Churches' Committee for Migrants in Europe

Community Competence over Third Country Nationals residing in an EC Member State

by

Antonio CRUZ

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INTRODUCTION

The completion of the Internal Market by the year 1993 and the need felt for cohesive economic and social policies raise questions related to Community action in the fields of immigration, refugees and integration. Moreover, the need is expressed of greater political union and there is a possibility that the EEC will undergo important changes to that effect. The forthcoming European Summit in Maastricht (December 1991) will probably take decisions to that effect. Migration related issues are involved as well because these issues are at the very heart of the concept of European Unity.

Lawfully resident third-country nationals should not be excluded from the move towards a Single European Market. To make this possible the competence of the Community should be extended to matters related to the integration of third country nationals in the Member States of the European Community.

In April 1991, the CCME prepared an internal working document which gave an insight into the complicated division of labour between the Community and the Member States in migration related affairs. At the same time, CCME's members were asked to make a strong plea on the various national levels to extend the competence of the Community to social policies concerning third country nationals.

This Briefing Paper gives a short historical overview of the political developments and of important European Court cases which have had an impact on Community action vis à vis third country nationals.

Jan NIESSEN

Foreword

With migration issues arriving high on the political and social agenda, the debate on Community competence over third country nationals (TCNs) is taking on increasing importance, especially in view of the on-going intergovernmental conferences on European Economic and Monetary and Political Union, the so-called IGC. Those in favour of granting the Community clear competence over at least some areas of migration policies on TCNs see the IGC as the last opportunity of having such competence explicitly spelt out in the EEC Treaty before 1st January 1993.

In fact, the Commission of the EC has been coming under increasing pressure from both within itself and from outside, namely from the European Parliament, and associations and groups concerned with migration and/or refugee policies to reaffirm the competence it already has in these fields. Clarification of such competence has become all the more urgent in view of the apparent failure of Member States, acting outside the Community framework (1), to come to agreement on certain measures related to the lifting of internal borders. As the deadline approaches, the Commission is feeling the need to "recuperate" certain dossiers on migration policies which, for political reasons, it had to abandon in 1988.

What kind of competence already exists is not all that clear and the extent of its competence over TCNs depends on whether we are speaking about those already residing on a permanent basis in one Member State, those on a temporary basis such as students, new arrivals be they asylum seekers or irregular migrants, or potential emigrants to the European Community.

The purpose of this paper is to shed some light on the debate by highlighting not only some of the most relevant articles of the EEC Treaty, as amended by the Single European Act (SEA) of 1986 but also co-operation and/or association agreements entered into by the Community with third countries. We shall also describe how far policies governing the entry and residence of TCNs have been entrusted into the hands of the Commission, specify where Community competence lies in matters of TCNs, point out certain relevant rulings of the European Court of Justice, and mention the initiatives taken by the Council, Commission and Parliament.

The smooth functioning of a Single European Market will require Community legislation against discrimination to protect all residents to avoid the creation of second or even third class citizens. Whether or not the Community can or will be able to legislate in this field depends on the clarification of its competence over TCNs and, of course, the political will of the 12.

Commission's powers on policies governing entry and residence of TCNs

The Commission's White Paper of 14 June 1985, which was approved by the Milan Summit of the European Council in June 1985 without any reserves, specifies certains

areas of immigration policies to be dealt with by Community Directives. Pointing out that "the abolition of checks at internal frontiers will make it much easier for nationals of non-Community countries to move from one Member State to another", the Commission made known its intention to "propose in 1988 at the latest coordination of the rules on residence, entry and access to employment, applicable to nationals of non-Community countries". It felt that this should, at the same time, be accompanied by proposed measures on the co-ordination of rules concerning the right of asylum and the status of refugees. In addition, it pointed to the need of developing, also in 1988, a Community policy on visas.

According to the timetable given, after the Council was expected to adopt these proposals by 1990. As it turned out, they never materialised, at least not officially, as a number of Member States called into question the Community's competence in such areas. For political and pragmatic reasons, the Commission backed down and the European Parliament has on several occasions voiced very strong criticisms on this, calling on the Commission "not to be party to the squandering of Community powers but to be mindful of its role as guardian of the Treaties". (2)

The transfer of responsibility in these areas from the Commission to intergovernmental structures, in particular the ad hoc Working Group Immigration (3), was based on a Political Declaration by the Governments of the Member States, annexed to the SEA on the free movement of persons, and reads as follows:

"In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. (...)"

Briefly, this transfer of competence has meant secret, but legitimate, discussions and negotiations by Member States whose decisions are accountable to no supranational body, whether judicial or otherwise, and the European Parliament does not have to be consulted. National parliamentarians have, of course, the right to question their executive on such negotiations, but they must be aware that such negotiations are going on. Intergovernmental activities come under international public law, thus implying no competence whatsoever on the part of the European Court of Justice. Moreover, the cabinets of the governments concerned have been (again quite legitimately) under no obligations to inform their own parliaments of such negotiations.

When examined carefully, this Political Declaration apparently contradicts a Declaration on Article 8a of the EEC Treaty, also annexed to the SEA. According to this latter Declaration, the Conference of the Representatives of the Governments of the Member States convened at Luxembourg on 9 September 1985 "wishes by means of the provisions in Article 8a to express it firm political will to take before 1 January 1993 the decisions necessary to complete the internal market defined in those provisions, and more particularly the decisions necessary to implement the Commission's programme described in the White Paper on the Internal Market. (...)"

Interestingly enough, this latter Declaration was adopted by the Conference who, in doing so, accepted the powers of the Community in the areas dealt with by the White Paper, including those related to TCNs as well as asylum seekers. On the other hand, the Political Declaration was only noted by the Conference and clearly states that such co-operation by Member States will be carried out "without prejudice to the powers of the Community", an explicit recognition of Community powers in these areas. However, matters have been further complicated as a result of the adoption by this same Conference of a General Declaration on Articles 13 to 19 of the SEA (on measures related to the setting up of the Internal Market, including matters of free movement and the removal of internal frontiers). "Nothing in these provisions", says the General Declaration, "shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries (...)." Nevertheless, it does not mention measures concerning third country residents.

The question that can be raised here is whether the Commission, as the guardian of the Treaties, by handing over matters of TCNs and asylum seekers to intergovernmental structures instead of abiding by its own programme established in the White Paper, may have breached several articles of the EEC Treaty, namely Articles 3(c), 8a, 100, 155 and/or 235.

Article 155 is of particular relevance here as it outlines the tasks to be assumed by the Commission "to ensure the proper functioning and development of the common market" and "that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied". It may "formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary" and "have its own power of decision and participate in the shaping of measures provided for in this Treaty".

Whether or not there is breach of the aforementioned articles depends largely on the interpretation of Article 8a which describes the internal market as "an area without internal frontiers in which the free movement of goods, persons and capital is ensured in accordance with the provisions of this Treaty". Contrary to what most people believe, this provision, introduced by the SEA, is not really new as it merely reiterates an undertaking made in the EEC Treaty to abolish "as between Member States, (...) obstacles to freedom of movement for persons, services and capital" [Article 3(c)].

At their meeting on 4 December 1990, the Council and the Ministers of Foreign Affairs of the 12 Member States meeting within the Council decided that the time had come to request that a study, involving the Commission, be carried out in order to define more clearly the scope of Article 8a: are "persons" to be understood as only EC nationals or do they include TCNs with permanent resident status as well?

The interpretation given to Article 8a will also define the scope of Article 3(h) which calls for "the approximation of the laws of Member States to the extent required for the proper functioning of the common market".

One argument is that the provisions of the EEC Treaty only applies to nationals of the Member States as no explicit mention is made of TCNs. Another is that in a regional area of States without internal frontiers, the free movement of persons must necessarily apply to all residents, whether they be EC nationals or not. Apart from the moral arguments against discriminating between these two categories, there is the practical question of how to ensure that non-EC residents do not cross over to another Member State in the absence of internal borders.

As far as Article 48 of the EEC Treaty on the free movement of workers is concerned, the Court of Justice has already ruled that it applies "only to workers of Member States" in a case concerning claims for family allowances by a US citizen married to a British national. (4)

The Commission's view on this is to draw a line between the right of work and/or residence and the right to move freely. On the right of work or residence, it believes that "the Treaty is unambiguous". It supports granting TCNs the right to move freely between Member States, but underlines that such a right "would carry with it no right of residence or work throughout the Community even for those non-Community citizens who have been granted such a right in a particular Member State". (5)

Third-country residents in the European Community - where does Community competence lie?

According to the official statistics, there are some eight million TCNs residing in the Member States of the European Community, of whom about two million are from industrialised countries. Clandestine migrants who, by definition, cannot be counted, and ethnic minorities who have acquired the citizenship of their country of residence are not included in this figure. Whilst it cannot be denied that the latter category are often victims of the same forms of discrimination as those suffered by third country residents originating from Third World countries, they are presumed to have exactly the same rights as EC nationals and the same degree of protection under EC legislation. Their situation therefore falls outside the scope of this paper, except where Community action against racism and discrimination is concerned.

The overwhelming majority of TCNs residing in one EC State arrived in the sixties and seventies, and just as there was no co-ordination whatsoever among the EC States to regulate their entry, there was also no consultation among them to declare a halt to their recruitment in 1974/75. In fact, it was not until March 1985, 17 years after the Council issued its Regulation N 1612/68 (6) setting out the rules on the free movement for workers within the Community, that the term "Community Policy on Migration" first appeared when the Commission communicated its Guidelines on this matter to the Council. (7) This was followed by the controversial Commission Decision of 8 July 1985 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries which was challenged in the Court of Justice by five Member States: Denmark, the FRG, France, the Netherlands and the UK. (8)

This Decision was based on Article 118 of the EEC Treaty which confers on the Commission "the task of promoting close cooperation between Member States in the social field, particularly in matters relating to: employment; labour law and working conditions; basic and advanced vocational training; social security (...)" and authorises it to "act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organizations. (...)."

The Court annuled the Decision on 9 July 1987 on the grounds that the Commission lacked competence "to extend (...) the scope of the communication and consultation procedure to cover matters relating to the cultural integration of workers from non-member States and members of their families and to provide (...) that the objective of the consultation is to ensure that the national draft measures and agreements are in conformity with Community policies and actions."

Despite the annulment, the ruling has paradoxically served to confirm Community competence in certain matters of TCNs since the refutation by the Court of several arguments put forward by the Member States actually strengthens the powers of the Commission.

In rejecting the argument by the French Government that migration policy was not part of social policy and when related to non-member countries it should be under the exclusive responsibility of the Member States, the Court ruled that "The promotion of the integration into the workforce of workers from non-member countries must be held to be within the social field within the meaning of Article 118, in so far as it is linked to employment. This also applies to their integration into society (...) inasmuch as the draft measures in question are those connected with problems relating to employment and working conditions (...)." "Moreover", ruled the Court, "migration policy is capable of falling within the social field within the meaning of Article 118 only to the extent to which it concerns the situation of workers from non-member countries as regards their impact on the Community employment market and on working conditions."

The Court also rejected the argument put forward by France and the FRG that obliging Member States to give prior notification to the Commission of their migration policies could jeopardize possible requirements of secrecy or confidentiality.

The most important part of this ruling is probably the decision of the Court to go against the position of a number of Member States which had been, since the early sixties, intent on giving the narrowest possible interpretation of Article 118, thereby very much limiting the powers of the Commission. Making use of the principle of implied powers, the Court ruled that "where an article of the EEC Treaty - in this case Article 118 - confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out that task". Since this Article confers upon the Commission the task to arrange consultations, it "must be interpreted as conferring on the Commission all the powers which are necessary" for their realisation.

The principle of implied powers could also be applied in a number of other Articles of the EEC Treaty by the Commission in order to reaffirm its competence on matters related to the dismantling of internal borders, including those affecting TNCs, that are prerequisites to the realisation of the objectives of the SEA. However, in the absence of political will by the Member States, such an approach would have carried the risk of provoking an important political crisis.

Member States have affirmed on a number of occasions their desire to co-operate in migration policy related to TCNs:

On the point of whether migration policy vis-à-vis TCNs could be included in the social field the Court rallied to the position of the European Parliament which supported the Commission and pointed out that "the desire of Member States to cooperate over migration policy in relation to non-member countries (...) was emphasized in the final communiqués issued by the Heads of State or Government at the meetings held at The Hague in 1969 and in Paris in 1972, as well as in the resolutions of 1974, 1976, 1980 and 1985".

As early as 21 January 1974, the Council, in its Resolution concerning a social action programme (9), expressed "the political will", i.a. "to achieve equality of treatment for Community and non-Community workers and members of their families in respect of living and working conditions, wages and economic rights, taking into account the Community provisions in force" and "to promote consultation on immigration policies vis-à-vis third countries". Moreover, included in the priorities among the actions referred to in this Resolution, is the "establishment of an action programme for migrant workers who are nationals of Member States or third countries". This action programme never materialised.

Two years later, in its Resolution of 8 February 1976 on an action programme for migrant workers and members of their families (10), the Council recognised as "necessary to improve the circumstances of workers who are nationals of third countries and members of their families who are allowed into the Member States, by aiming at equality between their living and working conditions, wages and economic rights and those of workers who are nationals of the Member States and members of their families". Moreover, this Resolution again considered it necessary to "promote consultation on migration policies vis-à-vis third countries."

Community competence in regulating entry from Third countries into the Community labour market is clearly called for in the Council Resolution of 27 June 1980 on guidelines for a Community labour market policy. (11) "Integration of the Community labour market" says the Resolution, "should be fostered, within the framework of free movement of labour within the Community (...) taking account of the employment priority to be afforded to workers who are nationals of Member States and of the need to contain access to the Community labour market by labour from third countries, and appropriate consultation on migration policies vis-à-vis third countries (...)."

The Council Resolution of 16 July 1985 on guidelines for a Community policy on migration goes even further. It recalls, i.a., both the final communiqué of the aforementioned Paris summit in 1974 that advocates "harmonization in stages of legislation on foreigners" and the Council's conclusions of 22 November 1979, calling on the Commission "to take the necessary steps to foster cooperation between the Member States in the field of labour market policy". Moreover, in recognising for the first time that "the presence of population groups from third countries is becoming more and more permanent", the Council believes that "the development of a Community policy on incorporation, integration and participation in society should also support the efforts made towards a progressive consolidation of those groups", and calls for "much closer consultation and cooperation (...) at Community level in the implementation of national migration policies vis-à-vis third countries". The notion of a Community policy on integration of TCNs thus came into being with this 1985 Council Resolution.

On the other hand, the Council was careful to add that "matters relating to the access, residence and employment of migrant workers from third countries fall under the jurisdiction of the governments of the Member State" but that such jurisdiction is "without prejudice to Community agreements concluded with third countries."

EC Agreements with some third countries grant some forms of protection against discrimination

Now it is precisely because of such agreements that the Member States may finally have to put aside their "suspicious and uncompromising attitude" (12). As we have seen the Member States have unanimously approved a number of resolutions and declarations on the desirability of co-operation and consulation among themselves on migration policy vis-à-vis third countries, but when the Commission took the initiative of translating their expressed wishes into action they attacked the move saying that the Commission had overstepped its bounds of competence.

The Community has signed a number of co-operation and association agreements with third country States, namely Turkey, Yugoslavia, and three Maghreb countries, Algeria, Morocco and Tunisia. The most far-reaching one is the 1963 Association Agreement with Turkey. According to Article 12, which forms part of Chapter 3 dealing with other economic provisions, the contracting parties agree to be guided by Articles 48, 49 and 50 of the EEC Treaty for the purpose of progressively securing freedom of movement for workers between them.

This agreement was followed by an Additional Protocol, signed on 23 November 1970 to fix the conditions, arrangements and time-table for implementing the transitional stage (in view of Turkey's entry into the EEC).(13) Its Article 36 provides that freedom of movement for workers between Members States of the Community and Turkey is to be granted "by progressive stages" in accordance with the principles set out in Article 12 of the 1963 Association Agreement at the latest by 1st January 1986, and that the Council of Association (14) is to decide on the rules necessary to that end. However, Article 38 gives the Council of Association "power to review all questions arising in connection with the geographical and occupational mobility of workers of Turkish

nationality and to make recommendations to the Member States to that end". On the other hand, Article 41 contains an express standstill clause concerning the introduction of new restrictions on the freedom of establishment and the freedom to provide services.

With regards to free movement of workers, two decisions of the Council of Association followed: Decision No. 2/76 of 20 December 1976 on the implementation of the afore-mentioned Article 12 of the Association Agreement in which the Community States and Turkey accord each other priority as regards access by their workers to their respective employment markets, and Decision No. 1/80 of 19 September 1980 on consolidating the legal position of Turkish workers already belonging to the labour force in a Member State and includes an express standstill clause (Article 13) concerning the introduction of new restrictions on the conditions of access to employment applicable to Turkish workers.

The afore-mentioned provisions were put to the test in 1985 by a Turkish woman, Mrs DEMIREL, who married in August 1981 a Turkish national residing in the FRG since September 1979 in the Land (State) of Baden-Württemberg. At that time, foreigners had to have 'only' three years' residence before their spouse could join them. As of 1st August 1984, the period of residence was increased to eight years.

In March 1984, Mrs DELMIREL went with her son to the FRG on a tourist visa valid until June 1984. She remained and gave birth to a second child. On the grounds that her husband had not been residing in the FRG for eight years, the city of Schwäbisch Gmünd where they were residing ordered her in May 1985 to leave the country. Her objection against the deportation order was rejected in July 1985 and, following her appeal in August 1985 to the Administrative Tribunal (Verwaltungsgericht) of Stuttgart, her case was brought before the European Court (15).

In its ruling, the Court dismissed the written observations put forward by the FRG and the UK, calling into question the application of Article 177 of the EEC Treaty on the provisions of the 1963 Agreement and the 1970 Additional Protocol, i.e. they did not consider that the Court was competent to interpret these provisions. The Court recalled an earlier case (16) in which it ruled that "an agreement concluded by the Council under Articles 228 and 238 of the Treaty is, as far as the Community is concerned, an act of one of the institutions of the Community within the meaning of Article 177 (1) (b), and, as from its entry into force, the provisions of such an agreement form an integral part of the Community legal system".

However, it ruled that Article 12 of the 1963 Association Agreement and Article 36 of the 1970 Additional Protocol "do not constitute rules of Community law which are directly applicable in the internal legal order of the Member States" because "they essentially serve to set out a programme and are not sufficiently precise and unconditional to be capable of governing directly the movement of workers".

Moreover, the argument raised by the plaintiff that increasing the period of residence requirement for family reunion from three to eight years was in violation of the standstill clause of Decision No. 1/80 was also rejected. The standstill clause in this decision only

concerns the introduction of new restrictions on the conditions of access to employment applicable to Turkish workers and makes no mention of the right of family reunion.

The Court also took into consideration Article 8 (respect for family life) of the European Convention on Human Rights (ECHR), but expressed the opinion that this Convention "does not impose on the contracting States a general obligation to respect a married couple's choice of the country of their matrimonial residence and unconditionally to allow foreign spouses to settle in that country". (17)

In 1989 another case was brought before the court concerning the scope of application of the Decisions of the Association Council. In this case, lodged by a Turkish national, Mr SEVINCE (18), the Court ruled again that it was competent to interpret the provisions of these Decisions, namely Articles 2 (1) (b) and 7 of Decision no. 2/76 and Articles 6 (1) and 13 of Decision no. 1/80 according to which a Turkish national regularly employed for five years, and then reduced to four years, in a Community State acquires the right to take up any paid employment of his/her choice. According to the Court, these provisions, including the standstill clause in Article 13 of Decision No. 1/80, fulfilled the criteria of being "clear, precise and unconditional" and "have direct effect in the Member States of the European Community".

By virtue of the Community's co-operation agreements with three North African countries and Yugoslavia, the Court has also recognised a certain degree of Community competence with regards to the nationals of these countries residing in one EC State. This was in the ruling on the case of the Office National de l'Emploi Belge v Bahia Kziber (19) the name of a Moroccan woman who filed a complaint against the Belgian State for excluding her from unemployment benefits because of her nationality.

In Belgium, school-leavers are entitled to unemployment benefits if, after a prescribed period, they are unable to find a job. Youths holding the nationality of mainly two countries, Morocco and Tunisia, had been denied this right between 1976 and 1989 on the grounds that no such provision is contained in the bilateral agreements between Belgium and their country of origin.

Ms KZIBER referred to the 1976 Co-operation Agreement between the EEC and Morocco, in particular Article 41 which stipulates that "workers of Moroccan nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed."

Although not relevant in this particular case, Article 40 is equally significant. It states: "The treatment accorded to each Member State to workers of Moroccan nationality employed in its territory shall be free from any discrimination based on nationality, as regards working conditions or remuneration, in relation to its own nationals".

The Court decided that such co-operation agreements between the EEC and third countries were binding upon each and every Member State and that Belgium, in excluding Moroccans from a particular form of social security benefits, had violated

Article 41. Moroccans and Tunisians are no longer excluded from such benefits. Even before this ruling, two royal decrees published in the Belgian Official Journal (Moniteur belge) on 23 August 1989 extended the right to unemployment benefits for school leavers to Moroccan and Tunisian nationals as of 1st January 1989.

Nevertheless, the consequences and implications of this ruling are quite far reaching as almost identical articles are contained in the Community agreements with Algeria, Tunisia, Turkey and Yugoslavia. Nationals of these countries make up a large majority of TCNs legally residing in a Community Member State. By virtue of such agreements, the Community has the competence to ensure that these TCNs are not discriminated on the basis of the nationality in the fields of social security, working conditions and remuneration.

Similar provisions are also contained in Annex VI of the IV Lomé Convention concerning a Joint Declaration on workers who are nationals of one of the contracting parties, residing legally on the territory of a (Community) Member State or an ACP State (20). So far there are 69 ACP States which are party to this Convention

Ironically, as a result of the Court's ruling in the Kziber's case, the Community is most reluctant to include similar provisions of non-discrimination in the draft association or co-operation agreements currently being negotiated with the former Communist States in Eastern and Central Europe, namely Poland, Hungary and Czechoslovakia.

Instruments to combat discrimination against third country nationals

As a follow up to the first Committee of Inquiry into the Rise of Fascism and Racism in Europe, set up on 25 October 1984, a Joint Declaration against Racism and Xenophobia was solemnly signed on 11 June 1986 by the European Parliament, the Council, the Representatives of the Member States meeting within the Council, and the Commission.

The signatories, inter alia, "vigorously condemn all forms of intolerance, hostility and use of force against persons or groups of persons on the grounds of racial, religious, cultural, social or national differences; affirm their resolve to protect the individuality and dignity of every member of society and to reject any form of segregation of foreigners; (and) look upon it as indispensable that all necessary steps be taken to guarantee that this joint resolve is carried out."

Hailed as a significant step forward in the combat against racism and discrimination, the European Parliament has made repeated reference to this Joint Declaration when requesting that there be follow-ups to combat the upsurge of such problems. The European Parliament's expectations that there be Community action against racism and xenophobia were clearly dashed when on 14 June 1988 the then President-in-Office of the Council, Mrs ADAM-SCHWAETZER, said with reference to the Joint Declaration that it was "not a question of recommendations that have been put to the various Member States: it is a declaration". (21)

The other 'major' initiative at Community level to combat racism and xenophobia is the Council's resolution which was adopted on 29 May 1990 (22) after years of procrastinations, 'bargaining' and negotiations, first within the Commission and then between the Commission and the representatives of Member States meeting within Council. It is believed that had it not been for the particularly vile and morbid desecration of the Jewish cemetery in Carpentras in France on 9/10 May 1990 which brought reactions from even outside Europe, the Social Affairs Council might have taken even longer to adopt the timid, and by then very much watered-down resolution.

This resolution, in its draft form, submitted to the Council by the Commission on 29 June 1988 (23) was itself "merely a programme - almost just a prospectus outlining what the Council could do on this question". (24) In the opinion of the Committee on Legal Affairs and Citizens' Rights of the European Parliament, it "does not introduce any significant new element compared with the recommendations in the report of the Parliament's Committee of Inquiry and limits itself to repeating most of these." (25) Moreover, it contains no legislative text, nor any mention of Articles 220 and 235 as the legal base. (26)

Defending the Commission's position before Parliament on 13 February 1989, Commissioner V. PAPANDREOU pointed to "serious and well-founded doubts (...) regarding the Commission's competence to institute binding action in this field." (27) The draft resolution was therefore no more than a declaration of good intentions. Despite this, the text was heavily diluted and some of the more meaningful 'intentions' were suppressed.

The request for the "urgent introduction of a preventive education and information policy to promote intercultural understanding and a clear and objective appreciation of the situation of migrant workers" was suppressed, and so was the mention of racism and xenophobia as constituting an obstacle to the free movement of persons within the Community.

In the final text adopted by the Council, Community States are no longer "invited" to collaborate with the Commission "to produce a report every three years assessing the position as regards the integration of migrant communities", and the "Commission's intention to submit a report on the application of this resolution within a period of three years from the date of its adoption, having assembled the necessary information from the Member States" also had to be abandoned.

In addition, a declaration is annexed to the resolution, specifying that its implementation may not lead to an enlargement of the competences of the European institutions as defined by the treaties.

Besides, in order to overcome the opposition of the UK delegation, the representatives of the 11 other Member States agreed to delete any reference in the text to TCNs legally residing in the Community. Pointing out that the adopted text no longer resembled its draft proposals, the Commission withdrew and disassociated itself from the resolution.

Given the ongoing hostility against any extension of Community competence to combat racism and discrimination, a step by step approach seems to be the only viable alternative, and can be achieved via the ECHR, the International Convenant on Civil and Political Rights and/or the International Convention on the Elimination of All Forms of Racial Discrimination.

On 31 October 1990 the Commission adopted a communication to the Council seeking its approval for an application for the Community to accede to the ECHR and authority to negotiate the terms of accession. This follows the preamble of the SEA in which the Member States expressed their determination "to work together to promote democracy on the basis of fundamental rights recognized in the constitutions and laws of the Member States, in the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice" and "to improve the economic and social situation by extending common policies and pursuing new objectives (...)."

In its Communication, the Commission rightly points out that at present although all legal acts of the Member States are subject to scrutiny as regards their implications for human rights by the Commission and Court of Human Rights set up by the 1950 European Convention, those of the Community are not. As a result, the Community enjoys some sort of "immunity" which could well be prejudicial to the rights of its citizens, especially in the fields of competition and free movement of workers.

Once the Community accedes to this Convention, TCNs in the Community will come under some legal protection by virtue of its Article 14 which guarantees the rights and freedoms provided by this Convention "without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin", etc. Whilst it is true that these rights and freedoms are limited to the most fundamental ones, much greater protection against discrimination (especially between Community citizens and TCNs) is provided by the additional protocols to which, it is hoped, the Community will eventually also accede. For example, Article 3 of Protocol No. 4 provides for the freedom of movement of persons whereas Article 1 of Protocol No. 7 guarantees procedural rights of aliens.

Another international instrument which is rather new in that it was approved by the UN General Assembly on 18 December 1990 is the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (28). Under Article 7, Contracting States undertake "to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality (...)", etc. It must be pointed out, however, that according to its Article 86, this Convention is "open for accession by any State" and the Community is not (yet?) a State.

Conclusions

The debate over the Community competence in these fields is really quite irrelevant when account is taken of the fact that without the approval, co-operation and political will of the Member States any attempts to assert such competence is condemned to failure. EC States will merely pursue their own separate policies on immigration and TCNs in accordance with their own interests.

Like any other sovereign nation the Community States have shown great reluctance to grant competence over foreign nationals to a supranational body, even when it concerns EC nationals. This can be seen by the large number of cases on the rights of EC nationals brought before the Court of Justice since the signing of the Treaty of Rome in 1957.

On the other hand, it would be against economic rationality to have a Single European market with 12 different policies towards non-EC residents, limiting their labour mobility to within the territory of one single Member State and requiring them to apply for entry visas and work permits for other Member States. (29)
This would result in the inefficient use of manpower and would give rise to problems such as the case of firms having to provide services or operating in two or more Member States. This would, moreover, aggravate the discrimination between Community and non-Community nationals, thus reinforcing the already tarnished image of a Community with second or even third class citizens which is contradictory to the democratic values which Member States purport to uphold.

Equally disturbing is the continued absence of a co-ordinated and harmonised Community policy towards TCNs despite the political will to do so expressed by the Council. There used to be a lack of political will at the national level, not to mention reluctance, to elaborate and carry out integration policies in favour of the immigrant communities, based on the irrealistic assumption that such groups would return to their 'country of origin' one day. This is no longer the case today as all Member States concerned now acknowledge that voluntary return is, and is likely to remain, insignificant.

A series of well-formulated arguments in favour of a Community approach to non-EC residents is contained in a report of experts drawn up on behalf of the Commission at the request of the European Council of Strasbourg on 8-9 December 1989. (30) Most Member States are apparently ready to accept Community legislation regarding TCNs in certain specific areas (31), but they are apprehensive that in granting the Community some powers, albeit very limited, over TCNs they may be setting a precedent and thereby exposing themselves to future 'encroachment' of the Community institutions' authority.

Ironically, some Member States (eg. the FRG, France, Italy, etc.) have recently become more in favour of European or Community legislation in the field of immigration and asylum matters not only as this might act as a shield against criticisms from national MPs and NGO's, but also this may provide a solution to their dilemma on such issues. In the FRG a harmonised European asylum policy will be the (ideal) solution to the long-running debate on whether to amend the Constitutional right of asylum or not, whereas in Italy the government is known to favour a Community on immigration quotas for certain branches of industries.

There seems to be much less opposition among most Member States in accepting Community legislation in matters of integrating TCNs. The main difficulty is how to mitigate the Member States' fear that allowing for Community competence in this area will not lead to further erosion of their sovereign right to decide on policies governing foreign nationals.

The Commission is believed to be trying to obtain Member States' approval of allowing certain categories of TCNs residing in one Member State to seek employment in another. Included in the proposal are refugees (32), those living near an internal border and those whose firms operate in two or more Community States and have to be transferred to another Member State for reasons of reorganisation or of providing services elsewhere. It is also believed to be ready to take the initiative of proposing a Community instrument to deal with the question of granting TCNs the right of free movement (without the right of establishment and residence in another Member State) as well as Community guidelines on the conditions of short-term working contracts for potential migrant workers, in particular those from the former Communist countries in Eastern and Central Europe.

The matter of the Community power to legislate against racism and discrimination is much more delicate and, under the present climate of rather negative public opinion against foreigners and the expansion of xenophobic extreme-right movements in Europe, any initiative in this direction will probably be clouded by political polemics, sensation and controversy, doing much more harm than good.

At the present stage, the most appropriate line of action is to encourage and support the request by the Petitions Committee of the European Parliament for more staff and financial resources to process and examine complaints of ,i.a., discrimination. An alternative proposal put forward by the Luxembourg presidency in March 1991 for the setting up of a European Ombudsman may give rise to substantial delays as it would take time to set up a new structure and agree to its mandate.

The Petitions Committee, on the other hand, already exists and has had years of experience in this field. The Luxembourg presidency proposed that the right to address a complaint to a 'European Ombudsman' be not limited to Community nationals. It may be exercised by "natural or legal persons residing or having their headquarters in a Member States". This same principle may be transposed to the Petitions Committee.

The agenda of the Dutch presidency during the second half of 1991 is a particularly heavy one, all the more since the new Union Treaty is scheduled to be signed in December. One major decision taken on 29 June 1991 by the European Council in Luxembourg was to instruct the IGC to examine further German proposals on the harmonisation of Member States' policies on asylum, immigration and aliens "with a view to revision of the Union Treaty". According to the German proposals "formal and actual harmonization" of such policies of Member States should take place at the latest by 31 December 1993. All this calls for urgent co-ordinated action of all organisations

and groups concerned to ensure that these processes of harmonisation be given adequate and substantial guidance in the right direction.

Brussels, 1st September 1991

Notes:

(1) In its Opinion of 21 October 1990 on Political Union (CM-60-90-200-EN-C) the Commission "notes that the intergovernmental method, which it supported, has failed to produce any meaninful results".
(2) Resolution on the free movement of persons in in the Internal Market, approved by the European Parliament on 15 March 1990.
(3) This group was set up under the UK presidency in the latter half of 1986 - see: A. CRUZ (1990): "An Insight into Schengen, Trevi, and other European Intergovernmental Bodies", CCME Briefing Paper, No. 1, Brussels.
(4) Case 238/83 (1984); ruling on 5.7.84.
(5) Commission of the EC: "Completing the Internal Market: An Area without Internal Frontiers", Progress Report required by Article 8b of the Treaty, Brussels, 23 November 1990, COM (90) 552 final.
(6) OJ of the EC, No. L 257/19.10.68
(7) Doc. COM (85) 48 final, published in the Bulletin of the EC, Supplement 9/85
(8) Cases 281, 283, 284, 285 and 287/85; ruling on 9.7.87
(9) OJ of the EC, No. C 13/3, 12.2.74
(10) OJ of the EC, No. C 34/2, 14.2.76
(11) OJ of the EC, No. C 168/1, 8.7.80
(12) A critical remark made by the Advocate General MANCHINI in his opinion of31.3.87 on the case concerning the 5 Member States" complaint against what they perceived to be the Commission's overstepping of its powers on the basis of Article 118 of the EEC Treaty.
(13) OJ of the EC, No. C 113, 1973
14. The Council of Association, set up by virtue of Articles 22 and 23 of the 1963 Association Agreement, consists of members of the Governments of the Member States and members of the Council and Commission of the Community on the one hand and members of the Turkish Government on the other. It acts unanimously and has the power to take the decisions necessary in order to attain the objectives of the Agreement.
(15) Case 12/86; ruling on 30.9.87
(16) Case 181/73; ruling on 30.4.74
(17) cf. Abdulaziz Case (9214/80) of the European Court of Human Rights. Ruling on 28.5.85
(18) Case C 192/89; ruling on 20.9.90
(19) Case C 18/90; ruling on 31.1.91
(20) However, the weakness of such provisions for ACP nationals lies in the fact that they are not an integral part of the Convention and appear only as an annex in the form of a Joint Declaration. Consequently, they are not binding upon each and every Member State.
(21) Debates of the European Parliament, No. 2-366/66, 14.6.88
(22) OJ of the EC, No. C 157/1, 27.6.90
(23) Proposal for a Council Resolution on the fight against racism and xenophobia [COM(88) 318 final] in OJ 88/C 214/12of 16.8.88.
(24) Comment made by the Spanish Socialist MEP, Mr M. MEDINA ORTEGA in the debates of the European Parliament, No. 2-374/18 of 13.2.89
(25) Explanatory Statement of the Report of the European Parliament's Committee on Legal Affairs and Citizens' Rights (Doc. A2-0265/88)

(26) Article 20 states: "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: - the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals (...)". Article 235 may be used as a legal base for the extension of Community jurisdiction over matters of racism and discrimination and includes the obligation to consult the European Parliament.
(27) Debates of the European Parliament, No. 2-374/20, 13.2.89
(28) See: "Proclaiming Migrants Rights - The New International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families", Briefing Paper No. 3, Churches' Committee for Migrant Workers in Europe (CCME), Brussels.
(29) The draft convention on all aspects of external border controls, to be signed under the Dutch presidency this year, is believed to include a provision allowing for free movement of TNC residing in a Member State, without the right of employment or establishment.
(30) "Policies on Immigration and the Social Integration of Migrants in the European Community", Commission of the EC, SEC(90) 1813 final, 28 September 1990.
(31) In a joint letter dated December 6, 1990, Chancellor KOHL of the FRG and President MITTERRAND of France expressed the opinion that "Certain questions presently dealt with within an intergovernmental framework could be incorporated into the ambit of the Union (Treaty): immigration, visa policies, right of asylum (...). The setting up of a Council of Ministers of the Interior and of Justice could be envisaged."
(32) Although in adopting a Regulation and a Directive on free movement the representatives of Member States meeting within the Council declared on 25 March 1964 the need to examine the situation of UN Convention refugees residing in one Member State and wishing to take up employment in another in view of granting them the most favourable treatment possible, four years later the Council refused to include refugees and stateless persons within the scope of application of Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community. In its prior Opinion, the Economic and Social Committee had urged the Council to do so. So far in EC legislation, refugees and stateless persons are only covered by Regulation 1408/71 (amended by 1390/81) on the application of Social Security schemes to employed persons and their families moving within the Community.

Churches Committee for Migrants in Europe

General Secretary: Jan Niessen

174, rue Joseph II
B-1040 Bruxelles
Tel.: 32 (2) 230.20.11 - Fax: 32 (2) 231.14.13

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