PART I

Aligned Paths from the Treaty of Paris to the Single European Act

This part begins the investigation in the past and examines how economic and social objectives shaped the regulation of migration in the period from the Treaty of Paris to the Single European Act. In doing so, it proves that while the concept of sustainable migration is a recent one, the social and economic pillars of sustainability have been constantly guiding the development of EU migration law. Specifically, the balancing between economic and social considerations shaped the regulation of migration already from the establishment of Community law. The analysis further shows that during the years of post-war growth, the Community institutions' approach to the regulation of migration was aligned for both Community and third country national (TCN) migrants. Contemporary analyses of EU migration law emphasize the different rationales behind free movement and regulation of migration from third countries. In contrast to this, the investigation shows that during the early years of Community law, all migrants were perceived as having the same function for the collective project of growth.

The demand for labour necessary for economic development in the Member States conditioned the extensive attribution of social rights at least until the 1970s. Following the 1970s oil crisis, the disruptive potential of surplus migrant labour for the economy lay behind the limitation of rights for migrant workers. Looking more closely at the regulation of migration in light of the economic and social objectives of Community law and the economic circumstances in the Member States until the end of the 1980s, one thing becomes clear. The attribution or limitation of rights to migrants is dictated by the need to ensure the smooth functioning of the economy in the Member States. In parallel, social progress is pursued in the form of equal rights for all migrant workers and their families. During this period, the regulation of migration could be found in four legal areas: in the free movement of workers framework as regards Community workers; in Accession Treaties regulating how migrants from acceding states should become part of the free movement

framework; in Association and Cooperation Agreements with specific countries granting rights to their nationals; and, finally, through the Community labour and employment policy aiming to generally raise the living standards of all population within the Community territory. This legal framework of migration, which is analysed in detail in this chapter, developed at a time of shifting economic and social circumstances. The 1950s and 1960s were characterized by rapid economic development and increased need for labour migration.[1] During that time, migration movements mainly comprised guest workers, and these were regarded by Member States as a short-term phenomenon, regulated by the demands of the market.[2] In contrast, during the 1970s, the Community underwent a period of economic crisis and a declining need for manpower. After the 1973 oil crisis, the economic situation in most Member States was characterized by stagnation, unemployment, and inflation.[3] This led to a decline in migration flows from third countries, and many Member States tried to completely ban migration.[4] However, a significant number of migrants remained on Community territory.[5] What is more, while in 1959 TCN workers accounted for 51.9 per cent of the migrant working population, by 1973, and despite the persistent economic stagnation, the share of TCN workers had risen to 73 per cent of the migrant working population in the Community.[6] This created the impetus to coordinate national migration policies.[7]

Perhaps the hope of return to the 1950s and 1960s paradigm, or the resilience of the legal framework to quickly shifting circumstances, meant that the considerations behind the legal instruments adopted during this period did not immediately reflect the bleak economic realities on the ground. Rather, the effects of the recession and national unemployment

[1] Programme de politique économique à moyen terme (1966–1970) [1967] OJ 79/1513; Bulletin of the European Communities (1969)6 23.

[2] Communication, On Immigration, SEC(91)1855 final, para 9; James Hollifield, *Immigrants, Markets, and States: The Political Economy of Postwar Europe* (Harvard University Press 1992) 72.

[3] Consultation on Migration Policies Vis-à-Vis Third Countries, COM(79)115 final, Annex, para 5.

[4] Ibid, point 6; Communication Transmitted to the Council on March 1985, Guidelines for a Community Policy on Migration, COM(85)48 final, II.5.

[5] Consultation on Migration Policies, COM(79)115 final, Annex, para 4 estimates 6 million, which could be around 12.5 million with their families.

[6] Ibid, para 5.

[7] See also point 10 of the Communique of European Summit in Paris on 9/10 December 1974, which calls for a 'stage by stage harmonization of legislation affecting aliens'.

for Community legal instruments were felt later, during the 1990s when it became clear that growth would never again achieve the levels enjoyed during the initial years of the Community project.

The scholarly analysis conducted during this period was mostly doctrinal and did not extend to all the areas reviewed in this part. The initial examination of the free movement framework consisted of purely doctrinal studies until the late 1970s, providing an overview of the relevant primary and secondary law of the field in this novel supranational area.[8] At this stage, certain authors suggested that free movement could also include TCN workers.[9] In light of judicial and legislative evolution from the 1980s onwards, scholarship in the field of free movement of workers became theoretically denser and started to explore the rights attributed to workers as an incipient form of European citizenship.[10] At the same time, while these evolutions clarified the personal scope of free movement to Community nationals, they spawned limited output on the relation of Community law to migrants from third countries.[11] As a result, scholarly research identifies the beginning of an EU migration policy in the late 1980s or early 1990s, starting with the intergovernmental cooperation of Member States discussed in Part II.

Regarding accession, the elements of flexibility and differentiation introduced in the 2004 enlargement enjoyed considerable academic attention, which is reviewed in Part III. Before that point, there is little literature on the issue of regulating migration in the context of accession. The only work that stands out is a book published by Böhning, who engaged with the Community rules on migration to diffuse misconceptions about the potential threats to the UK economy posed by foreign

[8] ED Brown, 'Recent Developments in the Social Policy of the European Economic Community' (1966) 3 CMLRev 184; K Lewin, 'The Free Movement of Workers' (1965) 2 CMLRev 300; H ter Heide, 'The Free Movement of Workers in the Final Phase' (1969) 6 CMLRev 466; Jean-Claude Séché, 'Free Movement of Workers under Community Law' (1977) 14 CMLRev 384; David O'Keeffe, 'Practical Difficulties in the Application of Article 48 of the EEC Treaty' (1982) 19 CMLRev 35; Derrick Wyatt, 'The Social Security Rights of Migrant Workers and Their Families' (1977) 14 CMLRev 411.

[9] DF Edens and Schelto Patijn, 'The Scope of the EEC System of Free Movement of Workers' (1972) 9 CMLRev 322; Allan Campbell, *Common Market Law* (Supplement 2/71, Longmans 1971).

[10] Richard Plender, 'An Incipient Form of European Citizenship' in Francis Geoffrey Jacobs (ed), *European Law and the Individual* (Elsevier/North-Holland 1976); Louis Singer, 'Free Movement of Workers in the European Economic Community: The Public Policy Exception' (1977) 29 Stanford Law Review 1283, 1284.

[11] Peter Oliver, 'Non-Community Nationals and the Treaty of Rome' (1985) 5 Yearbook of European Law 57.

workers during the period of UK accession.[12] Similarly, on international agreements and the rights they created for migrant workers, scholarly attention was only drawn later to the extensive interpretations of the Court on the rights of migrants under the EEC–Turkey Association Agreement.[13] Migrants from third countries and the potential of their enjoyment of rights during this period were largely overlooked.

Against this backdrop, this part looks at the period before the adoption of the Single European Act to investigate how economic and social objectives shaped the regulation of migrants' rights under Community law. Specifically, Community primary and secondary law, as well as Accession Treaties and Association Agreements that include provisions regulating labour movement, are examined in order to investigate how economic and social considerations appeared in their negotiation and eventual adoption. In this examination, I show how economic considerations conditioned the attribution or limitation of rights for migrants across different instruments already in the early years of Community law. The Community institutions had a clear view on the function of Community and TCN migrants for the project of growth, and relatedly they also considered the rights that migrants should enjoy because of their contribution to growth. The material examined in this part includes legal instruments, agreements, and case-law that were in place before the Single European Act was signed.

Chapter 2 analyses how free movement of workers was included in the Treaty of Paris and the Treaty of Rome and outlines the framework that was put in place to operationalize it for the completion of the internal market. Next, Chapter 2 engages with case-law and investigates how the CJEU took into account economic and social considerations in its adjudication of rights of Community workers. Chapter 3 provides an overview of (mostly) soft-law material and highlights the aspiration of Community institutions to extend the protection offered by Community law to all migrants legally resident in the Community. Finally, Chapter 4 turns to the focus on International Agreements negotiated by the Community that created rights for migrant workers, whose power was only felt later, through rulings of the Court in the 1990s.

From the analysis, it will become clear that the attribution and/or limitation of migrants' rights under Community law followed a single

[12] WR Böhning, *The Migration of Workers in the United Kingdom and the European Community* (Oxford University Press for the Institute of Race Relations 1972).

[13] The first judgment was issued in 1987, Case 12/86, *Demirel*, ECLI:EU:C:1987:400.

logic across the different instruments adopted in this period. According to this logic, migrant workers, regardless of origin, contributed to the Community development project. For this reason, they were to be granted rights. At the same time, the wide-ranging attribution of rights (with an emphasis on residence rights) could lead to market distortions and hinder growth. Thus, the legal framework needed to include clauses allowing for the smooth distribution of labour force in the Member States, while limiting potential distorting effects. In parallel, the attribution of social rights to all legally resident migrants was without question. Granting social rights was the central means to guarantee social progress to the population engaged in the Community development project, and to ensure that no unfair competition took place between the Member States, which were all involved in the same project. Arguably, across the different periods and shifts that took place in different areas of EU law, the attribution or limitation of migrants' rights did not follow a single logic based on the origin of the migrant. It rather followed a logic based on the function of the migrant for the collective development project. Behind this logic lies a balancing act between economic and social considerations aimed at shaping a sustainable migration framework that could support Community growth.