Citizen* in *New Legal Dynamics of European Union*, Shaw, J and More, G (Eds), Oxford University Press 1995

89 Edinburgh Summit 1992

90 See Curtin., D and Meijers, H. *The Principle of Open Government in Schengen and the European Union: Democratic Retrogression (1995)* 32 CMLR 391-442 and Chapter 8 for an update since Amsterdam

91 Case T-194/94 *Carvel & Guardian Newspapers v Council*, (1995) ECR II-2765 (1995) 3 CMLR 359

92 Steve Peers is a Reader at Essex University and Heidi Hautala is a Finnish Green MEP

The UK Labour Government has attempted to assume a significant role in the campaign for openness as witnessed in the initiative to amend the Treaty of Amsterdam to allow the ombudsman rights in Title VI TEU. At a press conference in December 1997 Robin Cook the Home Secretary announced they were interested in making the EU more open and transparent *"especially in the field of justice and home affairs"*. The UK Presidency in January 1998 presented a report on *"Openness in JHA Business"* to the K4 Committee[93] putting forward a number of proposals including publishing the calendar of meetings, publishing the agendas of the K4 Committee and *"where appropriate"* the Working Parties, providing more briefings to the media in Brussels, producing explanatory publications and holding more open debates of the Council of Ministers. This was discussed at the informal Justice and Home Affairs Council at the end of January 1998 on the principle that *"too little is known in the media, academia and among the public about the Third Pillar, yet much JHA business is very relevant to ordinary citizens "*[94].

Greater clarification of the rights of access is required. This could have been assisted by expressly recognising the right in the Treaties. The Dutch standing committee of experts on international immigration, refugee and criminal law supported the addition of a provision on openness to supplement the citizenship provisions and argued that the following Article should be included in the Treaty.

Suggested Article 8(f)

> "The citizens of the union shall have a right of access of information at the disposal of the institutions. The council shall, in accordance with the procedure established in Article 189B

93 Now renamed Article 36 Committee since Amsterdam

94 Statewatch, Vol 8 No 1, January-February 1998 *"EU: the battle for openness"*

> specify the categories of information to which the citizen shall not have access and grounds upon which such access may be denied"

Although the Article was not adopted at Amsterdam, steps towards greater transparency are being made, as reported in Chapter 8. As some Member States, including France, Spain and Germany, have expressed opposition to openness progress has been somewhat slow. Weiler suggests that a way to improve openness and transparency would be to place the entire decision making process, with a few exceptions, on the Internet.[95] It has also been argued that the Council should act in public when it debates and votes and publish all drafts and working documents as well as relevant minutes.[96]

Linking acquisition of EU citizenship to nationality has resulted in reinforcing the *"Fortress Europe"* mentality, widened the gaps between EU nationals and third country nationals and has led to the marginalisation of the latter as predicted by D'Olivera[97] *"If a category of persons, endowed with certain rights (and duties) is created or defined, then, by the same token, other persons are excluded. The inclusion of certain groups implies the exclusion of others."*

A growing number of commentators have called for the citizenship provisions to be extended to all legally resident in the EU but Amsterdam did not result in any moves in this direction. Peers opines that there is no prospect of the EU granting full

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95 Weiler, J.H., *The European Union Belongs to its Citizens: Three Immodest Proposals (1997)* 22 ELRev 153

96 Justice and Fair Play, op cit at Note 61, p. 17

97 D'Oliveira, H., *European Citizenship: Its Meaning, Its Potential* in Dehousse, R, et al (ed.) *Europe After Maastricht* (1994) Law Books in Europe

citizenship rights and that *"Denizenship"*[98] may be a more realistic goal in the present climate, given a resurgence of the growing unrest among Member States in relation to immigrants and refugees. Clearer, more accessible rules on nationality and citizenship and the extension of at least some of the rights to all legally resident are likely to assist integration of third country nationals. EU workers should receive equal treatment and steps should be taken to protect lawfully resident third country nationals. A clear set of rights should be extended, subject to agreed qualifying criteria, to legally resident third country nationals. Qualifying criteria could include such matters as lawful entry and residence, employment or other economic activity, good character and a qualifying period of residence.

Lack of equal rights and duties for certain groups institutionalises different treatment, can fuel racist and xenophobic attitudes and increase discrimination. The likelihood of an environment in which racism flourishes, due in part to increased unemployment and significant cuts in social welfare provisions, is not to be underestimated. The foundation for improved rights as laid down in EU's citizenship provisions need to be fully grasped if the *"dynamic"* mantle is to be realised. These rights must be interpreted in a positive manner for all *residents* as any further moves towards tightening the grip on 'foreigners' will inevitably result in increased racial tension and hamper free movement rights thereby harming the operation of the Union.

The incorporation of Article 13 in the Treaty of Amsterdam as discussed in Chapter 8

provides an opportunity to examine the *"rights"* of all legally resident in the EU. The question of who is entitled to citizenship needs to be tackled at community level rather than left to Member States themselves. Common rules, allowing the Commission, Parliament and Court jurisdiction, are necessary to prevent restrictive and racist national interpretations. Any additional rights granted under the Citizenship provisions need to be extended to long term EU residents. Individuals should be given the right to accept or reject this 'citizenship' as some countries do not recognise dual citizenship and this may result in renunciation of national rights in order to obtain EU citizenship[99]. The prospects for a Charter of Rights is discussed in Chapter 9

98 Peers, S., Op cit at Note 81

99 Turkish citizens could for example lose property rights in Turkey

PART THREE: ALLEVIATING THE BARRIERS OF RACE DISCRIMINATION AND RESTRICTIVE IMMIGRATION CONTROL: FUTURE EU POLICY ON FREE MOVEMENT, RACE DISCRIMINATION AND MIGRATION CONTROL:

CHAPTER 8

FREE MOVEMENT, RACE DISCRIMINATION AND MIGRATION CONTROLS IN THE EU AFTER THE TREATY OF AMSTERDAM

8.1 Background

As detailed in Chapter 5, the differing views and interests expressed by the Member States involved in the Amsterdam negotiations resulted in compromises in a number of areas. A "working document" was issued on 17th June 1997 entitled *"IGC - Presidency suggested overall compromise"*. It followed two days of intense negotiation and was described as being *"almost unintelligible even to a reasonably seasoned observer"* [1]. The Treaty was formally adopted in October 1997 and was eventually ratified by each of the 15 Member States Parliaments coming into force on lst May 1999.

The significance of 1997 was also marked by a change in UK Government. The UK Conservative Governments under Margaret Thatcher and John Major up to 1997 had vociferously and continually insisted that the EU did not have the power to involve itself in matters such as race discrimination, adopted a tough stance on strict border controls and opted out of the Schengen Agreement. When a new Labour Government was elected on lst May 1997 it was involved in the final phase of the Amsterdam

[1] Statewatch, commenting on the draft Treaty, Vol 7 No 3, May-June 1997, p.13

negotiations as detailed in Chapter 5. Although the Labour Government continued to resist involvement in the Schengen agreement it was more receptive to some change in Justice and Home Affairs. In addition, the UK Government quickly embraced the Social Policy provisions and made positive noises about EU wide protection on grounds of race. The inclusion of the new Article 13 EC on non-discrimination was somewhat assisted by the change in UK Government.

The most far reaching reform at Amsterdam is in the area of Justice and Home Affairs as the Amsterdam Treaty makes amendments to the Treaty establishing the Community, the first pillar, and third pillar issues in the Treaty on European Union and established a new area of *Freedom, Security and Justice.* It also adds a new title on Employment and has 17 Declarations and 6 protocols. The Schengen acquis[2] is incorporated into the "framework of the European Union'. Social rights are also given a higher priority as the respect of social rights is established as one of the general principles underlying the Union. The Protocol and Agreement on Social Policy annexed to the Treaty of Rome is abolished and the Social policy provisions have been included in the EC Treaty in a revised title Articles 136-145EC (formerly Articles 117-122). Other significant changes include the provisions for *"transparency"* and *"flexibility"*. Transparency is incorporated into the EC Treaty under Article 255 EC and allows Citizens a qualified right of access to EC documents. The flexibility provisions on closer co-operation have the potential to progress or damage the operation of the EU as detailed below.

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2 The Schengen acquis includes the 1985 Agreement, the 1990 Convention implementing the Agreement and a number of Accession Protocols and Agreements and Decisions and Declarations adopted by the Schengen Executive Committee

8.2 Relevant Protocols

A number of Protocols are relevant to this thesis. The protocol on the position of the UK and Ireland states that they will not participate in the new Title IV EC, covering asylum immigration, external border controls and judicial co-operation in civil matters, and that measures adopted under this Title will not apply to them. The UK and Ireland can *"opt in"* within three months of the Commission's publication of any proposals or by notifying the Council and Commission of its intention. When considering the *"opt in"* the Commission should decide within three months. The *"opting out"* of Title IV has been described as a *"repatriation"* of visa policy for the UK and Denmark[3]. However, the Danish protocol states that Denmark is still subject to visa matters covered by the former Article 100c.

Another protocol states that the UK shall retain the right to disregard Article 14 (formerly Article 7a EC) which establishes a frontier free Europe, and the UK may continue to apply its own immigration controls. These opt out and opt in proposals are likely to result in some confusion as the UK and Ireland are not involved in the Schengen discussions. The Protocol on the application of certain aspects of Article 7A EC (now Article 14 EC) allows the UK to keep its border controls and refers to the common travel area between the UK and Ireland continuing, therefore allowing Ireland the same border controls as the UK. This explicit statement authorising the UK to maintain its border controls emphatically states the UK's position.[4]

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3 Chalmers, D., and Szyszczak, E., *European Law Volume 2, Towards a European Polity?, Ashgate*, 1998,, p.136

4 This position was also maintained by the previous UK Conservative governments and has been challenged unsuccessfully in *R v Home Secretary ex parte Flynn* (1997) 3 CMLR 888 (CA). A

The protocol relating to the position of Denmark allows the Danes to opt out of the new Title IV EC with no possibility to adopt measures agreed under the Title. As Denmark was not willing to *"repatriate"* visa policy it will participate on measures relating to a uniform format for visas and determining the third countries whose nationals must be in possession of a visa when crossing the external border of the Member States. As Denmark is party to the Schengen Agreement it is committed in international law to adopt some of the measures agreed under Title IV. Article 5(12) of the Danish Protocol states that if the Council decides to extend the Schengen Aquis Demark has 6 months to come to a decision as to whether it will fulfil its obligations under international law. If Denmark does not decide to do so it could be problematic as the difficulties surrounding international law sanctions have already been discussed in Chapter 2.

The Schenqen Acquis is integrated into the Treaty on European Union by another Protocol as the UK Governments did not withdraw its opposition.[5] The protocol is referred to as an example of *"flexibility"* and authorises the 13 Member States to establish *"closer Co-operation"* conducted within the institutional and legal framework of the EU and the Schengen Executive Committee is replaced by the Council when the Protocol enters into force. Although this will result in greater transparency concern has still been expressed in a number of quarters.[6] A Declaration on the Schengen

recent attempt to challenge border controls in the *Wisenbejk* Case C-378/97, judgment 21 September 1999 also failed, see Chapter 6

5 Schengen allows the common borders of Schengen members (all except the UK and Ireland) to be crossed by citizens of the EU and EEA, together with third country citizens legally with the Schengen.

Protocol states that the level of protection and security will remain the same as in Schengen. Article 4 of the Protocol refers to the fact the UK and Ireland are not bound by the acquis but allows them *"at any time"* to request involvement, although all the Schengen members have to agree to this. The involvement of the UK and Ireland is not therefore a right. The incorporation of the Schengen Agreement into the EC Treaty will ensure that it is subject to parliamentary scrutiny and judicial interpretation, lacking thus far due to being outside the legal framework. It also results in it being subject to the principles of direct effect and precedence over Member States national law. New Article 44 TEU permits all Council members to be involved in discussions relating to the Schengen acquis but adoption of decisions can only be taken by participating Member States. Although members of the Commission and EP from non-participating Member States can participate in the decision-making process.

The Protocol on asylum for nationals of Union Member States is in response to concerns relating to terrorists, who it was feared could take advantage of other Member States asylum procedures to avoid extradition. It states that other Member States are deemed to be *"safe"* countries of origin and asylum applications from Member States are therefore manifestly unfounded.

8.3 Impact of the Treaty of Amsterdam on the EU Institutions and Procedures

In order to facilitate enlargement, institutional reform was on the agenda at Amsterdam.

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[6] See Chalmers & Szyszczak , op cit at Note 3, p. 135 for example commenting on the work of Den Boer who notes that the Schengen Acquis may have a negative or contaminatory efffect on EC legislation since it is largely negotiated in secrecy in the absence of any system of checks or balances.

However, disagreement continued long into the night on weighting of votes and other issues such as the number of future Commissioners and Member States failed to reach an agreement. Decisions in this area were delayed therefore and a Protocol on the Institutions with the Prospect of Enlargement of the EU was signed which will provide the framework for future negotiations on enlargement.

The provisions on *"flexibility"* aim to ensure that the EU is not stalemated by lack of unanimous agreement and that action towards further integration is achieved. This will permit a *"vanguard group"* of Member State to integrate quicker than others if they so wish. The provisions have been critically debated[7] but Kortenberg[8] is of the opinon that closer co-operation *"should be a factor for dynamism in the Union, and not division"* and that at least it will allow for decisions to be taken in the Community framework rather than outside. Kortenberg also argues that closer co-operation should be temporary and that every attempt should be made to ensure that non-participating States eventually join.

The provisions are only to be used if agreement between all Member States cannot be reached and should only be used if the majority, eight or more, wish to proceed and initiatives do not undermine the rights and responsibilities of Member States not involved. In addition, if such action concerns areas dealt with by the EC Treaty or Justice and Home Affairs, a qualified majority of all Members States is necessary

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7 See for example, Gaja., G., *How Flexible is Flexibilty under the Amsterdam Treaty?* (1998) CMLRev 35:855-870, and Kortenberg, H., *Closer Co-operation in the Treaty of Amsterdam* (1998) CMLRev 833-854

8 Ibid p.854

before action is taken. The reality of these provisions may be less far-reaching though. The EU has recently witnessed a *"twin-track"* system on social policy, prior to the UK government agreement to the social policy provisions at Amsterdam, which resulted in relatively few binding agreements between the majority of the member States signed up to the provisions as there was some reluctance to allow the UK to have a perceived competitive edge[9]. Langrish comments that the stringent conditions on flexibility in the first pillar may result in the concept being theoretical in that pillar and the potential lies more in the third pillar provisions.[10]

The institutions have been given increased powers and simplification of some of the legislative procedures was agreed, for example the co-operation procedure under Article 252EC (former Article 189c) has been reduced to areas related to monetary policy and many of the Articles previously dealt with by the co-operation procedure will now be dealt with by co-decision under Article 251EC (former Article 189b). The co-decision procedures has also been amended to allow measures to be adopted even if there is no common position and the European Parliament is given more power to vet measures under this procedure. In the remaining third pillar the Parliament's power is also increased as it must be consulted on all provisions apart from common positions. National parliaments are also given more involvement in first and third pillar measures. A mandatory six weeks period, from when the proposal is laid before the Council and

9 Four Directives were agreed under the Social Agreement, one on part time workers, one on parental leave, one on burden of proof and the other relating to European Works Councils. Following the election of the Labour Government in 1997 these were extended to the UK under former Article 100 EC (see Chapter 8). The Burden of Proof Directive is discussed in Chapter 9

10 See Langrish. S., *The Treaty of Amsterdam: Selected Highlights* (1998) 23 ELRev .5-7

agreement or a common position is reached, is granted for consultation with national parliaments. Changes have also been made to the working structures of Justice and Home Affairs *(see Table 5).*

Due to the integration of the Schengen acquis the Council of Justice and Home Affairs Ministers (JHA Council) role is complicated. The JHA will partly be involved in "first pillar issues under the new Title on *"free movement, asylum and immigration"* and will also be involved in Third pillar issues in accordance with the revised Title VI and the development of the Schengen acquis. When discussing these issues it will comprise 13 EU States (minus UK and Ireland in accordance with the Schengen Protocol opt out) but will additionally include Iceland and Norway as Article 6 of the Schengen Protocol allows Iceland and Norway to be *"associated with the implementation of the Schengen acquis and its further development....."*[11]

On moving the issues relating to immigration and asylum into the *"first pillar"* the Commission has the *"right of initiative"* although for *"..a transitional period of five years"* the Council will adopt Commission proposals by unanimity (as opposed to qualified majority) and the European Parliament will be *"consulted"* (previously the right of co-decision was allowed). The use of qualified majority has once again been extended to include employment, combating social exclusion, equality of opportunity and treatment for men and women, public health, transparency, fraud, establishment and research framework programmes within the EC Treaty

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[11] The agreement was concluded in 1999, OJ 1999L 176/35

Before the Amsterdam Treaty the ECJ was not allowed to rule on the majority of the third pillar provisions[12]. The ECJ's powers have been extended but the Court is still excluded from issues involving "*the maintenance of law and order and the safeguarding of internal security*" when adopting measures under Article 62(1) EC and subject to limited references from national courts as discussed below. This "*a la carte*" jurisdiction of the Court has been described by one commentator as "*unsatisfactory*" and led to an observation that it has the potential to undermine uniformity of interpretation, application and co-operation between the Court and national courts[13].

The new declarations on subsidiarity and proportionality contained in the Amsterdam Treaty could provide hurdles for controversial legislative proposals.

8.4 Free Movement of Persons: Frontier checks and immigration controls after the Treaty of Amsterdam

The disagreement amongst member States in the area of "*freedom, security and justice*" was more pronounced than in other areas[14] and has led to a fragmented and confusing set of arrangements, described as one of the most complex pieces of drafting in the Treaty and led commentators to question the intentions of the Member States as "....

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12 exception being Article K.3.2 (c) whereby Conventions agreed within the remit of JHA may grant jurisdiction to the ECJ

13 Albors-Llorens. A.., *Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam (1998)* 35 CMLRev 1291

14 See, for example, Monar. J., *Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation*, (1998) 23 ELRev 321

Obfuscation rarely evidences honourable intentions" [15]. There is some attempt to bring together the area of justice and home affairs as the amended Article 2 TEU, now states that one of the objectives of the Union is *"to maintain and develop the Union as an area of freedom, justice and security".* The objective is repeated in Articles 61 EC and 29 TEU and creates a connection between Title IV EC and the parts staying in Title VI TEU. The fragmentation and scattering of measures across the EC Treaty, TEU, the Protocol on the Schengen Acquis and the flexibility provisions are, however, likely to result in prolonged discussions, difficulties establishing the correct legal base, create problems for national parliaments attempting to scrutinise the provisions and could lead to legal challenges as immigration matters will now be subject to some scrutiny from the European Parliament and subject to interpretation by the Court of Justice.

Abolition of frontier checks, passport or identity checks, for those entitled to free movement is provided for in Article 61EC, detailed in Section 8.4.1 below, which aims to facilitate the Article 14 (Former Article 7a) free movement provision. As the UK continued to oppose the relaxation of border controls a protocol attached to the Treaty allowed the UK, together with Ireland in accordance with the common travel area agreement between the UK and Ireland, to maintain these. Internal controls, to check the residence rights, may be retained but these should not exceed those required of a national of the Member State in question.

The position of Denmark is more complicated. The protocol on the position of

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15 European Update: July 1997, *The Draft Treaty of Amsterdam, ILPA.* See also, Statewatch Vol 7 No 3, May-June 1997 p.13

Denmark attached to the Amsterdam Treaty states that Denmark is not bound by the internal control measures under Article 62(1). Chalmers and Szyzsczak[16] comment that as Denmark is bound by Article 14 EC (former Article 7a) but not the legislative procedures to secure it a decision from the Court of Justice may be required to clarify Denmark's position. They further comment that *"there is a paradox in all this"* in that the abolition of frontiers is central to the *"European identity"* and the agreements and opt outs at Amsterdam is likely to fragment this identity leading to free movement being easier between some Member States than others. The price for communitarisation and any relaxation of border controls has been a further increase in external controls and security. Some commentators have already criticised the *"obsession with security"*[17].

It is likely that many of the Council resolutions, joint actions and common positions previously agreed in the area of immigration and asylum will be re-adopted as Community law under the Amsterdam provisions, although some Member States may wish to re-negotiate some of these now they have a different legal significance and can be interpreted by the ECJ. The EU Summit in Tampere, Finland, on 15th and 16th October 1999 debated the EU's migration strategy and considered plans on policing immigration and asylum. The draft under discussion from the Finnish Presidency[18], considered in Chapter 9, is an improvement on the previous Austrian and German proposals, which were very Eurocentric,[19] but is still subject to criticism as it

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16 Chalmers & Szyszczak, Op cit at Note 3, , p.107

17 See, for example, Statewatch Vol 9 No 3 & 4, May-August 1999, p. 1 and Waever, O., *European Security Identities* (1996) 34 JCMS 103

18 *"Guidelines for a European migration strategy"*, 1.6.99, Finland

19 *"Strategy paper on migration and asylum policy"*, 1.6.98, Austria and *"Strategy on migration*

concentrates on excluding people from the EU and includes re-admission and expulsion to the country of origin. The proposals allow for economic sanctions where countries of origin refuse to take back their nationals.

Shortly before the Tampere Summit Statewatch observed that the decision making process does "*not bode well*" for the new transparent and open process, which is supposed to follow from Amsterdam, as the timetable for Tampere did not appear to allow time for open democratic debate.[20] Peers commented on the importance of the the EU's migration policy in defining the sort of European society the EU wants to create[21]. Despite the fact that the Commission's 1991 and 1994 immigration proposals emphasised the importance of integration, the EU's migration strategy, detailed in Chapters 4 and 5, is dominated by control and expulsion at the cost of integration. This has undoubtedly weakened the integration aspects and strengthened the restrictive ones.

8.4.1 Competence within the amended EC Treaty (new Title IV)

New Articles 61-69 EC, under Title IV, cover asylum, immigration, external border controls and judicial co-operation in civil matters but as the UK, Denmark and Ireland opted out of the Title this creates political tension and a weakness in the provisions.

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and migration policy" 19.1.99, Germany. The Austrian proposal suggested a model of "concentric circles" and was controversially received, see The Guardian 20th October 1998 *"Fortress Europe's Four Circles of Purgatory"*. It was condemned by refugee support groups and the UNHCR and other Members States originally disowned it, although the German presidency later selected 48 of the 116 recommendations.

20 Statewatch Vol 9 No 3 & 4, May August 1999, p. 1

21 Peers,S., *Building Fortress Europe: The Development of EU Migration Law (1998)* 35 CMLRev 1235-1272

Matters connected with police co-operation and judicial co-operation in criminal matters stay within the intergovernmental framework of Title VI TEU and are still therefore within the competence of the Member States. Whether the whole of immigration and asylum is now within the competence of the EU has been the subject of some debate. Hailbronner[22] comments that the whole of immigration and asylum policy is not transferred to the first pillar as measures on expulsion and deportation, including transnational enforcement are not explicitly mentioned and that Article 308 EC (formerly 235 EC) may be required to close any gaps as enforcement cannot remain a purely national issue . Monar[23] also criticises the provisions and argues they do not go far enough as occupational admissions, measures regarding the social integration of asylum seekers and immigrants and interior enforcement measures are excluded. Peers[24] opines that the Member States do not regard migration law as a priority as the majority of the provisions, with the exception of illegal immigration, do not need to be adopted within five years.

Discussions surrounding the voting powers to be given to the new Title IV EC were dominated by Germany and Chancellor Kohl eventually blocked the use of qualified majority voting due to fears relating to immigration and refugee pressure on Germany. The Title therefore requires a unanimous vote, with one exception for visa policy[25]. The use of the national veto will be reviewed five years after ratification of the Treaty to

22 Hailbronner, K., *European Immigration and Asylum Law under the Amsterdam Treaty* (1998) 35 CMLR 1047-1067

23 Monar , J., op cit at Note 14, p. 323

24 Peers, S., op cit at note 21, p. 1269

25 As the former Article 100c EC (repealed at Amsterdam) had introduced qualified majority voting for some aspects of visa policy.

determine whether the veto is hampering decision making. However, the principle of subsidiarity may well stifle developments. Title IV is covered by the ordinary rules of Community law for example direct effect, but the role of the ECJ in Article 234 references (formerly Article 177) is modified[26] to ensure that the Court does not get overwhelmed with individual immigration and asylum cases from national courts. Article 234 (formerly Article 177) references may only be made from national courts when the national appeal system has been exhausted. This is likely to create a barrier for third country nationals as few will have the resources to exhaust the national system prior to seeking an ECJ reference.

The legislative procedure during the first five years of the Treaty requires the Council to act unanimously on a proposal from the Commission or on an initiative of a Member State, after consulting the Parliament, under Article 67 (1) . Article 67 (2) lays down the rules following the transition period. The procedure grants more power to the Commission after 5 years as it will have the sole right of initiative. Article 67 (2) also states that the Council shall unanimously decide, following consultation of the European Parliament, that all or part of the Title IV provisions should be governed by the co-decision procedure under Article 251 which allows qualified majority voting. Peers observes that the Article 251 procedure may only affects "parts" of the Treaty.[27]

Article 61 EC states:

> "In order to establish progressively an area of freedom, security and justice, the Council shall adopt: (a)within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provision of Article 62(2) and (3) and Article

26 Article 68 (1) EC

27 Peers, S., *EU Justice and Homes Affairs*, Longman, 1999, p.41

> 63(1) (a) and (2) (a), and measures to prevent and combat crime in accordance with the provisions of Article 31 (e) of the Treaty on European Union;
> (b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63;
> (c)measures in the field of judicial co-operation in civil matters as provided for in Article 65
> (d) appropriate measures to encourage and strengthen administrative co-operation, as provided for in Article 66"

Article 61 (a) and 62(1), measures ensuring the absence of any controls on persons crossing internal borders, focus on implementing the established free movement provisions in Article 14 (formerly Article 7(a) EC) within a five year period. The power to remove internal borders is now accompanied by the power to enact measures to control external borders, including immigration and asylum and rights of residence for third country nationals. The new Articles grants powers to adopt compensatory measures.

Article 63 EC deals with immigration and asylum, again moving competence from the Third Pillar (old K 1 TEU) into the Community Pillar, and attempts to co-ordinate the asylum policies of the Member States within a period of five years after the entry into force of the Treaty. The Article states that asylum measures must be adopted in accordance with the Geneva Convention of 1951 relating to the status of refugees and deals with criteria and mechanisms for determining which Member Sate is responsible for considering an application for asylum (63 (1) (a), minimum standards on the reception of asylum seekers in Member States (1) (b), minimum standards with respect to the qualification of nationals of third countries as refugees (1) (c) and (1) (d) minimum standards on procedures in Member States for granting or withdrawing refugee status.

63 (2) deals with minimum standards for refugees and displaced persons and introduces an obligation relating to temporary protection for displaced persons from third countries who cannot return to the country of origin and for persons who otherwise need international protection and also calls on Member States to *"burden share"*. The latter provision was included at the insistence of Germany as it has had to deal with huge numbers of refugees as outlined in Chapter 3. However, as the measure only requires Member States to adopt measures *"promoting a balance of effort"* countries such as Germany may still suffer from an unequal distribution of refugees and displaced persons. The latest UNHCR figures highlight a 6% fall in asylum applications to Germany but highlight that this did not result in a major redistribution of asylum seekers across the EU, as the majority of countries receiving large numbers during 1997 experienced this again in 1998. Countries outside the EU, most notably Switzerland and Norway received larger numbers in 1998[28], due perhaps to the tight controls and perceptions of *"Fortress Europe"* . Article 64 (2) EC adds to this provision in the event of an emergency influx of refugees as it states that the Council may, acting on a qualified majority on a proposal from the Commission adopt provisional measures for up to six months.

63 (3) relates to immigration policy dealing with conditions of entry and residence and standards on procedures for long term visas and residence permits, including family reunion (3) (a) and illegal immigration and illegal residence, including repatriation of illegal residents (3) (b). 63 (4) covers measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may

[28] UNCHR, Asylum Seekers in 1998, Geneva January 1999, www.unhcr.ch/statist/

reside in other Member States. In earlier drafts of the Amsterdam Treaty this power also included the right to seek employment, incorporated to assist the assimilation of Europe's long term resident third country nationals, however, this was removed during the final negotiations. The Commission issued a proposal for a Directive on family reunion of third country nationals in December 1999. This is discussed in Chapter 9

Article 63 states that measures adopted by the Council in accordance with 63 (3) and (4) will not stop Member State maintaining or introducing national provision compatible with the Treaty and internal agreements and that measures adopted under 2(b), 3(a) and 4 are not subject to the five year period.

This was inserted to pacify the Member States particularly reluctant to give up sovereignty in the area of immigration and asylum as it appears to indicate that Community competence in this area is not the exclusive remit of the Community and that Member States also have competence to act, subject of course to being compatible with the Treaty provisions. It is envisaged that the Commission's 1997 Third Country National proposal will be discussed when legislative proposals under Article 63 EC are considered. Its prospects for success are fairly limited, as discussed in Chapter 5.4.

Article 64 states that Title IV "*shall not affect the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security*" and is somewhat ambiguous as immigration and asylum law is usually interpreted in this light. Hailbronner[29] argues that Article 64 will need to be

[29] Hailbronner, op cit at note 22 p. 1052

interpreted restrictively as it cannot allow member States to retain primary responsibility in connection with controlling immigration.

The new Article 67 (3) EC allows for exceptions from the above rules for visa policy as the former Article 100c (repealed by the Treaty of Amsterdam) allowed for qualified majority voting in the area. In future proposals for a list of countries whose nationals must have visas to enter the Union territory (qualified majority voting still applies), procedure and conditions for issuing visas, union format for visas and rules on uniform visa and measures on the conditions under which third country nationals may travel within the Union for three months or less will have to be agreed following a proposal from the Commission, after consulting the European Parliament, by a qualified majority vote of the Council. After a period of five years measures involving the issuing of visas and rules on uniform visa will automatically be dealt with in accordance with article 251 EC (formerly Article 189b EC) procedures

Although the role of the ECJ is strengthened by Article 68 its involvement is somewhat limited by a number of specific provisions. Preliminary rulings may only be referred by national courts whose international appeal system has been exhausted but Article 68 (3) allows Member States to raise questions relating to interpretation based on the new Title to the ECJ prior to being raised in national courts. Article 68 (2) excludes the Court from ruling on measures connected with *"the maintenance of law and order and the safeguarding of internal security"* in relation to Article 62 (1). No doubt Article 68 will cause some tension regarding interpretation in years to come. Hailbronner opines that national courts may well interpret ambiguous Community law in favour of applicants

and that it is *"doubtful"* whether the system will provided effective judicial protection against a violation of fundamental rights.[30] Given the significance now attached to fundamental rights in the Treaty of Amsterdam, and that a good number of the third country nationals in need of such protection will not have sufficient resources to exhaust the national system before seeking an ECJ interpretation, their treatment over the next 5 years or so may result in changes in the future.

8.4.2 The Schengen Agreement and Dublin Convention

The Protocol integrating the Schengen acquis following Amsterdam applies to thirteen Member States (excluding UK and Ireland, but they were allowed to opt in.)[31].

Although the protocol brings an element of coherence and transparency some concern surrounded the perceived lack of checks and balances which could have a *"negative or contaminatory effect on EC legislation"*[32]. The Declaration on the Schengen Protocol, which was attached on the insistence of the French who are retaining border controls with Belgium and Luxembourg, seemed to confirm this as it indicated that the level of security surrounding the new area will stay the same. Hailbronner[33] argued the *"closer co-operation"* provisions and Article 1 of the Protocol could result in

30 Hailbronner, op cit at Note 22 p.1056

31 Iceland and Norway are also included, see footnote 11

32 Den Boer, M. *Step by Step Progress: An Update on the Free Movement of Persons and Internal Security* (1997/2) EIPA SCOPE 8 as referenced in Chalmers, D. & Szyszczak. E., op cit at note 3 p.135

33 Hailbronner, op cit at Note 22, p.1062

agreements being conducted within the EU framework. Peers [34] observed that the draft proposal indicated that parts of the Schengen Convention will be allocated to Articles 62 (3) and 63(3) on the EC Treaty. An action plan on establishing the area of freedom, security and justice allowed the Schengen working groups to be absorbed by corresponding working parties of the Council[35].

The Schengen Protocol allows the Council, with all thirteen Member States in agreement, to *"take any measure necessary"* for the implementation of the integration of the Schengen acquis and with a unanimous vote of all Member States, the Council *"shall determine, in conformity with the relevant provision of the Treaties, the legal basis for each of the provisions or decisions which constitute the Schengen acquis"*, in Article 2(1).

Some confusion surrounded the relationship between the Dublin Convention and Schengen following Amsterdam. The Dublin Convention had exclusive competence for determining asylum applications since the Bonn Protocol agreement in 1994. Hailbronner asked whether the asylum provisions in Schengen would become Community law for Schengen States and whether Dublin would apply to non-Schengen States[36]. The Council agreed on the allocation of the acquis in May 1999 when it decided that the 1985 Schengen agreement and some of the Schengen Convention were redundant or had been replaced by Community law or Conventions such as the Dunblin

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34 Peers . op cit at note 21, p. 1270

35 See report in Statewatch, Vol 8 no. 6, November/December 1998

36 Hailbronner, op cit at Note 22 p. 1066

Convention[37]. Agreement was not reached on the Schengen Information System so this was allocated to the third pillar as detailed in 8.4.3 below.

These provisions for opting in to Schengen have already been relied upon by the UK. Following a request by the UK Government, the Commission recommended to the Council in July 1999 that the UK should be permitted to opt in to some aspects of the Schengen Agreement including provisions on police and judicial co-operation in criminals matters, action against drugs and the Schengen Information System. The significance of this is yet to witnessed .

Schengen has been thwart with problems over the years as highlighted in Annual reports. For example, France has been reluctant to relax borders with the Netherlands due to the fear of increased drug trafficking and Germany, one of the key players in Schengen, was reported as losing faith in the agreement and wanting to shelf it[38].

In January 2000 Belgium and Luxembourg announced they were temporarily reimposing border controls demonstrating *"....the fragility of the Schengen agreement"*[39].

8.4.3 Title VI TEU – Police and Judicial Cooperation in criminal matters and preventing and combating racism and xenophobia

As Members States were reluctant to communitise police co-operation and judicial co-

37 Decisions 99/435 and 436 (OJ 1999 L176) See discussion in Peers, p. 59, op cit at note 27

38 *The Guardian*, 6th January 1998, *EU Passport free regime buckles*, and *The Guardian* 7th January 1998, *Fortress Europe deserted*

39 *The Guardian, Belgium restores frontier curbs*, 10th January 2000

operation in criminal matters parts of the third pillar remain. The principles of intergovernmental co-operation and unanimous voting still apply. New procedures are introduced and the ECJ is granted greater powers[40]. Article 29 (currently K.1) TEU strengthens the measures as it allows for *"approximation"* where necessary of rules on criminal matters. Article 30 (2) (currently K2.2) deals with police co-operation and extends the power of Europol to allow it to *"facilitate and support"* investigative action thereby extending its role to an operational one. Article 31 (currently K3) TEU allows for *"common action"* in co-operation between judicial authorities, facilitating extradition, preventing conflicts of jurisdiction and the progressive establishment of minimum rules relating to the constituent elements of criminal acts. 31 (e) permits *"common action"* on judicial co-operation.

The *"joint actions"* contained in the previous third pillar provisions have been deleted and Article 34 (2) introduces two new instruments, namely, decisions and framework decisions. Decisions will be binding on Member States but cannot be used for approximation of laws whereas framework decisions can. A Declaration states that measures adopted under this provision will be published in the Official Journal.

The EP and ECJ have been given greater powers in the revised third pillar, although the EP still does not have any decision making powers. Article 35 (1) to (4) TEU confirms the preliminary rulings jurisdiction granted in pre Amsterdam criminal

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[40] previously powers virtually non-existent and restricted to interpretation of agreed Conventions

policing or customs Conventions, and extends the Court's jurisdiction[41]. The ECJ now has limited jurisdiction to make preliminary rulings *"on the validity and interpretation of framework decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of measures implementing them"* in Article 35(1). This jurisdiction is optional for Member States however as they may restrict the power to make references. The ECJ is also granted jurisdiction to resolve any disputes, other than measures relating to police operations, between Member State or Member States and the Commission relating to the interpretation or application of the third pillar. The K4 Committee remains in accordance with Article 36 TEU and is renamed the Article 36 Committee.

Parts of the Schengen Acquis not incorporated into the EC pillar have been incorporated in the new third pillar. As the Council failed to agree on the allocation of the Schengen Information System (SIS) provisions, which are used by police and customs to prevent crime, the SIS was allocated to the third pillar[42].

8. 5 Treaty of Amsterdam and Non-Discrimination

A high profile was given to equal treatment issues at Amsterdam. After years of campaigning and pressure the EU has finally enacted a Treaty Article relating to non-discrimination potentially providing a Treaty base for future legislation. The New Article 13 EC states:

> "without prejudice to the other provisions of this Treaty and within the limits of the powers

41 see Peers, S., pg.46, op cit Note 27

42 For discussion see Peers, S., p. 59, op cit at note 27

> conferred by it upon the Community, the Council , acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

Some disagreement amongst Member States still surrounds the clause as demonstrated by its passage. The clause is weaker than the original Irish proposal but stronger than the first draft from the Dutch which initially removed any reference to disability, age, social origins and sexual orientation although they reappeared in later drafts.

The Commission's Action Plan Against Racism[43] outlined its intention to present legislative proposals and a package of measures was announced by Padraig Flynn, the former Social Affairs Commissioner, at a European conference held in Vienna December 1998 and co-financed by the European Commission. The Commission is attaching a broad interpretation to its powers under Article 13 but acknowledges that some Member States will not want to move as quickly as others in this area. Nonetheless, it recognised its duty to go beyond purely symbolic proposals that have little impact expressing an intention of seeking to *"strike a balance between ambition and realism"*[44].

The newly formed Commission, under the guidance of the new social affairs Commission Anna Diamantopoulou, took up the reins where Padraig Flynn left off. In November 1999 proposals for combating discrimination were presented to the social

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43 COM (98) 183 final

affairs Council. The proposals contain three strands, namely, a framework Directive dealing generally with all grounds of discrimination in employment, a Directive dealing specifically with race (but not religious) discrimination, and an action programme. The framework directive will be horizontal in nature. The specific Directive on race discrimination will include areas such as goods and services, health, education and sport as well as employment. The Commission has selected the area of race to begin with due to increasing problem of racism and the Commission's desire to build on the momentum built up by the European Year Against Racism[45]. The third part of the package the action programme aims to strengthen co-operation between Member States and society, encourage partnerships and networking and spread best practice across the EU.

These proposals will be examined in Chapter 9 alongside the *"The New Starting Line"* proposals which influenced the Commission. Its passage through the Council will not be smooth, as highlighted by some of the comment and debate prior to the Commission's proposals detailed below.

The prospects for Article 13EC has been the subject of much comment and debate.[46]

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44 Flynn, P., *Vienna – a new start for the fight against discrimination*, Vienna Conference document, Anti Discrimination: The Way Forward, report of a European Confenence Vienna December 1998 p. 60

45 The decision to single out race discrimination for a specific directive has been criticised on the grounds that it is likely to reinforce the existing "Hierarchy" with sex discrimination the most privileged category and race becoming the second privileged category, Editorial 6 MJ 1 (1999)

46 See, for example, Allen, R., QC, *Article 13 and the search for equality in Europe: an overview in Anti-discrimination: The Way Forward, report of a European Conference*, Vienna December 1998, Bell, *The New Article 13 EC Treaty: A sound Basis for European Anti-Discrimination Law?*, 6 MJ 3 (1999), Waddington, L., *Testing the Limits of EC Treaty Article on Non-*

Indeed, even Padraig Flynn, was reported as commenting in 1997 that the new Article 6A (now re-numbered Article 13 EC) is *"timid, in that it has no direct effect and requires unanimity"*[47] and that one Member State could effectively veto any proposals. As historically there has been lack of political will to enact any hard law in this area, as discussed in Chapters 4 and 5, a unanimous decision will not be easily achieved. The Article requires *"appropriate action"* and this could be interpreted by some Member States as enabling more *"soft law"* provision. It is vital therefore that pressure, such as representations made by the Starting Line expert group[48], continues to be applied to give legal effect to the Article.

Historically, the UK has been the main voice of opposition to such legislation, however, the Labour Government's reaction sharply contrasts with the previous Conservative government's reluctance to sanction EU wide legislation. The Labour Government appears to be pledging its full support for the proposals. Its initial support came prior to Amsterdam when it indicated that the Treaty should be amended to provide people with the same protection against discrimination on grounds of race, colour creed they currently enjoy on grounds of sex"[49]. In 1997 Jack Straw, the UK Home Secretary, announced his

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Discrimination, (1999) 28 ILJ 133-151, Hervey, *Putting Europe's house in order: racism, race discrimination and xenophobia after the Treaty of Amsterdam,* in *The Treaty of Amsterdam,* Twomey, P. & O'Keeffe, D. (eds), Hart, 1999

47 European Industrial Relations Review 283 August 1997 p. 16. It should be noted that both the Khan Commission and the European Parliament had recommended that the proposals should have direct effect, see Chapter 5

48 Group responsible for the "Starting Line" draft directive and "Starting Point" proposals detailed in Chapter s 4 and 5. The group continued to lobby the EU in an attempt to enact and strengthen any legislative proposals and it eventually had the backing of nearly 300 organisations in the EU when it presented its "New Starting Line" proposals in 1998, see Chapter 9.

49 *The future* of *the EU, report on Labour's position in preparation for the IGC 1996* (London: the

intention to launch a drive to persuade other European countries to adopt Britain's race relations laws to ensure protection against discrimination when travelling and working in Europe. He claimed to be determined to see that Britain "is *seen to be taking the lead"* in implementing the Amsterdam agreement[50]. In December 1998 a joint letter from Tony Blair, the UK Prime Minster, and Goran Persson, the Swedish Prime Minster, urged the promotion of social integration, the promotion of equal opportunities between men and women and called for steps to fight discrimination on race, age, disability, religion and nationality including *"affirmative action to promote the social legislation of disadvantaged groups and ethnic minorities in particular"*[51].

Even though the UK Government has pledged its support[52] for the Commission's proposals there are likely to be problems with other Member States. There has been speculation for some time now that other States were hiding behind the former UK government's opposition to EU wide ace discrimination and there have been reports that Portugal, Spain and Germany are likely to oppose the proposals in their present form.[53] There is no time limit for measures to be taken which will allow those opposing measures to delay matters for as long as possible.

Labour Party 1995) and *Challenge 96* (Brussels.. Belmont European Centre) Issue 8, May-June 1996, p 13-14

50 *"Straw to push for EU race law"*, The Guardian October 1997 reporting on Jack Straw's address to a Policy Studies Institute Conference on ethnic minorities.

51 Agence Europe No. 7361 11 December 1998, p. 8

52 The UK Government issued a press release in support of the proposals shortly after they were elected

53 UKREN 2nd Annual National Roundtable in Partnership with the TUC, 4th December 1999 Speakers included Claude Moraes, MEP, Rob Cornelissen, DGV, Mark Bell, Starting Line

Difficulties relating to the interpretation of Article 13 EC were highlighted by Allen in Vienna, December 1998[54]. He referred to the work of Bell[55] in pointing out that there are a number of other provisions of the Treaty providing scope for action in the area of non-discrimination. The social provisions in Articles 131-146, in particular Article 137 (1) which permits directives relating to "*.... integration of persons excluded from the labour market...* " could provide a possible base and greater prospects for success as it allows for qualified majority voting and the European Parliament has more involvement. As the Parliament has been at the forefront of EU institutions in raising awareness of the need for legislation in this areas this would increase the possibility of concrete action.

In relation to the Article 13 and the explicit reference that the Council "*..... may take appropriate action to combat discrimination*" Allen warns that if the action adopted is ineffective it will alienate people who are expecting the EU to deliver something meaningful and that the EU should have learnt from other areas, such as sex discrimination, what appropriate action is and suggests that the tests for indirect discrimination should be developed along the lines outlined in *O'Flynn.*[56]. Positive discrimination is also identified as a *"key issue"* as equal treatment legislation many not be sufficient to ensure equality of outcomes. Commenting on the need for Article 13 to comply with the principle of subsidiarity as elaborated at Amsterdam, Allen asserted

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54 Allen, R. ,op cit at note 46

55 Bell, M., op cit at note 46

56 *O'Flynn v Adjudication Officer* Case C-237/94 (1996) ECR I-2417 where it was held that "..... it is not necessary to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect....."

that action at Community level would result in greater benefits as a uniform base of rights would facilitate EU Citizenship, help other countries wishing to become members understand the basic Community standards and discourage social migration within the EU as relevant States would effectively obtain the rights in Article 13.

Bell has argued that the inclusion of Article 13 in Part one entitled *"Principles"* is an indicator of its significance but it could also be implied that the Article is restricted and that *"it is not an independent source for anti-discrimination law"*. He referred to other Treaty provisions and used Article 12 as a comparison pointing out that it has direct effect and does not make reference to *"the limits of the powers"* as Article 13 does. However, he also points to Article 13's use of the term *"powers"* as opposed to *"scope"* in Article 12 as possibly making it less restrictive than the term *"scope"*. Reference is also made to Articles 5EC (former Article 3b) on subsidiarity and 308EC (former Article235) to illustrate his point but these suggest that there is no real distinction between the terms. He concludes that the implication is that Article 13 could only be relied on where competence already exists in the Treaty.

One of the disturbing features of Article is the fact that it does not make explicit reference to discrimination against third country nationals which could result it little or no protection for citizens of third countries even if concrete legislation is enacted. The problems associated with the interpretation of the Treaties and the resulting lack of protection for this group has been highlighted in the debates surrounding interpretation

of other EU provisions as outlined in Chapters 4 and 5 [57], and as Article 13 does not make any reference to nationality or residential status it could suffer the same restrictive fate. As the social provisions, for example former Articles 117 and 118, have been interpreted as including all those residing in the EU, basing any non-discrimination legislation on a social policy base may result in greater protection for third country nationals.

Hervey[58] and Waddington[59] paint a more optimistic future for Article 13. Waddington argues that the Commission seems to the *"determined"* to produce legislation and Hervey argued that its very inclusion demonstrates that Member States acknowledge that they cannot retain total control over actions to fight and prevent racism. She points to the history of the inclusion of Article 13 and employment legislation prohibiting discrimination on grounds of nationality and sex and argues that it is possible that these could be used as a model to promote race discrimination legislation on grounds of recruitment, terms and conditions of employment, dismissal and racial harassment at work. However, difficulties and contradictions surrounding the pressure of migration and the desire to reserve jobs for EU citizens need to be addressed. Hervey concludes that there is potential for future developments based on, or in part, the new Article 13 EC and that *"negative assessments of its potential may have missed the dynamic created by the institutions of the EU..."* referring to soft law and other financial incentives.

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57 See, for example, the arguments centred around former Article 12 (former Article 6EC, ex Article 7) in Chapter 4

58 Hervey, T., op cit at note 46

59 Waddington, L, op cit at note 46

The EU's protection from gender discrimination continues to maintain a high profile as once again, it is given a much higher status than other forms of discrimination as a new Article 2 EC makes this an object of the Community and states that the Community shall aim to eliminate inequalities and to promote equality between men and women and article 3 states that *"in all the activities referred to in this Article the Community shall aim to eliminate inequalities and to promote equality between men and women."*

8.6 Treaty of Amsterdam and Fundamental human rights

As refugee and asylum seekers are covered by international conventions and the right to be treated equally is a fundamental human right, EU policy on non-discrimination and its migration policy will need to ensure it adheres to human rights standards in future or it could be subject to challenge in the ECJ. Presently the EU does not have a comprehensive or coherent human rights policy but it holds itself out as a staunch defender of human rights and is awash with rhetoric on fundamental and human rights. The paradox of this has not gone unnoticed[60].

The Treaty of Amsterdam attempts to raise the status of fundamental and human rights and declares that *"the Union is founded on the principles of liberty, democracy, respect, human rights and fundamental freedoms and the rule of law" and that the Union " shall respect fundamental rights, as guarantee by the European Convention....and as they result from the constitutional traditions common to the Member States as general principles of Community law"* in Article 6 TEU. However, human rights is still not an objective of the EU and it has not yet granted itself *"...the means necessary to attain its objectives and carry*

through its policies" despite the Article granting it the power to do so and it continues to rely on judicial remedies.

The Amsterdam Treaty did, however, grant a number of specific powers in this area and Chalmers, commenting on new competencies, opines that the *"..... most dramatic interventions"* was in the area of fundamental rights[61], in particular, new Article 7 TEU which allows the Council acting unanimously after obtaining the assent of the Parliament to suspend the rights under the TEU where a serious and persistent breach of human rights by a Member State is identified. This, coupled with a declaration that only States who respect human rights may apply to become Members (Article 49 TEU) sends a distinct message to both existing Members and applicants. However, this may prove to be fairly ineffective as in the same section the Treaty declares that the European Court of Justice's jurisdiction is excluded from some provisions.

Alston and Weiler refer to two recent events to demonstrate the paradoxical nature of the EU's human rights policies, firstly, the final statement adopted by the European Council at Cardiff in June 1998 where the phrase *"human rights"* is only used once, calling on Indonesia to respect human rights, in the space of 97 paragraphs spread over 16 pages. Secondly, the ECJ decision of May 1998[62] which questioned the legal basis for human rights initiatives, led to a freeze on a number of projects and fuelled calls for

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60 See, for example, Alston, P. & Weiler, J., *An Ever Closer Union in Need of a Human Rights Policy* EJIL Vol 9 No 4, p.661 and debates surrounding the ECJ in Chapter 6

61 Chalmers, D., *European Union Law, Volume One, Law and EU Government,* Ashgate, 1998 p.71

62 *United Kingdom v Commission* C-106/96 (1998) ER I-2729

a coherent human rights policy. It is argued that the Treaty does not need to be amended but rather it needs to be glued together to produce a coherent policy framework and that the developments at Amsterdam heighten the need for such a policy. Third pillar reforms in criminal matters as detailed below, will need initiatives in the human rights field. Alston and Weiler also refer to the expanding powers in the field of non-discrimination, outlined above, which should be interpreted in a human rights framework and is *"at the core"* of human rights therefore providing a *"broad foundation"* for a human rights policy.

Since the Vienna Declaration of 10 December 1998 the Council has agreed to produce an annual report on human rights. The first report published in October 1999 stresses that the Union's human rights policy *"must begin at home"*[63]. The main focus of the policy is on the fight against racism. A new approach to human rights is articulated as discussed in the next Chapter

8.7 summary

The removal of borders and free movement remains high on the EU agenda but some Member States are still reluctant to lose their sovereignty in this year, most notably the UK and Denmark. The Treaty of Amsterdam has resulted in fragmentation and movements between the EU pillars and is likely to result in difficulty in establishing the correct legal base for future migration proposals . The new area of Freedom, Security and Justice appears to be emphasising the *"security"* aspects at the expense of justice and home affairs. The EU's migration policy is presently dominated by control and

expulsion at the cost of integration, despite the Commission's emphasis on the importance of integration

The flexibility provisions on closer co-operation have the potential to enhance or hinder the operation of the EU and could result in a multi-speed EU heightening political tensions between Member States. However, as Langrish opines, the stringent condition of flexibility in the first pillar may result in the concept being theoretical in that area[64]. It would seem that more potential for flexibility lies in the third pillar provisions.

The increased power of the European Parliament in the first and third pillars, the involvement of national parliaments, the extension of the ECJ's jurisdiction and provisions relating to transparency are likely to result in greater democratic involvement if sufficient time is allowed for consultation and debates. The narrow timescale for the adoption of immigration and asylum proposals at the Tampere Council meeting in October 1999 does not appear to have fully adopted the spirit of openness, accountability and democracy. There is limited opportunity for discussion in the European Parliament or national parliaments. Similarly, criticism can be levelled at the exclusion of the ECJ from article 234 references (formerly Article 177) as references may only be made from national courts when the national appeal system has been exhausted, and few third country nationals are likely to have the resources to exhaust the national system before seeking and ECJ reference. Human rights has been given a higher profile but the EU still lacks a coherent framework.

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63 Agence Europe, No 7572, 14 October 1999, p10

64 Langrish, op cit at Note 10

The prospects for the Commission's non-discrimination proposals have yet to be witnessed. Commentators are divided on its chances of success, some being of the view that non-discrimination issues may be more successful using a base which requires a qualified majority vote as there still appears to be lack of political will to enact concrete legislation. Although it may be some time yet before legislation protecting all vulnerable groups is on the statute books, the issue of race has presently secured a higher profile than some of the other groups.

The final Chapter will examine the way forward for free movement of legal residents in the EU. The Treaty of Amsterdam has at long last provided a vehicle for addressing some of the inequalities which have dogged the European Union. The next few years will witness many debates which will contribute to the shaping of the free movement, migration and non-discrimination legislation.

Where provisions relevant to this thesis require unanimous voting, for example under Article 13EC, there could be very few short term changes. Even if the Commission's proposals under Article 13 are successfully received by the Council as Article 13 does not explicitly refer to discrimination against third country nationals little or no protection for citizens of third countries is likely to result. The Starting Line group has acknowledged this and has therefore proposed a separate Directive for third country nationals, as discussed in the next Chapter.

As for the migration strategy, disagreement amongst Member States is also likely to cause delays as unanimity is required in the first five years. The promise may lie in

imaginative selection of a qualified majority base, and the hope that the ECJ will not uphold challenges to such selection, although challenges could also be made on the basis of subsidiarity, now contained in Article 5EC[65].

[65] See Hailbronner, K.,who suggests that the Community should ensure therefore that it only takes action insofar as the objectives of the proposed action cannot be achieved sufficiently by the Member States, op cit atote 22 p.1051

PART THREE: ALLEVIATING THE BARRIERS OF RACE DISCRIMINATION AND RESTRICTIVE IMMIGRATION CONTROL: FUTURE EU POLICY ON FREE MOVEMENT, RACE DISCRIMINATION AND MIGRATION CONTROL

CHAPTER 9

THE WAY FORWARD: AN EU RESIDENTS MANIFESTO FOR THE NEW MILLENIUM

9.1 The right to free movement without discrimination

As detailed in Chapter 7, the right to free movement in the EU is determined by nationality, with nationality of one of the Member States being the determinant for such rights and, since the TEU, rights to EU Citizenship. The right of States to determine who may obtain State nationality and enter their territory has been jealously guarded as a sovereign right in accordance with international law.

This thesis has demonstrated that EU policies on race discrimination and migration have created obstacles to free movement for *"visible minority"* EU and third country nationals thereby creating inequalities amongst some of its citizens and residents. The Treaty of Amsterdam has confirmed that the majority of Member States are keen to ensure that free movement is a reality, that the EU has power to enact migration provisions and that *"appropriate action"* relating to non-discrimination is taken across a broad range of disadvantaged groups. In order to facilitate freedom of movement of people and enhance good race relations future EU non-discrimination and immigration law should

comply with international human rights standards and adopt a positive stance acknowledging the benefits of cultural diversity and the contribution that migrants make to society and the economy. This Chapter will therefore examine the way forward.

As outlined in Chapter 2, legal theorists have struggled for centuries with the nature of law, rights and justice and the content of these rights varies from one jurisdiction to another. A legal system which entitles everyone to "*treatment as an equal*" recognising and valuing diversity should be at the centre of the EU. The law is not a panacea and law alone will not eradicate racial discrimination and hostile feelings towards "*foreigners*". A holistic approach to tackling the problems of race discrimination and unfairly restrictive immigration controls is necessary, this will require the issues of social justice to be confronted and principles of freedom and justice to permeate policies. The social justice model adopted throughout the thesis takes the view that legal intervention in matters connected with non discrimination and equality is vital for reasons of fairness and distributive justice. A clear set of rights for people living and working within the EU needs to be articulated. This will present great challenges as the Member States which make up the Union have been influenced by a variety of strongly held but conflicting religious beliefs and cultural backgrounds.

The EU is presently lacking a comprehensive fundamental human rights policy and this has fuelled calls for a coherent framework [1]. A number of commentators have

[1] Alston P., and Weiler, J. *An Ever Closer Union in Need of a Human Rights Policy*, (1999) 9 EJIL 658-722

also called for some sort of constitution[2], manifesto[3] or bill of rights[4] as examined below. Proposals have also been put forward for a Convention[5] or Directive[6] to grant rights to third country nationals. Although views vary as to the form and content of such measures there is no denying that a groundswell of opinion is emerging for some form of concrete action in the fundamental rights arena. Opinions vary as to whether all residents of the EU should be included or whether it should be limited to EU citizens. In June 1999 the European Council in Cologne agreed to adopt an *"EU Charter of Fundamental Rights"*. The proposed Charter merely summarises existing Citizens rights however and does not grant any new rights or include third country migrants, refugees and asylum-seekers.

This Chapter will provide an overview of future EU race discrimination and immigration proposals to examine whether they will assist in removing barriers to free movement. The case for some form of catalogue of rights for all EU residents will also be examined.

9. 2 Future EU race discrimination laws

Article 13EC could prove to be the long awaited legal base for future EU wide laws

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2 European Parliament Report of the Committee on Institutional Affairs on a Constitution of the European Union (rapporteur Fernand Herman) A3-0031/94

3 Bercusson et al, *A Manifesto for Social Europe* (1997) 3 ELJ 189-205

4 Justice and Fair Play Federal Trust Paper 6 1996 p.7

5 Commission proposal for Convention on the admission third country nationals, see Chapter 5.4 and 9. 3 below

6 Draft Directive on Third Country Nationals, prepared by the Starting Line Group and the Commission for Racial Equality, 1998, Chopin, I. and Niessen, J. (eds)

aimed at eliminating discrimination on grounds of racial or ethnic origin. As discussed in Chapter 8, Article 13 EC is rather vague and will not have direct effect, secondary legislation is required to give life to the Article . In 1998 the Starting Line Group of international experts put forward revised proposals for *"The New Starting Line"* Directive to eliminate racial and religious discrimination, using Article 13EC as a base. This and *"extensive"* consultations with a broad range of individuals and groups influenced the Commission's response. The Commission presented its package of proposals to the Social Affairs Council in November 1999[7], and although they have been reported as being *"well received"*[8] by the Council the requirement for a unanimous vote and absence of a time frame is likely to result in compromises and delays. There is already evidence that some Member States are not happy with the present proposals[9].

Legislation in the field of anti-discrimination often results in a compromise as attempts to balance the need to protect individual and human rights are weighed against individuals right of freedom of expression, and economic interests and the management

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7 Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain Community measures to combat discrimination OJ 1999 C 369/03, Proposal for a Council Decision establishing a Community Action Programme to combat discrimination 2001-2006 COM (1999) 567 final, Proposal for a Council Directive establishing a General Framework for Equal Treatment in Employment and Occupation, Proposal for a Council Directive Implementing the Principle of Equal Treatment between persons irrespective of Racial or Ethnic Origin COM (1999) 566 final

8 European Industrial Relations Review, ***Commission's anti discrimination package, (January 2000)*** 312, p. 13

9 UKREN 2nd Annual National Roundtable in Partnership with the TUC, 4th December 1999 Speakers included Claude Moraes, MEP, Rob Cornelissen, DGV, Mark Bell, Starting Line Group

prerogative in the employment field. In the EU arena the issues are further complicated by the different cultures and approaches to anti-discrimination law. The French, for example, are influenced by a philosophical approach which emphasises one state, one citizenship and one culture while the British approach is more pragmatic and attempts to tackle particular issues such as employment and education and encourages multi-racial pluralism, not accepting that the dominant culture should prevail.

Although it is difficult to measure the effectiveness of anti discrimination legislation, and statistical data across the EU has so far proved difficult to collate, the evidence of increasing racism and xenophobia and studies of legal measures in a number of States [10] suggests that stronger action is required. Interested parties will need to continue to exert pressure to ensure that legislation to implement Article 13EC is introduced. If the political will of all Member States proves to be lacking the Commission may need to explore the possibilities of using a qualified majority base for the legislation as suggested by Bell[11] and detailed in Chapter 8.

9.2.1 Extent and aims of the proposals

The Commission's proposals for a framework Directive, to include race, ethnicity, religious belief, disability, age or sexual orientation, and a specific race Directive

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10 See for example the comments on French and British anti-racist strategies in MacEwan, *M., Tackling Racism in Europe*, Berg Publishers 1995 p. 186 and Lustgarten, L & Edwards, L, *Race Inequality and the Limits of the Law* in Braham et al (eds.) *Racism and Antiracism*, Sage Publications 1992 p.270

11 Bell, M., *The New Article 13 EC Treaty: A sound Basis for European Anti-discrimination Law?* (1999) 6 MJ 3

provide a minimum level of rights. National Constitutions or common law measures will not be affected as the proposals are not intended to interfere with existing good practice. They reflect the Commission's desire for flexibility and are intended to *"supplement and reinforce"* national legislative measures implementing the principle of equality in the spirit of "*proportionality*" and "*subsidiarity*". The framework proposal and the separate race proposal overlap and they are meant to be *"independent"* of each other so that if the Council adopts one before the other, one can be amended. The action programme is fairly comprehensive acknowledging that legislation alone will not root out racism It includes the promotion of understanding of issues related to discrimination, developing "*benchmarks*" and *"awareness raising"* of opinion formers.

The framework proposal is limited to employment and occupation whereas the race proposal is more comprehensive as it includes, social security, social advantages education and access to goods and service. Contrary to the draft Directive put forward in *"The New Starting Line"* the specific race proposal does not include religion, although this is included in the framework proposal. Apparently the Commission decided not to include religion alongside the specific race proposal due to the requirement for a unanimous vote and the reservations of a number of Member States in this area.[12] The provisions are for a minimum level of rights. Article 7 of the Commission's framework proposals and Article 6 of the race proposal states that Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in the directive.

[12] Remarks made by Rob Cornelissen, Head of Unit for free movement of workers and the fight against racism, DG5 at Conference 1999, op cit at note 9.

The Commission's race proposals recognise the importance of non-discrimination in education. Member States have a responsibility under the ICERD (detailed in Chapter 2) to educate against prejudice and promote inter-racial understanding. Article 3 g) of the race directive states that it shall apply to

> "g) education, including grants and scholarships, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity"

The framework proposal does not extend that far relying instead on the measures contained in the Action Programme.

The extent of the Commission's Article 3g) is not as robust as Article 4.3 of the "*New Starting Line*" draft directive which explicitly acknowledges the role of the mass media and states:

> "Member States shall take the necessary measures to ensure that educators and persons working in the mass media are aware that they bear responsibility for an educational role in combating racial and religious discrimination, and that they behave accordingly"

The increasing level of racist incidents and structural discrimination in employment suggests that an element of education and social change is required. The law alone will not achieve this and the role of education and the mass media in valuing diversity and promoting tolerance should not be underestimated. The EU's competence in the field of education is presently somewhat limited to free movement of workers and financial support for education projects but there has been some recognition of the role of the EU in promoting racial tolerance and understanding in education.[13] The specific reference to

the mass media in the "*The New Starting Line*" proposal reflects the power and influence that it has on public opinion. This has been acknowledged by the EU Directive on television broadcasting[14] which requires Member States to take some responsibility for ensuring that television advertising does not incite race or religious hatred. However, the television broadcasting Directive has no impact on the damaging racist political broadcasts or internet sites controlled by extreme right wing groups as discussed in Chapter 1. Tougher proposals are required in this area.

9.2.2 Nature of liability and access to justice

Both the framework and specific race proposal allow Member States to determine for themselves the nature of the measures, criminal or civil. Presently, measures vary between Member States as discussed in chapter 2. Although the use of the criminal law to address crimes of violence, racial assault, harassment, racial hatred and propaganda sends a strong message, in that it is an offence against the State, threatens the fabric of society and will not be tolerated, it has not proved terribly effective in the employment field[15]. The standard of proof in such cases, being *"beyond reasonable doubt"* is much higher than in civil matters and juries may be unwilling to convict for discrimination. In addition, criminal sanctions may not be a sufficient deterrent as they can often create *"heroes"* amongst like minded peers and may not be satisfactory

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13 See for example the European Parliament Evrigenis Report 1986 which recognised the potential for education to promote racial awareness and tolerance, Commission Proposal for Council resolution 29th June 1988 which suggested that necessary action to promote a European dimension to education should be taken and a Council Resolution 1995 on the Response of Education Systems to the Problems of Racism and Xenophobia

14 Directive 89/552/EEC

15 See, for example, the experience of France detailed in Chapter 2

for the victim or society at large. In the employment field, the civil law is a more appropriate mechanism as it imposes a lower standard of proof and allows victims to claim compensation. However, as highlighted in Chapter 2, individuals may not have the finances to pursue civil claims and access to legal advice and aid are therefore vital to ensure that access to justice is not denied [16]. Some recognition of the difficulties posed is included in Article 8 of framework proposal and Article 7 of the race proposal as they allow *"associations, organisation, or other legal entities"* to pursue claims on behalf of the complainant.

9.2.2 Definition of Discrimination and Burden of Proof

The Commission's definition of discrimination is based on Article 2 of the Equal Treatment Directive relating to sex discrimination covering direct and indirect discrimination, as detailed in Chapter 4.2, and the Burden of Proof Directive[17] which provides a definition of indirect discrimination.

Article 2b) of both proposals cover indirect discrimination. Article 2 b) of the race proposal states :

> " indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice is liable to adversely affect a person or a group of persons of a particular racial or ethnic origin, unless that provision criterion or practice is objectively justified by a legitimate aim which is unrelated to the racial or ethnic origin of a person

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16 Some EU States have few documented reports of legal action being taken on grounds of racial discrimination and a number of studies have reported that this is due to overburdened legal systems, high costs, inability to meet the burden and standard of proof, lack of support from police and prosecutors and lack of knowledge on the part of victims of the remedies available. See for example Shelton D., and Verches R., *Study for the International Institution of Human Rights in Strasbourg* (1992) and Forbes and Meade., *Measure for Measure, UK Department of Employment* (1992)

17 Burden of Proof Directive 97/80/EC, 15 December 1997, due to be implemented 2001

> or a group of persons and the means of achieving that aim are appropriate and necessary".

Harassment is included in Article 2.3 definition of both proposals and victimisation is also incorporated in Article 9 of the specific race proposal and Article 10 of the framework proposal.

This broad definition is to be welcomed. Presently some EU States include the principle of indirect discrimination within their race discrimination legislation but others do not. Even where indirect discrimination is included in Member States legislation problems abound. Although intention to discriminate is not required in most legal systems recognising the concept of indirect discrimination, statistical information is clearly important to establish a *"disproportionate"* effect as in the UK.. The existence of monitoring data, which is difficult to obtain, is therefore often a vital feature of many claims.

The case of *O'Flynn v Adjudication Office*[18] strengthened the principle of indirect discrimination as it relates to free movement within the EU. *O'Flynn* established that a complainant does not have to rely on the availability of relevant statistics to prove discrimination, demonstrating that there is *"a risk"* is sufficient. The Commission acknowledges that it was *"inspired"*[19] by the free movement case of *O'Flynn* when formulating the definition of direct and indirect discrimination. Whether this definition

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[18] C- 237/94 (1996) ECR I-2617

[19] See Framework for Equal Treatment in Employment and Occupation proposal, op cit at note 7 p.8

remains intact following Council's discussions is yet to be tested. The UK's Commission for Racial Equality recommended the *O'Flynn* approach to the UK Government in its 1998 review of the Race Relations Act but the Government resisted any efforts to change the legislation arguing that existing legislation was sufficient.

Article 9 of the proposed framework directive and Article 8 of the Commission's proposed race directive is based on the Directive on burden of proof in sex discrimination cases . Employees who believe that they have suffered injury because of the non application of the principle of equal opportunity have the right to prove before a court the facts that will allow the presumption of the existence of discrimination, it is then up to the employer to prove that the discrimination is justified by objective factors not linked to sex discrimination. The employee has the benefit of any remaining doubt.

The impact of the burden of proof Directive has not yet been fully realised as some Member States, including the UK, have not yet implemented it. Presently, discrimination cases lie with the complainant in most Member States and as much of the evidence is in the hands of the employer, this causes problems which are often insurmountable. This has resulted in some countries, the UK for example, developing common law principles which allow tribunals to draw inferences. The Commission is of the view that the Burden of Proof Directive simply confirms ECJ decisions in the area of sex discrimination rather than grant any new rights, however some commentators disagree.[20]

9.2.3 Sanctions, and the use of Overseeing Agencies

Article 14 of the Commission's race proposal states

> "Member States shall provide adequate sanctions in event of infringement..."

This allows some flexibility in accordance with the general tone of the proposals.

Presently the Member States rely on individual enforcement of employment related discrimination cases which has been criticised by a number of commentators[21] who claim class actions have been partly responsible for compliance with the law in the US , as it is *"cheaper and easier"* to comply than face the consequences of heavier penalties. The ECJ has had a significant impact on penalties in employment related cases as witnessed in the UK recently. The *Marshall (No 2)*[22] decision declared the limit on compensation imposed by UK equality law to be unlawful and employers now have to pay a heavy penalty for discrimination and are more likely to consider the financial consequences of any discriminatory behaviour.

Article 12 of the Commission race proposal lays down a number of minimum requirements in relation to the establishment of *"independent bodies"* stating that

> 1. Member States shall provide for an independent body or bodies for the promotion of the principle of equal treatment between persons of different racial or ethnic origin. These bodies may form part of independent agencies charged at national level with the defence of human rights or with the safeguard of individual rights.

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20 Croners Europe Bulletin No 65, July 1998

21 Lacey, N., *From Individual to Group*? in Hepple, B & Szyszczak, E., *Discrimination: The Limits of the Law*, Mansell 1992 p. 115 , Lustgarten, L. and Edwards, J. and MacEwen, M., op cite at note 10

22 *Marshall v Southampton Area Health Authority*, Case C-271/91 (1993 ECR I-4367.

> 2. Member States shall ensure that these independent bodies have amongst their functions to receive and pursue complains from individuals about discrimination or grounds of racial or ethnic origin, to start investigations or surveys, concerning discrimination based on racial or ethnic origin and to publish reports and make recommendations on issues relating to discrimination based on racial or ethnic origin.

This is a particularly welcome requirement as few Member States have such agencies. Studies examining the role of agencies in investigating and enforcing anti discrimination legislation have highlighted their significance. Although some have been subject to criticism and are in need of reform, such as the Commission for Racial Equality in the UK, the need for some sort of enforcement agency is widely acknowledged[23].

9.2.4 Dealing with racist groups

Rather disappointingly the Commission's legislative proposals and action programme fail to deal explicitly with the dissemination of racist ideas. This is contrary to both the ICERD, as detailed in Chapter 2, and The New Starting Line proposals.

The draft *"New Starting Line"* Directive, Article 4.1. (c), allows member states flexibility to take the necessary measures in conformity with their legal systems to prohibit under legal sanctions

> "(c) the establishment or operation of any organisation which promotes such incitement or pressure together with membership of any such organisation and the giving of aid, financial or otherwise to any such organisation".

The increase in racist violence and the rise in the election of far right parties in Europe, as detailed in Chapter, 1 has led to lengthy debates concerning appropriate mechanisms

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[23] Forbes, I. and Mead, G. , *Measure for Measure: A Comparative analysis of Measures to Combat Racial Discrimination in the Member Countries of the European Community*, Department of Employment, 1992, MacEwan, M. (ed) *Anti Discrimination Law Enforcement: A comparative Perspective*, Avebury, 1997

for dealing with extreme far right political groups. Balancing the fundamental rights of individuals to freedom of expression and protecting individuals from discrimination on grounds of race is at the heart of the debate. Being free to express your views in private is one thing but the implications of expressing them in public is potentially damaging to the rule of law and a threat to democracy, as it can lead to a breach of the peace and serves to undermine the equal protection laws. Similarly, denying the right of extreme parties to stand for election is problematic as it is tied up in the constitutional principle of freedom of assembly.

It has been argued that adjustments to anti-racist legislation will not protect the victims of racist violence. A number of organisations have called for a statutory ban on far right extremist groups asserting that freedom of expression must be restricted in order to preserve democracy, although the campaigns were not well received by the majority of the population or the courts.[24] Nevertheless, in 1997 the minister of Justice in the Netherlands, Mrs Sorgdrager, called for a ban on members of the extreme right to stand for parliament and in local election as their connection to violence is a threat to democracy. [25]

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24 The Centre for Immigrants and the National Office for Combating Racism in the Netherlands and a number of groups in Belgium campaigned on these lines. In Belgium RTBF, the Belgian radio and television services lost a court battle following its decision to exclude non-democratic parties from broadcasts during the European election campaign. Similarly another judgment by the democratic parties against the Front National resulted in the judge pronouncing "..in a democracy the constitutional freedom of expression is even more important than electoral or criminal legality; and whereas to reverse this concept is to play into the hands of the enemies of democracy" EU Commission Report, *The Member States of the EU and immigration in 1994: Less tolerance and tighter control policies*, 1995, p. 8 and p.94-96.

25 Institute of Race Relations European Race Audit, 23, May 1997 p.20

Despite the fact that far-right racist political groups are not banned in the majority of EU countries the European Court of Human Rights has continually held that racist groups are a threat to the rights in the ECHR[26] and has restricted the right to freedom of expression where racism and xenophobia is involved[27]. Given the proliferation of racist internet sites, discussed in Chapter 1, it is likely to take more than an action programme to promote tolerance and understanding and prevent racist ideology spreading on a global scale

9.2.5 Positive action

The provisions for positive action are likely to be one of the most controversial areas as witnessed following judgments in the ECJ, discussed in Chapter 6 and referred to below. A number of commentators are of the opinion that positive action is necessary to ensure equal treatment. Schiek[28], for example, argues that structural discrimination and continuing inequality justifies preferential treatment but the concept must be seen in an *"asymmetric and substantive manner"*.

Both the Commission proposals and *"New Starting Line"* proposal allow some form of *"positive actions"*. Article 6 of the framework proposal and Article 5 of the race proposal are relevant here. Article 5 of the race proposal states

> This Directive shall be without prejudice to the right of the Member States to maintain

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26 See Cullen, H. , *Articles 9-11 ECHR in 1995: A New Approach to Fundamental Freedoms (1996)* 21 ELRev 29-39. The cases of *Walendy v Germany* 21 128/.95 80-A DR 94 and *Remer v Germany* 2506/94 (1995) 82-ADR 117 are cited

27 *Jersild v Denmark* (1994) 19 EHRR 1

28 Schiek,D., *Sex Equality Law after Kalanke and Marschall* (1998) 4 ELJ 166

> or adopt measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin.

The introduction to the framework Directive clearly states that this should be interpreted in light of current case law and Article 141EC.

Opinions are divided as to the merits or otherwise of positive discrimination in employment and have been debated for a good number of years. Supporters argue that it is necessary to counterbalance the institutionalised racism and inequality that works against minority groups. Opponents argue that such laws encourage dependency and can lead to an attitude of entitlement on the part of minority groups and resentment on the part of others. Parekh[29] asserted that it is our moral duty to assist disadvantaged groups. Commenting on the Indian, US and UK experience he concludes that although positive discrimination has its problems *"it is on balance and within limits a valuable tool of public policy"*. He stressed that it cannot be restricted to education and employment and it needs to encompass all areas of social life.

Pitt[30] observed that commentators on UK sex and race discrimination are increasingly of the opinion that *"some measure of reverse discrimination"* is necessary but claimed that allowing reverse discrimination could be as discriminatory as the actions it is trying to prevent, as reverse discrimination infringes the rights of the person who would have been chosen were it not for reverse action. Indeed, it is these arguments which have

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29 Parekh, B., *A Case for Positive Discrimination*, in Hepple,B. & Szyszczak,E., op cit at Note 21

30 Pitt, G. *Can Reverse Discrimination be Justified* in Hepple, B. and Szyszczak, E. op cit at note 21

been used to challenge many of the affirmative action programmes in the US recently, detailed below. Pitt concluded that perhaps public bodies should take the lead in positive action programmes and allow *"limited"*, closely monitored, reverse discrimination programmes.

One of the most successful positive discrimination programmes, or affirmative action as it is known, in recent years has been in the USA which influenced the Northern Ireland's Fair Employment legislation[31]. The US programme[32] allows preferences based on race in government hiring, contracting and university admissions. Its supporters claim it has been successful in redressing inequality by allowing a large number of people from ethnic minorities to enter University and employment. Its greatest achievements are to be witnessed in employment[33]. However, the affirmative action campaign in the USA has suffered great setbacks in the past few years and the legality of many of the initiatives has been questioned and subject to testing in the courts, as it has been argued that treating some preferentially rather than as *"equals"* is contrary to the Constitution[34].

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31 Northern Ireland's Fair Employment legislation aims to eliminate discrimination based on religion and as 33 per cent of the population are Roman Catholic the impetus to do something for such a large group is established.

32 Comparisons should be viewed with caution however as the political and moral pressure to introduce positive measures is much greater in the USA, where approximately 26% of the population consists of ethnic minorities, compared to EU countries where the ethnic minority population is much smaller, for example around 6% in the UK

33 As the employment participation rates of blacks and Hispanics significantly increased between 1966-1988 from 8.2 to 12.4 per cent for blacks and 2.5 to 6.2 per cent for Hispanics in private firms employing over 100 employees.

34 The programme is under threat and President Clinton called for a national dialogue on race and set up a commission to address this. For a discussion of US affirmative action programmes see, for example, Chavaz, L. *The Colour Bind: California's Battle to End Affirmative Action,*

None of the EU member States allow positive discrimination in employment on the grounds of race. Positive action which allows preferential education and training provision for racially disadvantaged groups is permitted in some States, for example UK, which attempts to allow individuals to fairly compete in the job market and encourages selectors to appoint on merit rather than positively discriminate. Some EU States, for example Germany, allow forms of positive discrimination on grounds of sex and the legitimacy of these have been tested by the ECJ in recent years as discussed in Chapter 6.4.2 . The cases have resulted in an examination of the extent of the Equal Treatment Directive and led to much comment from academics [35].

An attempt to adopt a Directive on affirmative action failed in 1984 and a non binding recommendation in which the Commission encouraged positive action was adopted.[36] However, Kalanke[37] created uncertainty about the legality of positive action programmes and the Commission issued a Communication in 1996[38] which attempted to clarify the position. It recommended that Article 2(4) of Directive 76/207/EEC be amended to include actions favouring the recruitment or promotion of one sex in circumstances where the latter is under represented, on condition that the employer can

University of California, 1998

35 See, for example, Neilsen,R., & Szyszczak, The Social Dimension of the EU, Handelshojskolens Forlag, 1997 p.184, Schiek, D., op cit at note 28, Charpentier, L., *The European Court of Justice and the Rhetoric of Affirmative Action* (1998) .2 ELR 167-195

36 Council Recommendation 84/635/EEC of 23 December 1984 on the promotion of positive action for women (OJ L331, 19 December 1984 p. 34

37 *Kalanke v Freie Hansestadt Bremen*, Case C-450/93, see Chapter 6 for a discussion of this an other cases

38 COM (96) 88 final on 27 March 1996

always consider the particular circumstances of each case. The Commission's view is that only quota systems which give absolute and unconditional rights to appointment or promotion and do not allow for individual circumstances are unlawful. The case of *Helmut Marschal*[39] clarified that a rule which did not automatically entitle positive discrimination was compatible with the Equal Treatment Directive as long as objective criteria applied.

Article 141(4) EC (amendment to former Article 119) introduced at Amsterdam seeks to clarify the position and states:

> *With a view to ensuring full equality between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.*

Charpientier argues that the *Marschall* case and the revised Article 141 (4) demonstrates a *"more active role"* on the part of Member States and that *"EC law has definitely entered the Terrain of a more substantive and complex equality."*[40] The most significant international provision dealing with the concept is the ILO Convention 111, which has been ratified by most Member States, exceptions being Ireland, the UK and Luxembourg as discussed in Chapter 2 . The ILO Convention expects affirmative action programmes to be established for the purpose of providing preferential treatment in education and training for disadvantaged racial minorities.

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39 Case C-409/95 (1997) ECR I-6363

It has been suggested that systems which facilitate difference, enable minorities and use positive discrimination (e.g. USA and Northern Ireland) or action (e.g. Netherlands and Britain) may contribute to discrimination and xenophobic attitudes as they encourage socio-cultural differences and increase the level of intolerance within States[41]. McEwan disagrees and claims *"there is little evidence that this hypothesis is substantially true"* as in neither the UK or the Netherlands has positive action led to more than marginal racial discrimination against the host community and there is no evidence that recognising minority group identities has caused a white backlash[42]. Forbes and Mead contend that positive, or reverse action, though legal in a few countries is *"...not a favoured policy instrument, since even the suspicion of its practice tends to cause conflict and dissatisfaction among beneficiaries and losers alike"*[43].

There is still much opposition in the EU to positive discrimination, at the point of selection, as witnessed in the discussions in France when race discrimination laws were recently amended.[44] Support for some form of *"affirmative action"* for disadvantaged groups, in particular ethnic minorities, was demonstrated in the joint letter from the

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40 Charpentier, op cit at Note 35, p. 194

41 Costa-Lascoux, *Anti-discrimination in Belgium, France and the Netherlands report prepared to the Committee of Experts on Community Relations, Council of Europe, Strasbourg 1990, MG-CR*, p. 26

42 McEwan, op cit at Note 10, p. 141

43 Forbes and Mead, op cit at Note 23

44 See European Industrial Relations Review No 309, *France,: Combating racial discrimination at the workplace*, 1999, p.30 (discussed in Chapter 2)

Swedish and UK Prime Ministers in 1998, discussed in Chapter 8[45]. The extent of this action has not yet been defined. It is worth noting though that the UK law does not interpret affirmative action to include positive discrimination at the point of selection.

9.2.6 Prospects for success

The European Parliament's Opinion is awaited before the Council can act on the Commission's proposals. History has demonstrated that the Parliament has long campaigned for greater protection from race discrimination. The new Parliament is now dominated by the European People's Party and European Democrats, comprising Christian Democrats and centre right parties, including the British Conservatives party. The British Conservative party has not previously been very supportive of EU wide non discrimination legislation. It is reported, however, that there is a *"new buoyancy"* in the Parliament following the ratification of the Amsterdam Treaty in May 1999 as MEP's now have greater involvement in the decision making process. While recognising the limited involvement of Parliament under Article 13 and the need for a great deal of lobbying, the adoption of the race directive is identified as an *"achievable target"* by some MEPs.[46]

The Commission's proposals are ambitious and comprehensive. In many respects the race proposal is similar to "*The New Starting Line*" proposal but the relegation of religion to a lower protective status and failure to adequately tackle the threat from rightwing groups is disappointing and likely to result in further acts of discrimination

[45] Agence Europe No 7361, 11 December 1998, p.8

and violence towards vulnerable members of the EU. However, the omission of religion from the specific race proposal is more likely to result in adoption of at least some of the proposals by the Council.

9.3 Future EU Immigration Controls

A series of EU Presidency migration papers have emerged from the EU following the Amsterdam Treaty. As detailed in Chapters 4 and 5 , the EU's *"closed door"* discussions on migration has been subject to a great deal of criticism by civil and human rights campaigners. A recent report commissioned by the EU Commission claimed that Europe's *"strong rhetoric on human rights is not matched by reality".*[47] and accused the EU of shaping asylum policy to accommodate nationalism and of weakening accepted international standards.

In 1998 a controversial Austrian Presidency paper[48] suggested that the Geneva Convention is out of date and should be *"supplemented, amended or replaced"* as countries could no longer guarantee a *"right"* to asylum but should make a *"political offer"* instead which could be a temporary measure. The Austrian paper criticised the Geneva Convention for raising expectations on the part of refugees and encouraging them to settle permanently in the host country. The paper was condemned by human rights groups as it suggested introducing a system of *"Concentric circles"* to *"replace Fortress Europe"*. The first circle included the EU , the second circle to be made up of

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46 Remarks made by Claude Moraes, at UKREN Conference December 1999, op cit at note 9

47 Human Rights Agenda for the European Union, October 1998, www.iue.it/AEL/Welcome.html

associated states (including Poland, Hungary and Czech Republic), the third circle to include "*transit countries*" which no longer create emigration but do not have tight control on migration (including Bulgaria, Turkey, CIS countries, Ukraine, Egypt and Morocco) and the fourth circle to include countries which cause emigration *"against which the whole range of migration policy measures need to be effective"* (including Iran, China, Sudan, Nigeria and other "black African" countries)

The Austrian paper was disowned by the other EU Member States and a High Level Group on Asylum and Migration was set up in December 1998 with a view to reporting back towards the end of 1999. Despite the controversy surrounding the Austrian paper the German Presidency paper [49] selected 48 of the 116 Austrian proposals to be actioned immediately, including deciding the extent to which the Dublin Convention should be altered to reflect changes at Amsterdam and rapid action against illegal immigrants[50].

The latest paper from the Finish Presidency [51] was considered at the Tampere Summit in October 1999. The proposals include compulsory fingerprinting of all asylum seekers over the age of 13, common criteria for asylum claims and agreement on spreading refugees across member states. At Tampere the Council agreed to act on reports from the High Level Group considering immigration flows and *"positively welcomed"* a common asylum procedures system. Council President Lipponen ruled out a quota

48 *"Strategy paper on migration and asylum policy"* (1.6.98)

49 *"Strategy on migration and migration policy"* (19.1.1999)

50 Statewatch, Volume 9 No. 1, January/February 1999

51 *"Guidelines for a European Migration Strategy"* (1.6.1999)

system for immigrants and proposed that the Council should recognise the need to extend *"stable"* third country nationals rights from *"social, to education, even to take part in local elections"*[52]. The Commission's first immigration proposal since Amsterdam announced in December 1999 seeks to implement objectives outlined at Tampere for a common immigration and integration policy for third country nationals[53]. It includes a proposal to grant rights of family reunification for third country nationals legally resident in the Member States who have a resident permit valid for at least one year. The proposal includes recognised refugees and, if adopted, will form part of EU law and be a positive step forward as Member States are operating widely different rules on family reunification despite efforts to harmonise measures in a Resolution in 1993, as detailed in Chapter 5.2.2 .

Although the proposals from Tampere are far more encouraging than the previous proposals and were generally well received in the European Parliament, some MEPs expressed disappointment that the Council had failed to agree on a single asylum system and called for Parliament to become a *"full partner"* in the process[54]. Criticism has also been levelled at the lack of transparency and openness and "*undemocratic*" nature of the discussions by Statewatch[55].

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52 Agence Europe No. 7574, 16th October, p. 5

53 Proposal for a Council Directive on the right to family reunification, COM (1999) 638 final, see Agence Europe, No 7605 2nd December 1999, p.16

54 See for example, European Parliament's response reported in The Week, 25-29 October 1999,p. 18-22

Commenting on the EU's migration strategy, Peers[56] reflects on how the EU will define itself following Amsterdam. It could adopt a positive stance and become an *"immigration society"* like the US, Canada and Australia, it could attempt to control entry strictly but incorporate a policy of integration or it could aim for tight control and expulsion. Peers opines that the early migration papers emerging from the Council post Amsterdam have not shown any signs of being an immigration society and, although the Union would claim to have adopted the second option and its latest proposals are more encouraging, it has in practice pursued the third option, that of tight control with little or no regard for integration.

9.4 The Case for a Constitution, Bill of Rights, Manifesto, Charter, Convention or Directive

The European Parliament[57] and Commission[58] have pledged their support for some form of catalogue of rights and recognised the need for an integration policy for migrants. The Commite de Sage[59] has also called for incorporation of fundamental civil and social rights, suggesting that a Commission proposal involving the national parliaments could be the way forward. The case for a Constitution, Bill of Rights, Manifesto, Charter, Convention or Directive has been articulated in several quarters as

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55 Statewatch Vol 9 No. 5 September-October 1999, p. 1

56 Peers, S., *Building Fortress Europe: The Development of EU Migration Law* (1998) 35 CMLRev 1235

57 For example, Commission on Institutional Affairs (Rapporteur F. Herman), Second report on the Constitution of the EU A3-0064/94 (European Parliament 1994)

58 For example, Commission report to the Reflection Group (Luxembourg 1995) and Report on the operation of the Treaty of European Union SEC (95) 731 final

59 Comite de Sages, *For a Europe of Civic and Social Rights,* European Commission, 1996

discussed below and is strengthened by the inclusion of Article 13 EC as non discrimination legislation could form part of a coherent EU constitutional framework of rights and obligations providing the impetus for a human rights policy.[60]

The debate as to whether the EU needs a written constitution has been well rehearsed [61]. The EU is not a State and cannot therefore have a constitution in the same sense as nation States, however the EU legal system has in effect constitutionalised the Treaties. The ECJ is identified as playing a major role in this[62]. Some commentators claim that EU already has a constitution, albeit *"...not in the traditional sense of (political) state constitution, but rather as an incomplete and dynamic body of law which protects ordinary European citizens in their economic role as consumers and their social role as workers..."*[63] and that although this may be a *"second best"* concept, a legal framework for a *"European Charter for Citizens"* firmly established in the roots of free movement, as restated by former Article 8a exists[64]. Reich acknowledges though that the Citizens Charter is a charter of *"bits and pieces"*, borrowing Curtin's phrase[65], and that its enforcement is weak.

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60 Alston and Weiler, op cit at Note 1, 681

61 See, for example, Grimm, D. *Does Europe Need a Constitution* (1995) 1 ELJ 282 and Weiler, J. *Does Europe Need a Constitution: Reflection on Deomos, Telos and the German Maastricht Decision* (1995) 1 ELJ 219.

62 See, for example, Mancini, F., *The Making of a Constitution for Europe*, 26 CMLRev (1989) 595-614

63 Reich,N., *A European Constitution for Citizens: Reflections on the Rethinking of Union and Community Law* (1997) 3 ELJ 132

64 ibid p. 162

65 Curtin D., The Constitutional Structure of the Union: A Europe of Bits and Pieces, 30 CMLR 17

The case for a Bill of Rights for all legally resident within the EU has been supported in a number of quarters and it has been argued that as the constitutional character of the EU continues to grow the case for a Bill of Rights becomes *"overwhelming"*[66]. Although other commentators have opined that the climate is not right for a Bill and that it would be counter-productive and difficult to formulate an agreement on the content[67]. A case for a *"Manifesto for Social Europe"* was also put forward during the final stages of Amsterdam. It was argued that a combination of the Charter of the Fundamental Social Rights of Workers with the Maastricht Protocal on Social Policy[68] should be inserted into the TEU to form one constitutional document to *"lay the legal foundations for a dynamic European social constitution; a Social Europe dedicated to the combating of social exclusion and the maintenance of solidarity"*[69] . It is argued that society is threatened by ineffective policies on unemployment, malfunctioning labour markets and inadequate social policy, that social rights should not be restricted to EU nationals and that social citizenship should ensure equal social rights for non-standard and non EU nationals.

An ambitious draft Convention on the admission of Third Country Nationals proposed by the Commission, as discussed in Chapter 5.4, could extend the rights of long term resident third country nationals if support is found in the Council. The Commission had indicated its intention to bring this forward as one of the first measures on

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66 See for example Federal Trust op cit at Note 4

67 *Judging the European Union: judicial accountability and human rights* (1996) Justice, p.15

68 Refer to Chapter 5 for comment of the Charter of the Fundamental Social Rights of Workers

69 Bercusson et al, op cit at Note 3

immigration following the ratification of the Amsterdam Treaty[70]. In response to the Convention, the *"Starting Line"* Group presented a proposal for a draft Directive relating to third country nationals. The Group decided that a Directive was necessary to supplement the Group's revised proposals on race and religion. It states that the draft directive is not intended to create new rights for immigration but *"to consolidate and improve the rights of those 10 million people (residing and working legally) and to facilitate their access to work in the territory of the EU"*[71] and that the rights given to Turkish nationals should be granted to all third country nationals. Articles 2-5 of the draft Directive grants rights of free movement to third country nationals and Article 6-7 the rights of establishment. Rights of family reunion after being legally resident in a member state for one year and being permitted to say for a least a further year are granted in Article 9 and Article 14 and 15 grant rights of family reunion for long term residents. Articles 21-23 deal with social provisions and requires that the same social and tax advantages be granted to long term residents, including access to employment, training trade union, housing, social welfare, education, health care and the provision of goods and services. The draft Directive does not address issues relating to voting rights.

At the end of the German Presidency in June 1999 the Council agreed to draft an *"EU Charter of Fundamental Rights"* and in October 1999 the Council agreed the composition of the body responsible for drawing up the Charter[72]. Statewatch reported

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70 The first measure introduced covers family reunification, see note 53

71 New Starting Line Draft Directive on Third Country Nationals, 1998, p. 34

that it was agreed that the Tampere Council would consider the procedure for the adoption of the Charter with a view to adoption in Helsinki in 1999 or Paris in June 2000[73]. The early draft Charter was criticised for not including any new rights and potentially excluding non Union citizens. Statewatch, for example, referred to the fact that the draft stated *"The Charter should include the fundamental rights that pertain only to the Union's citizens"* which implied that rights for migrants, refugees and asylum seekers would not be included. The status of the Charter has been the cause of debate and there have been calls from some quarters to introduce a binding Charter.[74]

9.5 The rights of Resident Aliens under the ECHR

The recognition of rights for long term residents has been witnessed in the European Court of Human Rights has heightened the debate pertaining to residents. The ECHR has been called upon to pronounce in a number of so called *"social integration"*[75] cases in recent years. Marin and O'Connell[76] argue that the Convention recognises the rights of non-nationals to remain in a country in which they are socially integrated. Although

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72 The group will comprise one representative of each Head of State, a representative of the president of the Commission, sixteen representatives from the Parliament, thirty representatives of national parliaments and agreement was reached to allow observers and invited bodies to give their view

73 Statewatch, May-August 1999, Vol 9 No 3 & 4, p. 2, the Charter was not considered at the Helsinki summit, however, and it is anticipated that it will be dealt with in 2000

74 Duff A., and Voggenhuber, J., co-rapporteurs for the Parliament at a press conference two days before the Tampere Summit, Agence Europe No 7572, 14 October p. 4 and Agence Europe No 7619 20th & 21st December 1999

75 The social integration theses acknowledges the significance of the social context in which people live and that expulsion of an integrated alien, particularly one born in the country from which she/he is being expelled, could force her/him to live in "almost total social exclusion" as they may have never visited their country of nationality, have no family or friends there or even speak the language

the Court has not pronounced this explicitly in its case law it is argued that a "*vocal minority*" has accepted this right.

In the Beldjoudi[77] case, for example, an Algerian national who had been born in France was the subject of a deportation order on criminal grounds. He had always lived in France, the majority of his family was in France and he was married to a French woman. He did not speak Arabic. The ECHR was of the view that deportation would constitute an excessive interference with his right to family life under the European Convention despite the fact that the French judge vociferously objected to the decision as he claimed that the ECHR was granting *"quasi-Frenchman"* status to the Algerian national and this interfered with the sovereign powers of France.

Other minority judgements have supported the extension of rights to integrated aliens. Justice Martens, commenting on the expulsion of integrated aliens, in the Beldjoudi case was of the opinion that *"In a Europe where a second generation of immigrants is already raising children (and where violent xenophobia is increasing to an alarming extent, it is high time to ask ourselves whether ban should not apply equally to integrated aliens...."*[78] Some judges have even been of the opinion that expelling an integrated alien could be a breach of Article 3 of the Convention and considered to be inhuman treatment.

Marin and O'Connel contend that integrated aliens are entitled to political rights and

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76 Marin, R. & O'Connell, R, *The European Convention and the Relative Rights of Resident Aliens*, (1999) 5 ELJ 4-22

77 (1992) 14 EHRR 801

freedoms under the ECHR Article 3 of the First Protocol which refers to the will of "*the people*" rather than citizens , although they admit that case law has not yet affirmed or denied this point. In addition, they argue that States should grant a right to naturalisation to integrated aliens or recognise that rights of residential stability and political action should not be limited to nationals. Although the Convention does not explicitly recognise the right to nationality, indirect recognition via other rights is possible. The refusal to grant nationality to an integrated alien could be deemed to be inhuman and degrading treatment under Article 3, particularly if the person would otherwise be considered stateless.

The European Convention on Human Rights is certainly a rich source of fundamental rights, as witnessed in the "*social integration*" cases and recent sexual orientation cases, discussed in Chapter 6. However, many individuals are unlikely to be in a position to access remedies under the Convention, as outlined in Chapter 2. [79] The UK's Human Rights Act 1998, due to enter into force in October 2000, could well improve access to justice under the ECHR in the UK.

9.6 Divergence/Clash of Rights

[78] ibid, 801,841

[79] As the ECJ has decided that the Community cannot accede to the ECHR unless the Treaty is specifically amended individuals relying on the application of the ECHR would have to pursue their rights in accordance with the incorporation, or otherwise, of the Convention in their Member States. The difficulties associated with the application of ECHR in EU Member States are outlined in Chapter 2. As the UK has recently enacted a Human Rights Act 1998 application of the Convention will be permitted in UK courts in future. This could result in greater rights for resident aliens as they may be inclined to challenge racist discrimination in immigration rules, for example.

The debate surrounding the content of any vehicle for fundamental rights is a difficult one, made all the more difficult in the EU arena due to the different countries and cultures involved. The task of compiling a set of rights agreeable to all Member States could prove impossible. Article 6 TEU (former Article F(2) TEU) incorporates an express obligation to respect the fundamental rights flowing from national constitutions as *"general principles of Community law"* and the ECJ has been called upon to apply principles *common* to the Member States as detailed in Chapter 6. The difficulties posed by establishing only those which are common to all the constitutions is illustrated by the *Hoechst* cases[80] where it was held that when *"there are not inconsiderable divergences between the nature and degree of protection afforded"* the existence of a particular right as a common principle cannot be recognised. The right to life in Ireland, which outlaws abortion, is not recognised in Member States permitting abortion for example, and would not therefore be incorporated into any EU Bill or Charter of Fundamental Rights.

Besselink[81] opines that although general principles are less certain than rights, as general principles are vague and uncertain in scope whereas rights can be precisely defined, a Community Bill of rights would face all the *"problems" of diverging standards* unless the maximum standard from all the national constitutions were included. Referring to Weiler's *"pluralist approach"*, which stresses the autonomous Community standard geared to the needs of the Community but acknowledges

80 Cases 46/87 and 227/88 *Hoechst v Commission* (1989) ECR 2859

81 Besselink, L. F. M., *Entrapped by the Minimum Standard: on Fundamental Rights, Pluralism and Subsidiarity in the European Union,* (1998) 35 CMLRev 629-680

problems related to Member States unwilling to relinquish stricter fundamental rights, Besselink points out that any lowering of national standards would result in anti-European feeling.

An alternative would be the "*substantive maximum standard*" approach which would allow standards to be adapted at national and international level as it is not founded on a fixed set of rights. The court would therefore apply the one which offers the best result in any given case. This would have a major advantage as "*the primacy and uniformity of Community law can be salvaged while simultaneously all fundamental rights are protected*" [82]. Besselink also argues that divergences will arise if a maximum standard is not adopted at Community level as the Community standard will be the common minimum standard, as it is presently.

9.7 Conclusion

The right to free movement of people is essential as it allows individuals an opportunity to improve their economic and social prospects and is an important fundamental human right[83]. The EU presently defines its "*people*" in terms of nationality and international law permits States to determine who can acquire State nationality. However people's sense of belonging and allegiance is not purely bound up with nationality. The reality in the EU is that EU and third country nationals work alongside each other and that

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82 Besselink ibid ,. 641

83 Pearl, D., *Freedom of Movement as A Human Right in English Law*" in Singh, R., *The Future of Human Rights in the UK*, Hart, 1997

many of the third country nationals may have been born in the EU, have adopted that Member States cultures and values, and may never have visited their country of nationality. Despite the fact that at least some of these long term resident third country nationals may have contributed more to the EU, in both financial and social terms, than some EU nationals many third country nationals are treated as second class.

While international law upholds States sovereign right to determine who can enter and leave its territory, this function should be carried out with respect for human and fundamental rights in accordance with international conventions, this is explicitly recognised in Article 63 EC which states that asylum measures must be adopted in accordance with the Geneva Convention. The Fortress Europe mentality is still alive and well in the Council though as witnessed in the early post Amsterdam Presidency migration proposals from Austria which suggested that the Geneva Convention is out of date and needs to be replaced. The latest migration proposals from the Finnish presidency are more forward looking and encouraging than previous papers, however. As the Parliament and the ECJ will have some jurisdiction[84] in this area future EU migration policy will be subject to much tighter scrutiny.

In recent years the EU has been at the centre of controversy surrounding perceived breaches of human rights in connection with its migration policy. There is a need to establish a comprehensive framework and mechanisms for monitoring as the EU does

[84] As indicated in Chapter 8 the ECJ powers are curbed in relation to individual asylum claims

not presently have a coherent human rights policy[85]. Enlargement of the EU will only serve to increase the geographical restrictions for some residents, increase the risk of discrimination towards *"visible minorities"* and increase the calls for greater protection of all legal residents living and working within the EU. The Treaty of Amsterdam emphasises the importance the EU places on the human rights records of other Member States being considered for enlargement and it should therefore get its own house in order before examining the records of other countries.

The increase in racism and xenophobia within the EU suggests that vulnerable visible minorities are in need of protection and assistance to ensure they can move freely across the EU and receive equality of treatment. Presently some countries do little to ensure that its citizens are given adequate protection against racism. Institutional racism exists in many legal systems resulting in discrimination against *"visible minorities"*, particularly legally resident third country nationals.

The Commission has presented a fairly comprehensive package of measures but there is evidence that some Member States may seek to oppose or push for major compromises. Due to the uncertain nature of Article 13, as detailed in Chapter 8, the Commission may live to regret bringing its proposals under Article 13 rather that the social policy provisions suggested by some commentators. Increasing pressure has to be brought to bear on the Council to ensure that appropriate legislation in the area of race is indeed enacted. Member States should not be allowed too much derogation from any legislation

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[85] See Alston and Weiler, op cit at Note 1

eventually introduced as the history of immigration measures, detailed in Chapters 4 and 5, would suggest that this results in complexity and confusion. A code of good practice should eventually be drawn up to supplement any legislation introduced. Once implemented, the EU must monitor the effectiveness of the legislation as there is a need to incorporate positive measures to promote equal opportunities. The revised Article 141(4) appears to have provided fertile ground for such measures.

If increases in racist violence continues to be witnessed across Europe a debate on mechanisms to curb the power and influence of extreme groups will need to be aired. Some countries may not be willing to introduce a ban on such groups and other penalties should therefore be considered, for example, large financial penalties aimed at strangling the political group in question.

Approval of both the framework and race directives will result in protection from race discrimination being more comprehensive than that attached to religion. It seems that some are more equal than others in the EU. The hierarchy of equal treatment provisions has already resulted in gender attracting greater priority than other forms of discrimination. Race could be elevated to second place followed by religion, age, disability and sexual orientation This difference will be difficult to justify and maintain in the long term. A complex hierarchy of workers with different rights has already been allowed to flourish in the EU and should not be furthered complicated.

The positive integration of migrants is vital to the economic success of the Union and the integration of workers is one of the best means of achieving this. Distinctions

between EU nationals and long term residents must be removed as they legitimise discriminatory behaviour. The inequalities are restricting mobility, hampering the competitiveness of the EU and have the potential to lead to further social unrest. As discussed in Chapter 7 arguments for levelling up Citizenship rights and extending them to all legally resident in the EU have been articulated by many commentators, although is has been argued that in the present day a more realistic goal of *"denizenship"*[86] has a greater chance of being adopted by the Council. The debate surrounding the rights of long term residents has been intensified by decisions in the ECHR as detailed in 9.3.5 above A number of countries already grant rights to non-nationals, for example, rights under the French Constitution are granted to all residents and the ECHR recognises non-citizens rights. The Tampere summit presents an optimistic outlook for some form of equitable treatment for third country nationals with President Lipponen calling for a *"more vigorous integration policy"* and a reduction of the gap between rights enjoyed by EU citizens and third country nationals.

The Commission has started to put forward concrete proposals in the area of immigration. The family reunification proposals introduced by the Commission in December 1999 is a move in this direction and the political will of Member States will be put to the test in the near future. The Commission should consider presenting proposals relating to the acquisition of Member State nationality and, subsequently EU Citizenship, through the naturalisation process as there is a view that easier access to nationality is the key to integration. The Belgium Centre for Equality of Opportunity, for example, believe that such entitlement should be the focus of the integration

[86] Peers, S. op cit at note 56

policy[87]. However, the reality in the EU is quite different. As detailed in Chapter 3 the right to nationality is being restricted.

It is becoming increasingly evident that the *"people"* of Europe, particularly long term residents[88], need a clear set of rights. The EU Charter of Fundamental Rights presently being adopted by the European Council is a useful starting point as it will make fundamental rights more visible and will in future be used by the European Court of Justice in interpreting fundamental rights, however, incorporation into the Treaties will send a stronger message.

This thesis has demonstrated that any Charter of fundamental rights needs to extend to all residing within the EU and that all long term residents, subject to agreed qualifying criteria along the lines discussed in Chapter 7, should receive the following minimum rights. The list is not exhaustive:

- all persons are entitled not be discriminated against (on grounds set out in Article 13EC)
- all persons are entitled to equality of opportunity in education, housing and employment
- every child born in the EU shall be entitled to apply for EU citizenship and nationality in accordance with agreed criteria
- every resident should be entitled to apply for naturalisation in accordance with agreed criteria

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87 For an overview of the debate regarding nationality and integration see Commission Report 1995, op cit at Note 24

88 Criteria for LTR status needs to be established along the lines suggested in Chapter 7.6

- all long term residents, subject to agreed qualifying criteria, should be entitled to move freely
- all long term residents, subject to agreed qualifying criteria, should be entitled to vote in national and EP elections
- all long term residents, subject to agreed qualifying criteria, should be entitled to petition the Parliament and Ombudsman
- members of ethnic, religious or national minorities should be entitled to use their own language and practise their own religion and culture
- everyone has the right to seek and be granted asylum in accordance with international conventions

It should also grant rights, such as those proposed by Weiler[89], to make the Union more accountable to its Citizens and residents. This includes ensuring that the entire decision making process of the Community be placed on the Internet as this would allow Citizens and residents to play a more informed role in the EU and result in a more open and accessible European Union which truly does *"belong to its Citizens"* (and all legal residents).

The EU's notion of a *"Citizens Europe"* is out of date in today's global society. The EU must learn to value diversity and utilise its greatest economic resource – its residents. This should be carried out within a coherent human rights framework. As we enter the next Century clear policies on non-discrimination must be enacted and a *Manifesto for the residents of Europe,* along the lines discussed above, should be considered alongside discussions on enlargement at the next IGC. Measures to implement the manifesto must also be agreed otherwise it will be consigned to a meaningless statement of

[89] Weiler, J.H.H.., *"The European Union Belongs to its Citizens: Three Immodest Proposals"* (1997) 22 ELRev 150

intent and rhetoric. If the EU truly intends to deliver the principle of free movement for all its *"people"* and move positively into the next millennium , it will have to recognise the need for major changes, and continual monitoring, to remove the discriminatory barriers for all *"visible minorities"* legally working and residing within the EU. The EU is a key actor[90] in world affairs and it has the ability to influence the lives of millions of people. Its commitment to wiping out discriminatory racist practices must be demonstrated for all to see.

[90] Presently the EU comprises nearly 7% of the world's population and almost as many people as USA and Japan combined. Impending enlargement is set to increase its territory

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