

PART II

Differentiation from the Single European Act to the Failed Constitutional Treaty

Part I has demonstrated the importance of migration for the Community project of post-war growth as the main reason behind the attribution of rights to migrants. Most importantly, the analysis unveiled an aligned approach on the part of the Community institutions regarding the attribution of rights to all migrants, shaped by an understanding that both Community and TCN migrants contributed with their labour to the development of the Member States, and because of this they were to enjoy equal treatment rights. The balancing of economic and social considerations behind the regulation of migration at that time was explicit, uniform, and clear-cut. Sustainability did not exist as concept for the greater part of the period examined. However, economic and social considerations driving the regulation of migration are identical to what the economic and social pillars of sustainability would demand, namely pursuing economic and social development by the regulation of migration.

During the period examined in this part, the approach to EU and TCN migrants was differentiated. The political ambition behind the transformation of the EU framework after the Single European Act framed an institutional discourse that emphasized the special status of EU migrants as EU citizens, and the lesser status of TCN migrants, whose status and rights were left in the realm of intergovernmental cooperation. However, a closer investigation of archival material and case-law undertaken in this part proves that the need to balance the economic and social objectives of the Treaties continued to appear and condition the rights of all migrants. Essentially this part shows that economic and social sustainability objectives continued to exist as the end to be served by the regulation of migration, even when the prevalent institutional discourse highlighted different considerations. Adding another building block to the historical investigation, this part demonstrates that while the EU sustainable migration objective is a recent one, its underlying

considerations have constantly found their way in EU secondary law and case-law.

The late 1980s and early 1990s found the Community up against diverse challenges. The growth of the 1950s and 1960s was long forgotten, while global changes pointed to the potential of bigger population movements towards the Community Member States. Specifically, increased unemployment and political instability pointed to potential movements from the Mediterranean.¹ In addition to this, the fall of the Soviet Union and the process of accession of the Central and Eastern European Countries (CEECs) pointed to the potential of increase in labour migration.² This was at a time when the Community industries were not in need of extra labour, and the Member States continued to employ the restrictive policies that began in the 1970s in order to permanently halt migration.³ Towards the mid-1990s, growth began to slowly resume, and this created extra demand for labour in specific sectors.⁴ In parallel, a new challenge appeared – that of an ageing population which would no longer be able to support the EU development needs.⁵ All these were taking place in a period of continued national unemployment combined with settled migrant communities that were increasingly facing racism and xenophobia.⁶ The need to resort to labour migration to cover labour needs would become complicated for the EU, as it took place in a highly politicized climate around migration,⁷ and a constantly changing legal framework.

In parallel, Member States engaged in an ambitious project of incorporating political elements into their cooperation, and consequently the

¹ See Commission, Information DG, *The Countries of the Greater Arab and Maghreb and the European Community*, DE68, 1991.

² HAEU, GJLA-246, Commission, DG External Relations, Task Force Enlargissement, Enlargement and the Community's Relations with its Mediterranean Neighbours, Brussels 2 March 1992, RDM/m 4.

³ Communication, On Immigration, SEC(91)1855 final, para 3.

⁴ See retrospective description of the 1990s trends in Communication, On a Community Immigration Policy, COM(2000)757 final, Annex 1.

⁵ Communication, On Immigration and Asylum Policies, COM(94)23 final, para 9.

⁶ Ibid, para 10; See Evrigenis Report and Parliament Resolution on Racism and Xenophobia, adopted on 10 October [1991] OJ C 280; Maastricht European Council, Presidency Conclusions, 16 December 1991, Annex 3; Corfu European Council 24–25 June 1994, Presidency conclusions, Annex III.

⁷ On Immigration and Asylum Policies, COM(94)23 final, foreword; HAEU, CEUE_SEGE-SEC(1991)0803, Commission, Secretariat General, Communication from the President, Mr Bangemann and Mrs Papandreou in agreement with Mr Andriessen, Mr Marin and Mr Matutes, Communication to the Commission, Immigration, Annex I, Annex 6.

Treaty framework was repeatedly transformed during the years under review. The Single European Act demanded the completion of the internal market, defined as an area without internal frontiers, in which, among others, free movement of persons should be guaranteed under Article 13. The completion of the internal market moved border controls between Member States to the external frontiers of the EU territory. This first change was followed by the Maastricht Treaty, which came with the grand promise of political integration between Member States. The citizenship of the Union was established, which created a generalized right of nationals of Member States to move and reside freely within the territory of the EU. At the same time, migration policy came into the EU framework under the intergovernmental pillar of Justice and Home Affairs. During these developments, there seemed to be an ambition to create political bonds between nationals of the Member States and the EU, whereas the status of TCNs was to be regulated through intergovernmental cooperation. The changes were completed with the Amsterdam Treaty, which moved migration to the Community pillar and created a specific competence basis for the adoption of legislation on migration under Title IV of the Treaty. The Amsterdam Treaty established the AFSJ, under which measures would be adopted in different areas to guarantee the free movement of persons within EU borders. While the incorporation of migration in the Community framework was welcomed, the creation of an AFSJ was thought to perfect a legal structure whereby Europeans are the primary recipients of rights from the EU legal order and all other persons would come into the picture either by their association with a European citizen or with very limited rights guarantees.⁸

As for scholarly research during this period, it became much more theoretically dense as regards European migrants and their rights. This was due not only to the Treaty changes but also to the Court's case-law which began to employ grand phrasing and emphasized the importance of the newly created citizenship status, as we will see in Chapter 5. Different scholars emphasized the *telos* of an ever-closer Union between the peoples of Europe, and engaged with different theoretical frameworks

⁸ Steve Peers, 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union' (1996) 33 CMLRev; David O'Keeffe, 'Recasting the Third Pillar' (1995) 32 CMLRev; Steenbergen, 'All the King's Horses. . .: Probabilities and Possibilities for the Implementation of the New Title IV EC Treaty' (1999) 1 European Journal of Migration and Law 29.

that would permit a conceptualization of this *sui generis* citizenship.⁹ Others emphasized the continuum and natural evolution between the rights afforded to EU workers and the rights protected by EU citizenship.¹⁰ At the same time, scholarship also examined the deficiencies of the new status and emphasized a perceived lack of social direction of the internal market.¹¹ In addition, some authors reflected on more specific exclusions (on the basis of gender, nationality, class) which, in their view, EU law privileged.¹²

Research on TCN migrants and their rights under EU law remained much more doctrinal and to a large extent descriptive.¹³ Authors engaged in case-law analyses on the right to family reunification of EU migrants and on Association Agreements.¹⁴ What is more, different scholars engaged with the deficits and potentials of the changing Treaty framework for TCN migrants, and criticized the intergovernmental elements of

⁹ See Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 *The Modern Law Review* 233 for an overview.

¹⁰ Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004), Chapter 5.

¹¹ Antoine Jacobs, 'Social Europe in Delay' (1990) 6 *International Journal of Comparative Labour Law and Industrial Relations* 26; Miguel Poiarés Maduro, 'Europe's Social Self: "The Sickness Unto Death"' in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart 2000); Noreen Burrows, 'The Promotion of Women's Rights by the European Economic Community' (1980) 17 *CMLRev* 191; Charlotte O'Brien, 'Social Blind Spots and Monocular Policy Making The ECJ's Migrant Worker Model' (2009) 46 *CMLRev* 1107.

¹² Tamara Herve, 'Migrant Workers and Their Families in the European Union: The Pervasive Market Ideology of Community Law' in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Clarendon Press 1995); Clare McGlynn, 'Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy' (2001) 7 *ColumJEurL*; Isabella Moebius and Erika Szyzszak, 'Of Raising Pigs and Children' (1998) 18 *Yearbook of European Law* 125.

¹³ Daniel Duyssens, 'Migrant Workers from Third Countries in the European Community' (1977) 14 *CMLRev*; Kenneth R Simmonds, 'The Fourth Lomé Convention' (1991) 28 *CMLRev*; Jan Niessen, 'European Community Legislation and Intergovernmental Cooperation on Migration' (1992) 26 *International Migration Review* 676; Peter-Christian Müller-Graff, 'The Legal Bases of the Third Pillar and Its Position in the Framework of the Union Treaty' (1994) 31 *CMLRev* 493.

¹⁴ Willy Alexander, 'Free Movement of Non-EC Nationals A Review of the Case-Law of the Court of Justice' (1992) 3 *EJIL* 53; Henry G Schermers, 'Case C-192/89, S.Z. *Sevince v. Staatssecretaris van Justitie*, Preliminary Ruling of 20 September 1990 Requested by the Raad van State of the Netherlands' (1991) 28 *CMLRev*; A Weber, 'Case C-18/90, *Bahia Kziber v. Office National de l'Emploi (ONEM)*, Preliminary Ruling of 31 January 1991, Requested by the Cour du Travail de Liège (5th Chamber)' (1991) 28 *CMLRev*.

cooperation on migration.¹⁵ Finally, some engaged with the question of whether and how the EU could extend free movement rights to TCNs and to create a coherent migration policy.¹⁶ In this context, different authors mapped the rights TCN migrants enjoyed under the different legal frameworks (family reunification for Community workers, Turkish workers, and other Association Agreements); they pointed out inconsistencies and legal conflicts arising from the treatment of TCNs under Community law and proposed different solutions.¹⁷

Against this backdrop, this part develops as follows. Chapter 5 presents the institutional ambition to disconnect economic objectives from the exercise of free movement rights, in an attempt to create a political community of European nationals. It shows how this ambition was reflected in the case-law, underlining that economic considerations were never detached from secondary law. Chapter 6 focuses on the regulation of migration from third countries. The usual lens for this period in the scholarship is a critique of intergovernmentalism and of the creation of Fortress Europe. The examination undertaken in the section does not contest that. However, the analysis draws a more nuanced picture and demonstrates that the Commission and the Council had divergent approaches as to the regulation of migration and its relation to the economic and social objectives of the EU. Finally, Chapter 7 evaluates the case-law on Association Agreements and highlights the Court's significance as an actor of European integration. This approach of the Court was not well received. Rather, Member States tried to employ more conservative wording in the Agreements concluded during this period precisely with the purpose of avoiding the application of the case-law.

¹⁵ Kay Hailbronner, 'Perspectives of a Harmonization of the Law of Asylum after the Maastricht Summit' (1992) 29 CMLRev 917; Steve Peers, 'Building Fortress Europe: The Development of EU Migration Law' (1998) 35 CMLRev; Ferruccio Pastore, 'Visas, Borders, Immigration: Formation, Structure, and Current Evolution of the EU Entry Control System'; and Steve Peers, 'Family Reunion and Community Law' in Neil Walker (ed), *Europe's Area of Freedom, Security, and Justice* (Oxford University Press 2004).

¹⁶ See David O'Keeffe, 'The Free Movement of Persons and the Single Market' (1992) 17 ELR 3; Elspeth Guild, *European Community Law from a Migrant's Perspective* (Katholieke Universiteit Nijmegen 2000).

¹⁷ Marise Cremona, 'Citizens of Third Countries: Movement and Employment of Migrant Workers within the European Union' (1995) 22 LIEI 87; Kay Hailbronner and Jorg Polakiewicz, 'Non-EC Nationals in the European Community: The Need for a Coordinated Approach' (1992) 3 DukeJComp&IntLL 49; Joseph HH Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals – A Critique' (1992) 3 EJIL 65; Thomas Hoogenboom, 'Integration into Society and Free Movement of Non-EC Nationals' (1992) 3 EJIL 36.

The chapter finally examines EU action in enlargement and association with European developed countries, where the extension of rights to migrants was easily accepted.

Overall, the period under review in this part adds to the evolution of EU law by the element of differentiation. Unlike the previous period, where there were seeds for a common single migration policy that would cover all migrants, now a mix of economic recession and political ambition shaped differentiation. This differentiation came with the aspiration of making something more of the EU migrants, overcoming the function of their labour and shaping a set of rights they should enjoy as members of a new political community of a kind. That aspiration was matched by disagreement on what to do with other migrants and on how to regulate their rights. This disagreement blocked the proactive stance of the Commission, that had a specific vision of how migrants could play a part, even in this political project, and how their rights could be aligned with the economic and social objectives of the EU, thereby service economic and social sustainability. Both ambitions were undermined due to diverse historical events experienced in the new millennium, as will be shown in Part III.